

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604264

MELISA MAE SIPES, EMPLOYEE

CLAIMANT

WOLVERINE WORLDWIDE, INC., EMPLOYER

RESPONDENT

SENTRY INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED NOVEMBER 13, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 17, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JOHN BARTTELT, 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-style claim to determine the claimant's entitlement to workers' compensation benefits. On April 24, 2007, 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 afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

Claimant amended her contention to reflect the onset of symptoms of her injury for which she seeks workers' compensation benefits was approximately November 15, 2005. Further, the

parties stipulated that the claimant's average weekly wage was \$382.00.

The testimony of Melisa Sipes, the claimant, Angela Wilson, Lisa Moad, Alexis Sowards, and Kathy Sowards, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Melisa Mae Sipes, the claimant, with a date of birth of December 23, 1980, completed the 11th grade and later obtained her GED in 2002. Claimant resides with her husband at 133 Green 902 Road, in Paragould, Arkansas.

Claimant commenced her employment with respondent-employer in August 2005. Respondent-employer is a shoe manufacturer. Claimant had never worked in a factory prior to her employment by respondent. Claimant's work experience prior to her employment by respondent had consisted of cashier work.

The claimant was initially employed by respondent on August 1, 2005. Claimant asserts that when she begin her employment with respondent-employer she was in good health. Claimant acknowledged that in the past she has had some health issues or injuries. However, claimant maintains that during the period prior to her employment by respondent she did not have any particular health problems or issues going on.

The testimony of the claimant reflects that her first job with respondent consisted of eyelets - specifically putting the shoelace holes in the shoe using a machine. In describing the mechanics of the eyelets job, claimant explained that she took the already-formed shoe and held it up to a small bar, slide it down, and using her foot press the machine which punched holes. In demonstrating the afore procedure claimant held her hands approximately six inches apart, with

her hands clenched in a fist. Claimant explained that the afore indicated that she was holding the shoe itself. (T. 9-11) Regarding the pressure utilized in lining the shoe up with the punch machine, claimant's testimony reflects:

It takes some to hold it there. If you move it just the slightest bit, the hole is off and you have to take it apart and do it again. (T. 11).

In order to hold the shoe in place claimant testified that you have to hold it "pretty tight". (T. 12).

The press is activated by foot. Claimant worked the eyelets job for approximately one week when she was changed to another job because she was unable to hit the mark very well on the eyelet press.

Claimant next performed the job of inspector. In describing her duties while performing the inspector job, the testimony of the claimant reflects:

We checked the shoes over to make sure there was no sewing mistakes, we clipped off excess strings, we pulled a bootie out and checked around the bootie to make sure all the stitches were intact, and we did that for all the shoes. (T. 13).

Claimant performed the inspector job for approximately two (2) months. Claimant testified that she was not having any hand pain while performing the inspector job.

Claimant's testimony reflects that in mid-October 2005, she was placed back on the eyelets job. Claimant explained that at the time of her return to the eyelets job she was not afraid of the machine and felt more comfortable doing the job. The testimony of the claimant reflects that shoes arrived at her work station via an assembly line:

It come down a line, and the person behind or in front of me marked it with the little stencil, and then she gave the box back to me.

Yes, she marked the inside - - she laid the thing down and marked it inside the shoe, and then I would take it and put the eyelets on. (T. 14-15).

Claimant estimated the duration of time to put the eyelets in the shoe was “a few seconds”.

Claimant’s testimony reflects that she worked on the Bates Line from mid-October 2005. The footwear that the claimant worked on was an Army boot. Claimant testified that when she started her employment with respondent her production quota was 804 pairs of shoes per day. Claimant’s testimony reflects that she work on the eyelets job from mid-October 2005 until she was laid off in mid- December 2005, approximately eight weeks.

Claimant’s testimony reflects that in mid-November 2005, she begin experiencing problems with her hand. Claimant noted that the problems begin in her right hand, explaining:

And it was the way I would clip my shoes, they would start to tingle down my wrist. (T. 17).

Claimant described the tingling sensation and throbbing pains as being in the area between her index finger and thumb across her palm and into the wrist. Claimant testified that the symptoms started out mild however towards the end of the day would get severe.

To address her symptoms, claimant testified that she purchased some wrist guards to wear. Claimant noted that she could not alter the manner or the mechanics in which she performed her job. Claimant developed similar problems/symptoms in her left hand about two weeks following the onset in her right hand. Claimant acknowledged that she did not report her symptoms/complaints to a supervisor. In mid-December 2005, the claimant was laid off due to a lack of orders for the shoes on the line that she working.

