

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306902, F509846, F509847

BEATRICE KAY JAQUES, EMPLOYEE	CLAIMANT
EMERSON ELECTRIC COMPANY, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 22, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on July 13, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Thomas W. Mickel, Attorney-at-Law, Conway, Arkansas.

Respondents represented by Mr. Donis B. Hamilton, Attorney-at-Law, Paragould, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 13, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on June 27, 2007, and a Prehearing Order was filed on June 28, 2007. At the hearing, the parties stated that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the applicable compensation rates. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

This is a confusing and convoluted case involving three (3) separate claim numbers and multiple injury dates. After reviewing the evidence presented at the

July 13, 2007, hearing, as well as the volume of medical evidence contained therein, it was apparent to this Administrative Law Judge that the issues, as well as the contentions of the parties, were inconsistent with their respective prehearing information filings submitted prior to the prehearing conference. Accordingly, a post-hearing conference was conducted on August 20, 2007, to further clarify the contentions of the parties. At said conference, the parties acknowledged that the Prehearing Order contained mis-statements, which the parties failed to clarify at either the prehearing conference or hearing in this matter. In order to further clarify the record, a copy of the prehearing information filings submitted by both parties are being "blue-backed" and made a part of the record herein.

At the prehearing conference, it was stipulated that the employment relationship existed between the parties at all relevant times, including July 10, 2002, May 26, 2005, and July 10, 2005; that the claimant sustained an admitted, compensable injury on July 10, 2002, at which time the respondents propose an average weekly wage of \$369.71, entitling her to compensation rates of \$246.00 per week for temporary total disability and \$185.00 per week for permanent partial disability; that respondents paid temporary total disability through on or about March 25, 2004, as well as a ten percent (10%) whole body impairment assessed by Dr. Marcia Hixson, the last payment having been made on or about August 11, 2005; and that respondents had controverted all benefits beyond those previously paid. At the hearing, the claimant agreed that the proposed average weekly wage, as well

as the compensation rates were correct.

At the prehearing conference, the parties agreed to litigate the following issues:

- 1) The date claimant's healing period ended.
- 2) Claimant's entitlement to additional temporary total disability.
- 3) The claimant's entitlement to additional medical treatment.

At the prehearing conference, the claimant contended, in summary, that she sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on July 10, 2002; that she sustained recurrences of said injury on both May 26, 2005, and July 10, 2005; that she was entitled to additional temporary total disability benefits as the result of said recurrences for the period beginning January 20, 2006, and continuing through January 16, 2007; that respondents should be held responsible for all outstanding medical and related treatment after benefits were terminated, as well as continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant's healing period ended on or before March 20, 2004, at which time claimant was rated by Dr. Marcia Hixson; that it paid all appropriate temporary total disability and permanent impairment benefits; that the claimant's continued physical problems are unrelated to the admitted injury or any alleged recurrences; and that the claim for additional benefits is barred by

statute of limitations.

The claimant was the only witness to testify. The claimant introduced a ninety-two (92) page packet of medical reports introduced as "Claimant's Exhibit A." Respondents introduced thirty-one (31) pages of documentary evidence which consisted of various claim forms and non-medical correspondence, as well as several medical reports which were introduced as "Respondents' Exhibit A." Originally, the record was composed solely of the transcript of the July 13, 2007, hearing. However, as set out above, a review of the entire record revealed a number of inconsistencies between the prehearing information filings and the Prehearing Order which prompted a teleconference on August 20, 2007. At the post-hearing conference, claimant's attorney amended his contentions consistent with the earlier filings and maintained that the claimant sustained a gradual onset injury to her neck as the result of her job with Emerson Electric Company which required rapid repetitive motion of both hands and arms while maintaining that the major cause of claimant's need for treatment and disability after benefits were terminated were directly related to her compensable injury which manifested itself on July 10, 2002. The claimant maintained that the subsequent claim filings of May 26, 2005, and July 10, 2005, were recurrences of the initial injury for which the claimant was treated for bilateral upper extremity injuries prior to the claimant's being diagnosed with a cervical injury.

Respondents contended that the claimant's cervical complaints were not

causally related to her admitted work injury. Further, as an alternative contention, respondents contended that the claim for additional benefits was barred by limitations.