During the lay-off claimant did not work elsewhere. Claimant testified that she primarily stayed around home. In February 2006, claimant was called back to work for respondent.

Regarding the condition of her hands during the period she was laid off from mid-December

2005 through February 2006, claimant testified:

The longer it seemed that I was off work, the better they were. Around, I guess it was before I went back to work, they'd actually gotten where it wasn't a constant pain, you know. I could actually move them and I didn't have to, you know, constantly - - (T. 20).

When the claimant returned to work in February 2006, she went back to the eyelet job, however on a different line. Claimant continued working the eyelet job through April 17, 2006, the last day that she worked. Claimant's testimony reflects, regarding the impact of returning to work had on her hands:

I started work back February 1st, I believe, and within a week my hands started to get to where they were the same way when I worked there before. I couldn't move them, they would swell at night, they would generally be very painful. (T. 21).

Claimant explained why she did not report her complaints to supervisory personnel of respondent-employer:

I didn't know what it was. I just assumed that it was something everyday that it would happen. I didn't honestly know what it was. (T. 21).

The testimony of the claimant reflects that her symptoms/complaints continued to worsen until she eventually sought medical treatment. Claimant explained:

I got up like I normally do to go to work, and usually I would flex my fingers and get the to where I could actually use them a bit, and I couldn't move them at all. They were swollen, and they just were like claw-like, and I couldn't really move them, and it scared me. (T. 22).

Claimant was taken to the emergency room by her husband. As a result of the emergency room medical treatment claimant was furnished a note which she provided to appropriate personnel of respondent-employer. Claimant is uncertain if she provided the note to respondent on April 13, 2006, or the following day. Claimant provided the note to Lisa Moad, in the Human Resources

office. In presenting the note from the emergency room to Ms. Moad, claimant testified:

I told her that I had a note from my doctor, and I thought I might have carpal tunnel, and he offered - - told me to stay two or three days off to let my hands relax, and I gave her the note and everything, she had me sit in the office and wait. (T. 23).

The testimony of the claimant reflects that after sitting and waiting for a period of time she was called to an office where several supervisors were present. Claimant testified that the individuals present in the office included Kendra Fite, Kathy Sowards, and, she believed, Alexis Sowards.

Claimant testified that Kendra Fite was behind her desk and that Kathy Sowards was present in the office. Claimant was certain if Alexis Sowards had made it to the office at the time the conversation began. Claimant testified that Ms. Fite relayed that they had decided to let her go because she had missed work. The testimony of the claimant reflects that she last missed work on the day that she went to the emergency room, April 13, 2006. Claimant acknowledged that she missed another day in that time due to weather. Claimant candidly acknowledged that she did not remember if she missed anymore days or not. Claimant testified that there was no discussion about the April 13, 2006, doctor's note during the conversation. Claimant testified that her response was to ask if she was fired and she left.

Respondent provided a letter/document reflecting that the claimant was absent from work on April 12, 2006, the day prior to the emergency room visit. Claimant testified that while she did not remember being absent on that day, it was possible. The claimant was seen in the emergency room at 7:11 a.m. on April 13, 2006. The other unexcused absence of the claimant from work cited by respondent was February 18, 2006. Regarding February 18, 2006, absence, claimant explained that there was snow and she was unable to get out of her driveway.

The testimony of the claimant reflects that after she was fired she was unable to obtain further medical treatment. Claimant did not have health insurance. Claimant had previously had health insurance through her employment with respondent during her first period of employment with same, however, following her lay-off and call back it was not available to her. Claimant did not have finances to continue treatment after April 13, 2006.

Claimant did work at a couple of convenience stores after April 13, 2006. The testimony of the claimant reflects that she worked the last two weeks in May 2007, at WD's in Marmaduke. Claimant testified that she also worked at Big Al's, another convenience store, from April 12, 2007 until June or July 18, 2007. Claimant also received unemployment benefits, which she filed for after she was fired.

Regarding the current status of her hands, claimant's testimony reflects:

They don't hurt as bad. I don't have to - - you know, repetitive motions with them, and as long as I don't use them very much, then they don't hurt. (T. 28-29).

Claimant testified that she continued to have problems with them while working at the convenience store. Claimant noted that the aspect of her job at the convenience store of counting money caused her hands to hurt. Claimant desires further medical treatment.

Claimant acknowledged completing an employment application as a part of the employment process with respondent-employer. Further, claimant acknowledged that employment-wise she had worked as a cashier for a couple of convenience stores in 2005, and that prior to that she was a stay-at-home mom, having not worked outside of the home for several years.

During cross-examination the claimant was questioned extensively regarding the

information on her employment application, to include former employers and periods of employment. (T. 30-33). Claimant did not work following the birth of her son in 2001 until 2005. Regarding any prior problems with diabetes, claimant maintains that with the exception of when she was pregnant, she has never had problem it. Claimant added that she never actually had diabetes. Claimant's son was born on January 18, 2001.

Claimant acknowledged past problems with her neck. In 1998, while a senior in high school claimant was involve in a head-on collision motor vehicle accident. Claimant suffered an injury to her neck from a 2002, automobile accident when the vehicle which was rear-ended. In 2004, claimant injured her left shoulder when she fell off a horse at a Girl Scout camp. Claimant denies having problems with her neck in the 2004 accident.

Claimant acknowledged going through new employee orientation on two occasions while employed by respondent-employer. Further, claimant concedes that as a part of the orientation discussion was had regarding the reporting of injuries. Claimant also acknowledged that as she performed her job at respondent-employer she had access to supervisors and assistant supervisors who were out on the floor.

The testimony in the record reflects that from the time the claimant began working for respondent in August 2005, she worked on jungle boot line. Claimant worked on the jungle boot line the entirety of her employment with respondent from August 2005 until her lay-off in December 2005. Claimant's symptoms begin after she left the inspection job and return to the eyeletting job.

As part of the inspection job claimant had to do some "ripping". Claimant did more "ripping" during the inspection job than she did during the eyeletting job. In describing the

“ripping” she was doing in the inspection job, claimant testified:

They call it an overlay on the side of your shoe. Most of the time that’s what I would have to pull it up and use a straight knife or a razor and cut the strings off of it, so they could take it back to them and sewed it, and they could resew it. (T. 38-39).

Claimant asserts that the “ripping” did not cause her problems until she was on the eyelets. The testimony of the claimant reflects that in doing the eyeletting job on the jungle boot line, the boots came to her in a box, the box was place a few inches from her. There were six pairs of boots in a box. Claimant handled each boot individually, placing it on the press to punch in two eyelet holes on each side of the boot. Because the claimant was paid on a piece basis, once she finished with one box of six pairs of boot, a sticker would be placed on the box and the box slide down. With respect to actually picking up the box of boots, claimant testified:

Depending on who was behind me doing it, I would put it on the line and it slides down and then it would come back on the line and they would open a little gate and it would come to their work place, and sometimes I would slide it behind me. (T. 41).

Claimant explained that the reason she did not go out looking for work after she was laid-off in December 2005, was because she was expecting to be called back to work for respondent. Claimant testified that between the time she was laid off in December 2005, and when she returned to respondent in February she did have any medical treatment however she did not relay complaints about her hands/wrist to medical providers during the visits.

The claimant was seen by Dr. Cagel, her family doctor on December 7, 2005, however did not report any difficulties or problems regarding her hands or wrists. On December 24, 2005, claimant was seen Arkansas Methodist Medical Center, in Paragould. The testimony of the claimant reflects that the December 24, 2005, visit to the emergency room was the product of

food poisoning. Claimant testified that at the time of the visit she was throwing up and bowled over.

At the time claimant returned to the employment of respondent following the lay off she completed a health history form on January 30, 2006. The document inquired if the claimant had performed repetitive work in the past and whether the same had caused any medical problems. Claimant concedes that responded that she had performed repetitive work and that it had not caused any medical problem. Claimant acknowledged that she was experiencing symptoms at the time she completed the health history form. The testimony of the claimant reflects that when she completed the earlier health history form during her initial employment with respondent on July 29, 2005, she indicated that she had performed repetitive work in the past. Claimant testified that she deemed her work as a cashier to have repetitive aspects to it.

Once the claimant returned to the employment of respondent in February 2006, following the lay-off, she performed work on the Bates Line, which manufactured Oxford shoes. Claimant acknowledged that when she was assigned to eyeletting job she did not complain, protest or report that the job had hurt her hands in the past. The testimony in the record reflects that the eyeletting job did not involve any regular repeated vibration. Claimant acknowledge that she did not have to apply force to hold the shoes in place, only to hold it steady.