Again, this confusing case involves three (3) separate claim numbers and three (3) claimed injury dates. However, the claimant has, at all times maintained, that her physical problems, need for medical treatment, and disability were the result of recurrences of an injury which first manifested itself during June or July, 2002. Further, despite the proposed stipulations that respondents paid temporary total disability through on or about March 25, 2004, as well as a ten percent (10%) whole body impairment assessed by Dr. Marcia Hixson, the record reflects that the claimant missed very little work between July 10, 2002, when she first began receiving medical treatment and the later part of 2006, at which time the claimant was diagnosed as having a cervical problem which later required surgery. In fact, the claimant underwent cervical surgery, specifically, a fusion at C5-6 and C6-7 on November 20, 2006. The claimant returned to work for the employer herein on January 16, 2007. In addition, the record reflects that prior to her treatment and cervical surgery by Dr. K. Dewayne Eubanks, all of the claimant's prior medical treatment was accepted and paid as a workers' compensation claim. The initial claim was accepted and paid as bilateral upper extremity injuries. As will be set out further below, the claimant's primary care physician for the admitted bilateral upper extremity injuries was Dr. Marcia Hixson. The claimant was not paid temporary total

disability through March 25, 2004, the date Dr. Hixson assessed permanent impairment, but, rather, the record reflects the claimant was either paid appropriate temporary total disability or continued to work at all times. Further, Dr. Hixson's impairment rating was ten percent (10%) to each upper extremity, and the claimant was paid 36.6 weeks of permanent partial disability, representing an impairment of ten percent (10%) to each extremity below the elbow. It is unclear whether either the last payment of indemnity benefits or medical treatment was paid on August 11, 2005; however, it is undisputed that respondents have controverted all benefits beyond those previously paid.

Alternatively, respondents contend that the claim for additional benefits is barred by statute of limitations. There is no merit to this assertion. Clearly, the claimant filed a claim for additional benefits and requested a hearing on compensability of her cervical problems within one year of the date of last payment of benefits pursuant to Ark. Code Ann. §11-9-702(b) (Repl. 2005).

Accordingly, the primary issue which requires resolution is whether, in addition to the claimant's admitted upper extremity injuries, the claimant also sustained a compensable cervical injury which arose out of and during the course of her employment with Emerson Electric Company.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the

following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employment relationship existed between the parties at all relevant times, including July 10, 2002, May 26, 2005, and July 10, 2005, specifically, beginning 1987 and continuing through the present.
3. The claimant sustained admitted compensable gradual onset bilateral upper extremity injuries which were reported to the employer on July 10, 2002, at which time the claimant's average weekly wage was sufficient to entitle her to compensation rates of \$246.00 per week for temporary total disability and \$185.00 per week for permanent partial disability.
4. Respondents paid appropriate temporary total disability through on or about March 25, 2004, as well as a ten percent (10%) impairment to each upper extremity below the elbow which was assessed by Dr. Marcia Hixson on March 25, 2004.
5. Respondents last paid workers' compensation benefits on or about August 11, 2005.
6. The claimant has failed to prove, by a preponderance of the evidence, that she sustained a cervical injury arising out of and during the course of her

employment with Emerson Electric Company as the result of any specific incident identifiable in time and place of occurrence.

7. The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained a gradual onset cervical injury arising out of and during the course of her employment with Emerson Electric Company.
8. Respondents have paid all appropriate benefits as the result of claimant's admitted compensable injuries, to date.
9. The within claim is not barred by statute of limitations.
10. In the event the claimant is entitled to additional workers' compensation benefits, which is herein denied, respondent is entitled to a credit or offset for all benefits paid pursuant to Ark. Code Ann. §11-9-411 (Repl. 2005).
11. Respondents have controverted all benefits beyond those previously paid.

DISCUSSION

The claimant, Beatrice Kay Jaques, testified in her own behalf. I found the claimant to be a credible witness, in part, because of her proven strong work ethic. However, she was an extremely poor historian and her testimony was confusing. In fact, it was extremely difficult to follow the claimant's course of medical treatment after July, 2002, because the claimant has been examined and treated by numerous physicians. Most were at the direction of the employer and/or by referral of another treating physician. In addition to having been evaluated by at least eleven (11) physicians, the claimant has undergone numerous diagnostic studies

while missing relatively little work since July, 2002.

The claimant is forty-five (45) years old. She has a ninth grade education. The claimant began working for Emerson Electric on August 10, 1987. The claimant began working in the company cafeteria where she cooked, served, and ran the cash register. The claimant later moved into the factory, working on the assembly line. Emerson manufactures electric fans. Although it was difficult to conceptualize the claimant's work activities, her description of her job duties, the report of injury, and the claimant's initial medical treatment is set out below:

Q And so what was it you were making for them in 2002?

A They are fans. We had to – they come out, and if they had flash around them or in them, you had to take a little knife and trim it –

Q Okay.

A – get all of it off.

Q Just to help you out a little bit, are we talking about fan blades for fan motors? Is that what you're talking about?

A I guess, the fans.

Q Are you talking about –

A They just called them fans. It's a little fan.

Q – the housing that goes around the motor?