Claimant testified that in April 2006, she had to take her son to be enrolled in school because there were forms she had to sign. Claimant estimated that it took her “about four hours” to go and sign the forms/papers. Angie Wilson was the assistant supervisor on the Oxford Line. Claimant acknowledged that she was expected to be at work on April 12, 2006. Regarding the other day that she missed work in February 2006, because of the weather claimant acknowledged

that other employees were able to get to work. Claimant concedes that she was given a discipline notice for her failure to report to work on the February 2006, date.

The testimony of the claimant reflects that on April 13, 2006, when she sought medical treatment for her hands and wrists, her hands were swollen and in a claw-like posture, with tingling up to her wrists. Claimant also noted that she was experiencing some numbness in the hand. Regarding the date that she delivered the note from the emergency room visit to respondent-employer, claimant testified:

I'm not for sure if it was the day after because if I'm not mistaken it was a holiday in that time, and I don't know if I waited to the next week. I can't remember if I come in right then - - I believe it was the next day, but I could be wrong on that. (T. 56).

Claimant testified that it was her recollection that her husband called respondent-employer on April 13, 2006, to report the claimant's emergency room visit and resulting incapacity. The testimony in the record reflects that April 14, 2006, was Good Friday and that the plant was closed. The plant was also close on April 15, 2006, and April 16, 2006, Saturday and Sunday.

The testimony of the claimant reflects that she immediately applied for unemployment insurance following the termination of her employment by respondent. Claimant received three (3) months of unemployment benefits at the weekly rate of \$180.00. The employment benefits ceased after three (3) months due to the lack of employment for the period.. Claimant concedes that in obtaining unemployment benefits she represented that she was able and available to work.

Claimant's testimony reflects that while she may have been seen at the emergency room between April 16, 2006, and the date of the hearing, she did not relay complaints regarding her hands to medical providers. Claimant testified that she has not been seen by a primary care

physician regarding her hands/wrists complaints. Claimant explained why she did not complain about her wrists/hands during the there (3) visits to the emergency room subsequent to April 13, 2006:

I didn't see what they could do for it without me going to a primary care physician and doing some tests. (T. 59).

In addressing the document that was a part of the employment process, the testimony reflects that the "Training Checklist" document addresses the applicant's perception of needed training to perform the job rather than the physical ability to do so. The testimony of the claimant reflects that by the time she returned to the employment of respondent in February 2006, following the lay-off she had all of the training she needed to perform the job.

The discipline note reflects that the claimant failed to work a scheduled Saturday. From the claimant's perspective there is some confusion whether the occurrence is the same as the day she did not work due to the weather in February 2006. (T. 64). Claimant concedes that she may have missed work on February 12, 2006. Claimant testified that she was unaware that there was a problem with her work attendance in April 2006.

Ms. Angela Denise Wilson testified that she worked for respondent in 2005, and 2006. Further, the testimony of Ms. Wilson reflects that in 2006 she worked as an assistant supervisor for respondent on the Bates Line. Ms. Wilson explained that the Bates Division is responsible for manufacturing the "shiny shoes the military wears for dress code". Ms. Wilson's testimony reflects that at one time the claimant worked on the Bates lines. Ms. Kathy Sowards was the supervisor of the Bates line.

Ms. Wilson testified that in April 2006, the claimant contacted her and discussed the need

to be off work to enroll her child in school. Ms. Wilson's testimony reflects regarding the afore:

She came in that morning and said that she had to leave at 2:20 because she had to enroll her kid in school and they had to do it that day because it was the last day to enroll. (T. 72).

Ms. Wilson testified that as a result of a telephone call received from the claimant's husband plans were altered such that the claimant left at 8:30 a.m, in order to accomplish the enrollment of her son. Prior to the claimant's 8:30 a.m. departure Ms. Wilson testified that she had a conversation with her:

She said she had to go down and enroll her kid because it was in the morning, it wasn't in the afternoon, and she said she should be back by lunch, and I told her to hurry, you know, I needed her back at work, and she said she would be back by lunch. (T. 73).

Ms. Wilson explained why the claimant's presence at work needed:

Yeah. The way our line works is there's so many people in each job, and if someone misses, it slows that job down and it slows the whole rest of the line down because that one person is out of work (T. 73-74).

Ms. Wilson acknowledged that after the claimant left at 8:30 a.m., she did have further contact with her. Specifically, Ms. Wilson received a telephone call from the claimant that afternoon at approximately 1:30 p.m. Regarding the afore, Ms. Wilson testified:

That she was still up there waiting to enroll her child in school, they were waiting on the principal, the he was the one that had to enroll her kid, and I asked her if they were going to wait that long, why didn't she come back to work that morning, and she said that she didn't know, and she said it shouldn't be very much longer, and I told her we was working til 5:30 and I needed her back when she got done. (T. 74).