A It goes on top of them.

Q Okay.

A I can't think of what it was called.

Q But either way, these are coming out of the moulding machine?

A Yes.

Q And your job was to –

A Trim.

Q – cut the flash or excess plastic off of the item as they came through?

A Yes.

Q What kind of tool did you use to do that?

A A little carpenter's knife. They had two of them. They had a big one, and they had a smaller one.

Q Okay. And was this a production line kind of job?

A You were supposed to get so many out a day.

Q Okay. How many in a day back in '02, if you can remember, were you generally required to get out in a day?

A I just was doing it to fill in for somebody when I was doing it. It was – I want to say like 3,000, 4,000. (Tr.13-14)

* * * * *

BY MR. MICKEL:

Q Okay. So that wasn't your normal job?

A No, any job, machine job there, we do them all as they need us.

Q Okay. So you might float from one job to another?

A Yes.

Q But on this particular day, you were trimming this flash off this plastic?

A Yes.

Q Okay. Do you know how many days in a row before your hand started hurting did this trimming this flash started making your hands hurt?

A I don't know a positive how many days.

Q Did it make both your hands hurt?

A Yes.

Q Are you right-handed, or are you left-handed?

A I'm right-handed.

Q Okay. When all this stuff started hurting you, did you go tell your supervisor you were having problems?

A Yes.

Q Okay. What did your supervisor do for you at that point?

A Told me to go to human resources.

Q Okay. And did you see this gentleman that's sitting here with Mr. Hamilton today back then?

A Yes.

Q Okay. And what did this gentleman do? Did he offer to send you to a doctor?

A They had me fill out paperwork and then went from there.

Q All right. And did you tell this gentleman here why it was you thought you were hurting at that point, what you had been doing, I guess, before you started hurting?

A Yes.

Q Okay. Did you continue doing that job in the days after you made that report of injury to him?

A Yes.

Q Okay. Did he or anyone within Emerson reassign you to any other type of job

that didn't hurt your hands as much?

A Well, I do all the jobs back there.

Q Okay.

A We all do.

Q All right. Do all these jobs you're referring to – because we don't know what all those jobs are. All these jobs you're talking about, are you having to use your hands on a fairly continuous basis?

A Yes.

Q Are you required to get out a certain number of pieces of whatever it is you're working on within a certain day to meet a quota or some kind of a goal?

A You are required to if at all possible.

Q Okay. And, again, some of these things that you're doing, are they machine, you know, assembly line type things where you've got to get done and go right on to the next one just immediately?

A These back there in plastics, we all run a machine. They're all – the parts come off the machines, and we have to inspect them, or if they need like the trimming or de-flashing, just different –

Q Okay. And all of this required you to use your hands, correct?

A Yes.

Q All right. Did this job require you to do any reaching at or above your shoulder level?

A At times, yes.

Q Okay. Would that be something you might have to do more than once or twice an hour in a job?

A Yeah.

Q Would it vary according to the type of job you were having to do back then?

A Yes, different jobs you use –

Q Okay. And when you were having to lift stuff at or above your shoulder or eye level, were these items very heavy items, or were they just little old pieces of plastic, or were they electric motors, what were they?

A The housings, we had to lift material, you know, for the housing, and I did that job most of the time.

Q Okay. Now, the folks at Emerson – it looks like you reported your injury on the 10th of July of '02, and it looks like the first time you saw a doctor was a Dr. Stacey Noel some eight days later on July 18th of '02. Does that sound about right?

A Yes.

Q Okay. Did you go to Dr. Noel on your own, or did Emerson send you there?

A Emerson.

Q Okay. And did you continue to treat with Dr. Noel after that first visit in July of '02?

A Yes. (Tr.15-18)

The claimant was initially examined and treated by Dr. Stacey Noel, the company doctor who is a general practitioner, on July 18, 2002. The claimant voiced complaints of pain in both hands and arms, primarily on the right. Claimant was diagnosed as having lateral epicondylitis and prescribed medications, a tennis elbow strap, and alternating heat and ice, to return one week for recheck. Dr. Noel also noted that a urine drug screen came back positive for opiates and benzos while pointing out that the claimant had been taking Valium daily for nerves and also Hydrocodone for pain. The claimant was also seen in follow-up by Dr. L. L. Shedd and Dr. Barry D. Hendrix, other company physicians. The claimant was sent to the

Baptist Memorial Hospital in Memphis, Tennessee, for EMG/NCV studies which came back reflecting mild right carpal tunnel syndrome without evidence of left carpal tunnel, no evidence of peripheral neuropathy or ulnar nerve compression across the elbow in either upper extremity, as well as normal EMG of the left upper extremity and cervical spine. The claimant continued to receive conservative treatment while apparently continuing to work. Again, respondents either paid the claimant appropriate temporary total disability or provided light-duty employment pursuant to the various treating physicians' instructions. The claimant was subsequently referred to Dr. Marcia Hixson, a hand specialist in Little Rock, Arkansas. Dr. Hixson first evaluated the claimant on November 26, 2002. Dr. Hixson clinically found bilateral mild to moderate carpal tunnel syndrome. Because of the claimant's nerve conduction studies, Dr. Hixson suggested a cortisone injection in both carpal tunnels which were performed. Dr. Hixson allowed the claimant to continue working her regular job and scheduled a re-examination in six (6) weeks. In addition, Dr. Hixson also referred the claimant for repeat EMG studies on the same date of her evaluation which were performed by Dr. Reginald Rutherford, and which were interpreted as normal. The claimant returned to Dr. Hixson on January 7, 2003, reporting that the carpal tunnel injections helped the right hand quite a bit, but did not help the left hand. The claimant was treated with prescription Neurontin 300 mg., permitted to continue working with discussion concerning surgical release of the carpal tunnel if the medication was not helpful.

The claimant was re-examined on April 9, 2003, at which time her symptoms were unchanged. The claimant underwent a release of the left carpal tunnel on May 23, 2003, again performed by Dr. Hixson. In a June 3, 2003, report, Dr. Hixson noted that the paresthesia and shooting pains in the left forearm had disappeared. The claimant was fitted with a padded glove and referred to a physical therapist while permitting the use of the left hand for very light activity. The claimant returned to Dr. Hixson on September 30, 2003, at which time she was four (4) months post-surgical release of the left carpal tunnel. Dr. Hixson noted that the claimant had not improved significantly and that injections into the carpal tunnel and medications did not help. Because the claimant was not making a full recovery from the surgery, Dr. Hixson continued the claimant on light-duty, wearing a splint on the left hand with minimal use of the left hand. Dr. Hixson also referred the claimant to a pain specialist, Dr. William E. Ackerman in Little Rock, Arkansas. Dr. Ackerman's initial consultation was on December 8, 2003. Dr. Ackerman treated the claimant with medications Hydrocodone and Lidoderm patches. The claimant was re-examined by Dr. Hixson on February 12, 2004. Dr. Hixson's report is set out below:

Ms. Jaques was reexamined on 2-12-04. She is nine months following release of the left carpal tunnel. The left hand is pretty much the same. She has occasional paresthesias in it and pain with activities. She states that sometimes the hand turns a bluish color. This is apparently unrelated to heat or cold. She does not use the left hand for much because of the pain. She is seeing Dr. Ackerman who is prescribing medication that is helping. Ms. Jaques currently works at a light duty job cleaning tables.

Examination is unchanged. She has full range of motion of the wrists and digits. Grip strength today measures 35 pounds in the right hand and 7 pounds in the left

hand.

Ms. Jaques has healed from the release of the left carpal tunnel but has ongoing chronic pain problems. She will continue to see Dr. Ackerman for treatment of this problem. Because of the nerve dysfunction in the left upper extremity, he may want to consider some injections. She has an appointment to see him in a few weeks.

Ms. Jaques would like to try to return to her former job, which is holding and trimming parts using a knife. I wrote her a note allowing her to return to that job on 2-16-04. She should not lift, push or pull more than five pounds. She will give me a call if this does not work out. Otherwise, I will reexamine her once more in six weeks. At that time I should be able to determine a partial impairment rating and MMI. (Cl. Ex. A, p.44)

Dr. Hixson released the claimant from her care on March 25, 2004, at which time she opined that the claimant had reached maximum medical improvement from the injury and surgery. Apparently, because of the poor result on the left carpal tunnel, the claimant was always treated conservatively on the right. At the time of claimant's release on March 25, 2004, Dr. Hixson assessed a ten percent (10%) impairment to both the left upper extremity and right upper extremity, related to persistent flexor tenosynovial hypertrophy. The claimant was released to work her regular job without restrictions and to be re-examined in two (2) months. (Cl. Ex. A, p.46)

Also, on March 25, 2004, the claimant again saw Dr. William Ackerman by referral of Dr. Hixson. The interim history reflected that the claimant was extremely anxious. She requested Valium while continuing to work. Dr. Ackerman prescribed the Valium and suggested that the claimant see a behavioral medicine specialist because the claimant was so anxious.