Ms. Wilson's testimony reflects that the claimant responded that she would be there as soon as she got out. Ms. Wilson testified that the claimant did not return to the plant that day. Ms. Wilson identified the date of the claimant's failure to work as a "Wednesday", thought she could

not remember the specific date of the month. Ms. Wilson's testimony reflects that the claimant was seen at the emergency room the following day. Informed of the date of the claimant's emergency room visit as April 13, 2006, and the fact that April 14, 2006, was Good Friday with the plant being closed, Ms. Wilson concluded that the date that claimant missed work to enroll her son in school was Wednesday, April 12, 2006.

During cross-examination, Ms. Wilson testified that respondent-employer is located on Aggie Drive in Jonesboro. Ms. Wilson offered that the claimant lived in Paragould, approximately 30 minutes from work. Ms. Wilson conceded that the claimant was enrolling her child in one of the schools in Paragould. While the claimant did not return to work on Wednesday, April 12, 2006, Ms. Wilson acknowledged that the claimant did telephone to report her status.

Ms. Wilson acknowledged that a disciplinary notice was generated regarding the claimant missing work on April 12, 2006. Ms. Wilson's testimony reflects that an employee has to miss eight hours in 30 days to get a write-up. Ms. Wilson maintains that respondent has rules and is "very strict on our absenteeism". (T. 77). Ms. Wilson testified that she has no knowledge whether any disciplinary action was taken regarding the claimant failure to work on April 12, 2006. The testimony of Ms. Wilson reflects that during the 2006 time period writing up disciplinary notices was not a part of job responsibilities as an assistant supervisor.

Ms. Lisa Moad is employed by respondent as a Human Resources Assistant and was so employed in 2005 and 2006. Ms. Moad denies that the claimant ever contacted her regarding an injury to her hands or arms. Ms. Moad testified that if she received a telephone call from an employee and is informed that they will be missing work she puts the call straight through to the

employee's supervisor. During cross-examination Ms. Moad testified that if she ever received a telephone call from the claimant she put the call straight through to the claimant's supervisor.

Ms. Moad was uncertain if she ever received a telephone call from the claimant's husband.

Ms. Alexis Michelle Sowards, the Human Resources Coordinator for respondent since November 2005, testified that she started her employment with respondent working in the factory in the stockroom. Ms. Sowards' testimony reflects regarding her job duties as Human Resources Coordinator:

I did several things. I'm over safety, I do handle the - - if we have a work-related accident, I also do orientation for new hires, I process all that paperwork, I do all that stuff. I deal with unemployment. (T. 106)

Ms. Sowards testified that while she never actually worked on a machine she did roll out the materials for the cutters. Ms. Sowards resides in Paragould, and testified that it takes her 25 minutes to get from her house to respondent's plant.

Ms. Sowards testified that the claimant was a probationary employee of respondent in April 2006. The testimony of Ms. Sowards reflects that new hires of respondent retain the status of probationary employee for the first 90 days of their employment. Ms. Sowards testified that when an employee's employment is terminated the employee loses all seniority. With respect to the attendance policy regarding probationary employees, Ms. Sowards testified that such employee "can't miss any days in the first 90 days". (T. 84). Ms. Sowards noted that the afore is relayed to employees during orientation, which typically takes about 30 to 45 minutes.

In light of the attendance policy regarding probationary employees Ms. Sowards responded why the claimant's employment was not terminated in February 2006 when she failed to report for work:

Well, she was written up that day because if you missed a Saturday, it's a mandatory write-up, and that was on a Saturday. The rest of our policy is if you miss over eight hours, then you get - - in a 30-day period, then you get wrote up. She wasn't terminated that time because - - for the Saturday, because it was for weather, and people made it to work, but some people didn't. (T. 86).

Ms. Sowards' testimony reflects that there was some leniency given:

Right,. So it was just, I mean, our being nice. (T. 86).

Ms. Sowards testified that between February and April 13, 2006, the claimant missed another day from work, February 20, 2006. Regarding the afore, the testimony of Ms. Sowards reflects:

She missed 2/20 to take her child to have surgery on his tonsils, and again, she was still a probationary employee, but we understood that and talked to her that she couldn't miss anymore, that we weren't going to write her up for it. (T. 87).