The claimant was next referred to Dr. David Rhodes for a second opinion. Dr. Rhodes felt that the claimant's work-up and history was more a rheumatological process than work-related and recommended that the claimant get a work-up under her personal insurance for possible rheumatoid arthritis. The claimant returned to Dr. Hixson for re-examination on May 27, 2004, at which time the claimant continued to complain of pain and swelling in her hands and fingers. Dr. Hixson opined that the claimant had chronic flexor tenosynovitis. Dr. Hixson noted that the claimant would continue on medication prescribed by Dr. Ackerman, but that since Dr. Ackerman had discharged the claimant, these would probably have to be filled by a local physician. The claimant returned to Dr. Hixson on December 30, 2004, basically requesting pain medication prescriptions. Dr. Hixson indicated that Dr. Ackerman's final diagnosis was chronic upper extremity neuritis. She recommended that the claimant be seen by Dr. Sprinkle for evaluation of her upper extremity pain and numbness while stating that she was not in a position to give the claimant pain medication on a chronic basis. She opined that if Dr. Sprinkle could not find some way to manage the claimant's pain and upper extremity symptoms, that the claimant needed to have one of her regular physicians designated to prescribe medication. (Cl. Ex. A, p.60)

Again, the claimant was an extremely poor historian. However, the claimant eventually began seeing Dr. Roger Cagle and Dr. Kemp, family physicians. Dr. Cagle eventually referred the claimant to Dr. K. Dewayne Eubanks, a neurosurgeon

in Jonesboro, Arkansas. Dr. Eubanks first examined the claimant on January 20, 2006. Prior to his evaluation, the claimant underwent additional diagnostic studies, specifically, an MRI at the Arkansas Methodist Hospital on December 13, 2005, apparently at the direction of Dr. Cagle. Dr. Eubanks' January 20, 2006, report contains the following patient history information:

HPI: Ms. Jaques is a 43-year-old woman seen at the request of Dr. Cagle for evaluation of neck, left shoulder, and left upper extremity pain as well as numbness and paresthesias in her left upper extremity. She says about three years ago she was hurt at work and had tingling and numbness in her hand as well as having developed pain in her shoulder and scapular region on the left and in the neck. She had a median nerve release on the left and she vacillates about whether this did anything to help her or not. She finally admitted that it seems like she drops things less than she did previously and that her tingling is better but otherwise denied that her symptoms are better. She says about a year ago she began to develop more pain in her hand and in her scapular region and neck. She has only minor and even more vague symptoms on the right. We spent quite a bit of time going over it and she is unable to give me any specific location of symptoms in her left upper extremity that help to make a determination about a nerve root or nerve distribution. The only thing that helps is that she does point out the superior and the medial scapular border and says she has a lot of pain directly in that area. Over the last couple of months or so she has begun to get bad suboccipital headaches. She denies lower extremity symptoms or bowel or bladder symptoms. She has been on light duty for quite awhile, in fact I think since her median nerve release on the left. That was done in 2003 in Little Rock. (Cl. Ex. A, p.64)(emphasis supplied)

Dr. Eubanks' diagnosis was cervical spondylosis C5-6 and C6-7 with mild disc protrusion versus contained small disc herniation on the left at C6-7. Dr. Eubanks was apparently the first specialist that attributed the claimant's increased physical problems to her cervical spine. Dr. Eubanks recommended additional diagnostic studies and allowed to keep the claimant on light-duty work pending further development of the medical evidence.

Again, as previously noted, the record reflects that after respondents terminated all benefits, the claimant received additional medical treatment under her group health and accident insurance provided by the employer herein. Further, I anticipate that the claimant also received short-term disability benefits. In the event the immediate claim is ultimately found compensable, which is inconsistent with the foregoing findings and conclusions, respondents would be entitled to a dollar-for-dollar offset of any benefits previously received in medical services or disability benefits paid under a group health plan or a group disability policy pursuant to Ark. Code Ann. §11-9-411.

Following additional diagnostic studies, the claimant underwent a surgical fusion on November 20, 2006. She returned to work for Emerson Electric on January 16, 2007, and has continued working for the employer in a light-duty capacity since that time.

The primary issue presented for determination is whether or not, in addition to the claimant's admitted injuries, she sustained a cervical injury which arose out of and during the course of her employment.

ADJUDICATION

Ark. Code Ann. §11-9-102(4)(A)(i) (Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a

specific incident and is identifiable by time and place of occurrence.” *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase “arising out of the employment refers to the origin or cause of the accident,” so the employee is required to show that a causal connection existed between the injury and her employment. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs “‘in the course of employment’ when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer’s purpose, or advancing the employer’s interest directly or indirectly.” *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers’ Compensation Act and must sustain that burden by a preponderance of the evidence. See, Ark. Code Ann. §11-9-102(4)(E)(i) (Repl. 2002); *Clardy v. Medi-Homes LTC Services*, 75 Ark. App. 156, 55 S.W.3d 791

(2001).