Ms. Sowards' testimony reflects that the claimant missed work on March 20, 2006, due to car trouble and the failure to issue a termination letter as a result of same was an oversight. The claimant's supervisor, Kathy Sowards, is the mother of Ms. Sowards.

During cross-examination Ms. Sowards denied that the policy of respondent dictated that if someone missed a day from work for any reason during the probationary period they were to be fired. In explaining the policy, Ms. Sowards testified:

Okay. The policy is for probationary employees, that, you know, they can be terminated for any absences in their first 90 days. That is up to us. I mean - - (T. 89).

Ms. Sowards conceded that the policy afforded a lot of discretion for the first 90 day according to the circumstances. Ms. Sowards acknowledged that the claimant was a good worker.

Ms. Sowards acknowledged that the claimant reported to work on Wednesday, April 12, 2006, and obtained permission from supervisory personnel to leave to enroll her child in school.

Claimant did not leave the plant until after 8:00 a.m., an hour after her shift began at 7:00 a.m. The claimant called back at 1:30 p.m., to report that she was still waiting to enroll the child in school. Ms. Sowards concedes that while within the probationary period and at her discretion the claimant missed work due to the weather, to take her child to have surgery, and permission to leave work to enroll the child in school with the understanding that she would return once it was accomplished.

Ms. Sowards testified that she learned that the claimant had a note from the doctor “that day”, April 13, 2006. Ms. Sowards maintains that the assistant supervisor, Angie Wilson, told her about the claimant’s doctor note. Ms. Sowards testified that Ms. Wilson wanted to terminate the claimant’s employment. Ms. Sowards later testified that both the supervisor, Kathy Sowards, and the assistant supervisor, Angela Wilson, want to terminated the claimant’s employment, though Ms. Wilson was first.

Ms. Sowards was questioned about the claimant’s hospital note in relation to Ms. Wilson’s termination recommendation:

Wait, okay. You’re talking about the hospital. Yes, she wanted to - - she had a note, she wanted to terminate her for the day before that, for the child, when she missed all day and didn’t come back. She came in the next morning and said, you know, “I told her to be back at lunch. She wasn’t back at lunch. She called. I told her we were working until 5:30 I need her, and she never came in,” and she was a probationary employee, and they didn’t think that she was going to work out. (T. 95-96).

Ms. Sowards, who was present in the hearing room at the time Ms. Wilson testified, acknowledged that Ms. Wilson did not testify that she recommended the termination of the claimant’s employment, however offered that the question was not put to her.

Acknowledging that the claimant had a doctor’s note reflecting that she had carpal tunnel

syndrome, explained the reason the claimant was not sent to doctor, “because she was being suspended for the day before”. (T. 97). Ms. Sowards denies that medical treatment relative to the claimant’s carpal tunnel syndrome was withheld because of the pending termination of the claimant’s employment. In response to the specific question of why the claimant was not sent for medical treatment, Ms. Sowards testified:

Because she came in and actually she didn’t come in and speak with me.

I have a boss, the manager, Kendra Fite, who is the manager who - -

I don’t the question was ever brought up that it was a workers’ compensation claim. I don’t know what was stated or if you know she said that - - I don’t know. I don’t know the conversation. (T. 98-99).

Ms. Sowards testified that she was not in the office at the outset of the claimant’s meeting with Ms. Fite when the doctor’s note was presented. Further, Ms. Sowards asserts that she was unaware that the claimant was asserting a work-related injury regarding her hands/wrists complaints. Ms. Sowards maintains that she first became aware of the workers’ compensation claim when the lawsuit came about, at which time an incident report was filed. On the one hand Ms. Sowards testified that the doctor’s note regarding the assessment of carpal tunnel relative to the claimant did not raise a “red flag” as a Human Resources Coordinator. On the other hand, Ms. Sowards maintains that she did not receive the note. (T. 101-102). Ms. Sowards testified that if the claimant or any employee of respondent reported to her that they were having work-related problems, the employee would be sent to the company doctor.

Ms. Sowards testified that when the claimant returned to the employment of respondent in February 2006, following her December 2005 lay-off, she returned as a “re-hire” with another

90-day probationary period. Ms. Sowards's testimony reflects that in terminating the employment of a probationary employee, the employee is always suspended before the employment is terminated. Ms. Sowards testified that the April 13, 2006, doctor's note regarding the claimant came into possession of respondent when the claimant and her fiancé bought it in on April 13, 2006 and talked with Ms. Kendra Fite, the manager. Ms. Sowards concedes that she was not present during any conversation at the afore.