However, Act 796 also recognizes certain specified exceptions to the general limitation of compensable injuries to those injuries which are caused by specific incident and which are identifiable by time and place of occurrence, and these exceptions are set forth in Ark. Code Ann. §11-9-102(4)(A)(ii) through §11-9-102(5)(A)(i)(v) (Repl. 2002). Claims involving mental illness, heart, pulmonary, and cardiovascular conditions, and hernias are excepted from the definitiveness rule in Ark. Code Ann. §11-9-102(4)(A)(iii) through §11-9-102(4)(v). The requirements necessary to establish the compensability of these conditions are set forth in other sections of the Arkansas workers' compensation law. Claims for injuries caused by rapid repetitive motion, for back injuries, and for hearing loss are recognized in Ark. Code Ann. §11-9-102(4)(A)(ii). To satisfy the definition requirements for injuries falling under Ark. Code Ann. §11-9-102(4)(A)(ii), the employee still must satisfy all of the requirements discussed above, with the exception of the definitiveness requirement. Thus, the claimant still must prove, by a preponderance of the evidence, that he sustained internal or external damage to the body as the result of an injury that arose out of and in the course of employment, and the employee still must establish the compensability of the claim with medical evidence, supported by objective findings. However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. §11-9-102(4)(A)(ii), 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) (Repl. 2002).

Carpal tunnel syndrome is recognized as a gradual onset injury; hence, it is not necessary for a claimant to prove that her carpal tunnel injury was caused by rapid repetitive motion. *Freeman v. ConAgra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). A claimant seeking workers’ compensation benefits for carpal tunnel syndrome must prove, by a preponderance of the evidence, that: (1) the injury arose out of and in the course of his or her employment; (2) the injury cause internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was a major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4)(A)(ii) and (E)(ii) (Supp. 2005).

The record reflects that the claimant has filed three (3) separate claims for workers’ compensation benefits in which varying dates were identified, specifically, July 10, 2002, May 26, 2005, and July 10, 2005. Further, as previously pointed out, the stipulations contained in the June 28, 2007, Prehearing Order were inconsistent with the claimant prehearing information filings. In fact, the record is void of any specific injuries identifiable in time and place of occurrence. Rather, the claimant now maintains that she sustained a gradual onset injury to her neck as the result of her work activities. The claimant had a complicated course of medical treatment. The claimant was initially treated for bilateral upper extremity injuries beginning in July, 2002. In fact, the claimant was paid appropriate benefits through at least

August 11, 2005. The claimant contends that she sustained recurrences of her neck injury on May 26, 2005, and July 10, 2005, while asserting that the major cause of her need for treatment and disability beginning during the later part of 2005 was the original gradual onset injury which first manifested itself on or about July 10, 2002.

In my opinion, it would require sheer speculation and conjecture to attribute the claimant's cervical problems, need for treatment, including surgery on November 20, 2006, and resulting disability to any alleged work-related injury, the symptoms of which first manifested themselves in July, 2002. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company v. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

This claim fails for a number of reasons. A claimant seeking benefits for a gradual onset neck injury must prove, by a preponderance of the evidence, that: (1) the injury arose out of and in the course of her employment; (2) that the injury required medical services or resulted in disability or death; (3) that the injury was caused by rapid repetitive motion; (4) medical evidence supported by objective findings to establish the injury; and (5) that the injury was the major cause of the disability or need for medical treatment. If the claimant fails to satisfy any of the five (5) requirements, the claimant fails to establish compensability and the claim fails. *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

Based upon my review of the evidence, the claimant has failed to prove multiple elements necessary to establish compensability. First, the claimant has failed to prove that her cervical complaints were the result of an injury which arose out of and during the course of her employment. The claimant failed to offer any medical evidence supported by objective findings to support a cervical injury at any time contemporaneous with the initial filing of the claim on July 10, 2002. Although the claimant maintains that her subsequent problems were recurrences of the original injury, there is no credible evidence of a cervical injury before the later part of 2005. Further, although respondents accepted and paid benefits for bilateral upper extremity injuries, including carpal tunnel injury, which is by definition caused by rapid repetitive motion, there is no credible evidence that the claimant's alleged cervical injury was the result of the repetitive use of her hands. In a post-hearing conference, claimant's attorney argued that under the law as amended, a claimant does not have to prove rapid repetitive motion for a cervical injury. This assertion is inconsistent with the existing law. Admittedly, Act 1250 of 2005 amended Ark. Code Ann. §11-9-102(4)(A)(ii)(b) to include a neck injury which is not caused by a specific incident or which is not identified by time and place of occurrence as a compensable injury. However, A.C.A. §11-9-102(4)(A)(ii)(b) did not go into effect until July, 2005. Prior to that date, the law only recognized a back injury which was not caused by specific incident. Neck injuries prior to the amended Act did not fall within this category, and a claimant was required to prove job activities which

required rapid repetitive motion to cause a cervical injury. In addition, based upon the medical evidence set out further below, I find that the claimant has failed to prove that injury alleged work injury was the major cause of her need for treatment and disability. Finally, as set out in the medical below, the medical opinions addressing compensability, specifically, the opinions of Dr. Eubanks were not stated within a reasonable degree of medical certainty.

I feel compelled to point out that despite the admonitions in the Prehearing Order, advising the parties that exhibits should not be highlighted or underlined, many of the claimant's narrative reports introduced at the hearing contained underlined language. In the event an appeal is taken from this decision, it will be necessary for the claimant to substitute those pages before the transcript is prepared for appeal. The reports identified below will omit any of the underlined language. Any emphasis will be supplied by this Administrative Law Judge.

The record reflects that respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt reasonably necessary medical treatment. In fact, upon reporting complaints of problems with her upper extremities, which the claimant attributed to her job activities, respondents accepted responsibility and immediately provided the claimant with evaluations and treatment. The claimant underwent numerous diagnostic studies. She was seen by as many as a dozen different physicians, including various specialists. It was not until 2005 that the claimant began to

develop problems involving her scapular region and neck. After respondents terminated the claimant's treatment during July or August, 2005, the claimant went to her family physician who referred her to Dr. Eubanks. Dr. Eubanks was the first physician to make a clinical diagnosis of cervical spondylosis. After more than three (3) years of treatment, the issue of whether the claimant's cervical complaints were causally related to her admitted injuries was raised. Although the claimant made an unauthorized change of treating physicians when she initiated treatment with her family physician, it appears that respondents also attempted to ascertain whether the claimant's new complaints were causally related to her employment. The record reflects that the claimant returned to the company physician, Dr. Shedd, who referred the claimant to Dr. Ron Schechter, an orthopedic surgeon in Paragould, Arkansas. Based upon the cervical spine MRI, as well as his clinical examination, he suspected that the claimant may have developed cervical radiculopathy. Dr. Schechter agreed with Dr. Eubanks that additional studies, specifically, nerve conduction studies with EMGs were warranted. Dr. Schechter referred the claimant to Dr. Terrence Braden in Jonesboro for the studies which were normal. Because there were no objective nerve abnormalities, he felt that degenerative changes in the claimant's neck might be the cause of some of her pain while pointing out that nerve studies did not show any signs of radiculopathy. He opined that, clinically, the shoulder did not appear to be a problem. He suggested some therapy and possible referral to a pain clinic. (Cl. Ex. A, pp.67-70)

The claimant returned to Dr. Eubanks on August 29, 2006. Dr. Eubanks again diagnosed cervical spondylosis at multiple levels and offered fusion surgery as an opinion while advising the claimant that operative intervention would only offer a fifty percent (50%) chance of symptom relief. Dr. Eubanks was apparently questioned concerning whether or not the claimant's work-related injury was the major cause of her need for treatment. In a response to a claims examiner, Dr. Eubanks issued a September 27, 2006, letter which stated:

I am in receipt of your letter of September 26, 2006. I am unable to state within medical certainty that her need for treatment and surgery is 51% or more solely related to a work related injury. I do not find enough information in my chart to warrant such a definitive statement. (Cl. Ex. A, p.73)

However, it must be pointed out that the record does not reflect any prior work-related cervical injury. In fact, the only injury claimed prior to the hearing request concerned bilateral upper extremity injuries. The claimant's cervical problems have, at all times, been diagnosed as cervical spondylosis. The symptoms did not manifest themselves until several years after the accepted claim.

On October 31, 2006, Dr. Eubanks stated:

I have explained all this to Mrs. Jaques and I think she understands our difficulties in assigning 51% blame for her neck symptoms on her workplace injury. I think our best course at this point is to focus on the problems that she has that are identifiable and may be treated regardless of the etiology of it. I do not think there is any way to have 51% or more certainty that her cervical problems are related to her injury and thus I think that is a secondary issue at this point as far as I am concerned. The primary issue is how to treat this lady and help her with what symptoms can be resolved. I had a long talk with her about all these things and I think she has a good understand [sic] of what are the possibilities of treatment of her cervical symptoms and her radicular symptoms as well as spondylosis symptoms. I have advocated C5-6 and C6-7 ACDFs with plate instrumentation and

PEEK change placement and iliac crest bone graft harvest. After along discussion of expected benefits possible complications and problems as well as expectations of surgery, she desires strongly that we proceed. (Cl. Ex. A, p.78)