Ms. Sowards' testimony reflects that the claimant's employment termination took place on Monday, April 17, 2006. According to Ms. Sowards the claimant was suspended on April 13, 2006, "during the day she came in with the note". (T. 108). Ms. Sowards testified that the claimant was suspended by Ms. Fite:

She verbally would say, "You're suspended while we review the record, and we'll let you know," and she would either - - I think she does both. She gives them a phone call and mails them a certified letter. (T. 109).

Ms. Sowards maintains that the claimant was not at the plant of respondent on April 17, 2006, but would have received the letter notifying her of the termination of her employment. Ms. Sowards testified that the claimant never returned to the plant of respondent after April 13, 2006. Accordingly, base on Ms. Sowards' testimony the duration of the claimant's suspension prior to her termination was four to five hours. (T. 110).

Ms. Kathy Sowards testified that she has been a supervisor at respondent for approximately seven years. Ms. Kathy Sowards' testimony reflects that she actually train employees on the job, and did so in the case of the claimant. Ms. Kathy Sowards estimated that employees have approximately five weeks on the job to achieve the desired efficiency rate. In

explaining how the efficiency rates are determined, Ms. Kathy Sowards testified:

It's a piece-work job, so it's based on the pairs that you make every day, and each week the amount of pairs you have to make goes up, so that by the end of that time, you should be making 100 percent. (T. 113).

The testimony of Ms. Kathy Sowards reflects that the claimant reached the point where she was achieving the efficiency rate.

Ms. Kathy Sowards explained and demonstrated the process of "ripping out" on the Bates line, a task that the claimant had to perform on occasions:

I would be a lot easier. The job that she would be doing would be putting these in, and if she didn't put them in correctly, then she would have to take this lining out and take this piece out to have it replaced.

So anything that she would either put two eyelet holes in or misalign the eyelet holes, she would be responsible to take it apart so that we could put new parts in and have her to re-eyelet it.

It's just easier to show you. You can take that lining out and then you just pick this piece up. I have a better little tool that I would be using to put this up which I didn't bring, and once you get that lifted up - - yeah, you just take this tape loose like so, see it about pulls itself loose, and then we would send it to repair, they would replace the lining, replace this piece, another operator would sew this back on, and then it would be ready to be re-eyeleted. (T. 113-114).

Regarding the amount of time devoted to the above process by an employee at 100 percent efficiency, Ms. Kathy Sowards testified:

If they're at 100 percent efficiency, they wouldn't be doing too many because they would lose too much time. They wouldn't be able to keep their percentages up because you have to do so many pairs per hour, and anytime you have to stop and break down a shoe, you lose that many minutes out of an hour. So it's harder to make up that lost time. (T. 115).

In addition to the approximately twenty seconds to engage the eyelet press to insert them in both

sides of the shoe, other tasks that the employee performed were described by Ms. Kathy Sowards:

You have to take the shoes out of the box and put them on your table. Do your coupons, sign the sheet to show that you did the job. Then you would do your eyeletting, put all the shoes back in the box, tie the bags, put the box on a conveyor belt and send it down and start the process again. (T. 115).

Ms. Kathy Sowards testified that she was aware that the claimant's employment with respondent was terminated in April 2006, and that she was involved in the decision for the termination. Ms. Kathy Sowards' testimony reflects that the decision for the termination was hers, explaining:

She was working for me and she was in a probationary period and she had excessive attendance problem, so I had went to the personnel department to talk to them about it and told them I wanted to terminate. (T. 116).

Regarding the circumstances warranting the termination of the claimant's employment, Ms. Kathy Sowards added:

Because she was in a 90-day probationary period, and during that 90 days we stress attendance. When I hire you, I stress attendance. We look at any reason you missed. Hopefully, you won't miss any during that 90 period, that's our best thing. But we - - you know, if you miss more - - We don't give them a certain amount. One, it depends on why you're missing. You know, if you just oversleep a lot, then we're going to continue to go back - - so she had missed, I know of two other days plus there may have been some partials I can't recall it all before the day that she - - the Wednesday that she left and didn't come back. I believe that's when that was, and then she had called in that Thursday morning, or someone called in for her actually. (T. 116-117).

Ms. Kathy Sowards testified that she was not involved in any meetings with the claimant. Ms. Kathy Sowards' testimony reflects that she did give the claimant a warning.

Ms. Kathy Sowards testimony reflects that she was involved in the meeting regarding the termination of the claimant's employment. Regarding the afore, Ms. Kathy Sowards testified:

No, Kendra did most of the talking because we had went over the whole attendance record and she had all the facts in front of her, so she did most of the talking. (T. 118).

As to whether there was a point in which the claimant was considered to be suspended before her employment was terminated Ms. Kathy Sowards offered, "I believe that's what she did". (T. 118)

Regarding when the suspension occurred Ms. Kathy Sowards testified:

It would have been - - since she didn't come in, then we had a holiday. I think it was the following Monday.

No, I didn't talk to her at all on that Thursday because I said someone else called in for her, and it was - - Friday was a holiday, and it was the next Monday is when we talked to her. (T. 118-119).

Ms. Kathy Sowards' recollections of the claimant's comments during the meeting reflects:

I'm sure - - I believe she told something about being at the hospital and she couldn't help being off, but I don't recall the details. (T. 119).

Ms. Kathy Sowards maintains that the claimant never told her that she had a problem on her job.

In reconciling her response of not recalling the specifics of the claimant's comments during the meeting with a certainty that claimant did not report a work related injury during the meeting Ms.

Kathy Sowards' testimony reflects:

I don't remember - - she's not the only person I've had to terminate, and I don't remember every conversation that we ever had, but I do know how I handle anybody who has an injury or a problem on the job. From the time I hire them, I tell them that if they have hurt themselves or think they hurt themselves, even if it's just a splinter or little cut, they need to go to the Human Recourse Department and report it. Any time anyone has ever complained to me about having any kind of injury, I tell them right then, the first thing you need to do is go to Human Resources and have it reported. It's part of our checklist, it's part of my training, it's just something I do. I've

been in this business for a very long period of time because I have 20 years experience at another factory. (T. 122).

Regarding the Monday meeting with the claimant, Ms. Kathy Sowards testified that it occurred “around 7:30, 8:00 o’clock”. Ms. Kathy Sowards’ testimony reflects that she is uncertain if she brought the claimant to the office for the meeting or if she had someone to bring the claimant to the meeting. Finally, Ms. Kathy Sowards concedes that the claimant, “came up there to talk to us”. (T. 123). Ms. Sowards testified that on Monday, April 17, 2006, she first saw the claimant in the personnel office of respondent. Ms. Sowards testified that she is not certain of the circumstances which caused her to be in the personnel office on respondent on the morning of April 17, 2006.

The testimony in the record reflects that Ms. Kendra Fite is the Human Resources manager at the plant. Ms. Kathy Sowards testified that Ms. Fite mentioned to her that the claimant had been in on April 13, 2006, with a note that said that she was injured. (T. 125). Ms. Kathy Sowards’ testimony, regarding the meeting with Ms. Fite before the claimant came in:

When she - - we were talking about the fact that Melisa - - I did come up there, one of the things I did talk to her about - -

I am. You have to be patient. I’m going to have to talk - - I did talk about the fact that Melisa wasn’t there, and I did want to terminate her. Melisa had the note - - from the doctor.

Yes. I wanted to terminate her for attendance problems.

She brought a note - - all I remember is she came in, she had the note about her hands or something. I believe it was her hands, and that she had been to the emergency room because of numbness. I had nothing else to do with that. (T. 126-127).

Ms. Kathy Sowards noted that the claimant did not say anything to her, but that the above was

relayed to her by Ms. Fite. Ms. Kathy Sowards' testimony reflects that she and Ms. Fite talked the last day that the claimant missed work about the claimant's attendance problem. Ms. Kathy Sowards noted that the claimant had missed work on Wednesday, April 12, 2006, and Thursday, April 13, 2006. Ms. Sowards concedes that she "was told" that the claimant went to the doctor on Thursday, April 13, 2006. (T. 127). Further, Ms. Kathy Sowards acknowledged that the claimant requested and received permission to leave work on Wednesday, April 12, 2006, to orientate her child in school. Regarding the afore, Ms. Kathy Sowards' testimony reflects:

Yes, and she was supposed to return to work as soon as she got her child orientated, which usually takes about an hour because we have lots and lots - - she called at 11:30, something like that, and said that she was still waiting to orientate her child and she was told that when she got done, she needed to come t work because we were working til 5:30. She never reported back. (T. 128).

On rebuttal, the claimant testified regarding her conversation during the April 17, 2006, meeting with Ms. Kenda Fite, the HR Manger