The claimant underwent surgery on November 20, 2006. Apparently, the surgery improved the claimant's symptoms. The claimant's surgery was paid under her group health and accident insurance. Following the surgery, claimant's attorney attempted to obtain a report from Dr. Eubanks attributing the claimant's need for neck surgery and the resulting disability to a work-related injury. In fact, the claimant brought a letter that claimant's attorney had sent to her regarding her cervical problems, as well as a copy of diagnostic studies taken back on August 9, 2002, in support of their assertion. Dr. Eubanks' December 1, 2006, report addressed to claimant's attorney is set out in its entirety below:

Ms. Jacques [sic] brought to the office the letter that you sent her on October 23, 2006 regarding her cervical problems and the question of workers comp, etc. She also brought by a copy of an EMG/NCV report from 8-9-02 (which is the only medical records that she has given me regarding anything in her past). I see according to the EMG/NCV report, she was complaining of symptoms from "her hands up towards her shoulders and then into the left neck and shoulder blade". I also note that the EMG was read as "normal" with "no electro diagnostic evidence of an active cervical radiculopathy". Interestingly, the NCV report said "normal" on the left and "very mild right carpal [sic] tunnel syndrome".

My intuition tells me that Ms. Jacques's [sic] neck probably is indeed related to her work. Unfortunately for her, this poor woman is simply a terrible historian. Not only has it been several years since the initial onset of her symptoms, she just cannot describe to me any particular event that she recalls being related to her work. The best I have ever been able to get from her is her feeling that it is work related because of the repetitive nature of hard work that she did for many years at the plant. Unfortunately, she has never supplied me with any medical records until just now.

I try to be real fair with patients and frequently I find myself going to bat for a patient

that I feel truly has a work related injury when the work comp is claiming otherwise. I also am forthright in telling the patients and work comp carries that an injury is NOT related to the work place when I feel that is the case.

In Ms. Jacques [sic] case, my intuition tells me that her neck problems probably are related to the long term of work that she has but this is strictly my gut feeling. This poor lady is so terrible of a historian that I have nothing objective to base that opinion on. (Other than this EMG/NCV report that I have today, which at least shows that she was complaining of problems into her neck and shoulder blades in 2002.) I am sorry I wasn't able to help any better with Ms. Jacques [sic]. If you have previous records that would strongly indicate that her complaints can be dated back to 2002 (especially if those records indicate some distinct work place injury) I would be happy to look at those for you to see if there is enough evidence of details in her medical records to make up for her vagueness in the history that she is currently able to provide. Otherwise I do not think there is any way for someone today to state with over 50% certainty that her current neck problems are work related. Ms. Jacques is a pleasant lady and I would be happy to try to help if you have any further questions. (Cl. Ex. A, pp. 84-85)

The claimant's attorney then wrote Dr. Eubanks a letter on January 5, 2005, stating his theory on the claim and, again, requesting that Dr. Eubanks reconsider his opinion. Not unexpectedly, after several attempts, Dr. Eubanks reversed his prior opinion and stated:

I have reviewed the records that you have sent me regarding Mrs. Jacques [sic] and discussed her situation with her. I think that there is a high likelihood that Mrs. Jacques [sic] has cervical spondylosis as a result of a "gradual onset" type of injury rather than a specific inciting event. Mrs. Jacques [sic] is very keen to return to work. I think she is a sincere straight forward lady in that respect. Based on the understanding I have of her work history and repetitive nature of her work I think it is highly likely that her cervical spondylosis was either caused by or exacerbated by her chronic work place activities. I hope this helps answer any questions you may have. Please feel free to contact me for further questions. (Cl. Ex. A, p.88)

A claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. *See, Wal-Mart Stores, Inc. v. Van Wagner*, 337 Ark. 443, 990 S.W.2d

522 (1999). In fact, the Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). However, if the disability does not manifest itself until months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and disability, the issue becomes a question of fact for the Commission's determination. *Kivett v. Redmond Co.*, 234 Ark. 855, 355 S.W.2d 172 (1962). See also, *Wentz v. Servicemaster*, 75 Ark. App. 296, 575 S.W.3d 753 (2001).

The claimant's cervical symptoms did not manifest themselves until years after the claimant's alleged gradual onset upper extremity injuries. The claimant must prove that she sustained a cervical injury which arose out of and during the course of her employment and which was caused by rapid repetitive motion. The claimant must further prove that a work-related cervical injury was the major cause of her need for treatment and disability. Finally, medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. The claimant has simply failed to establish a work-related cervical injury.

It is well-settled that claimant has the burden of proving the job-relatedness

of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that she sustained a compensable cervical injury arising out of and during the course of her employment with Emerson Electric Company. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge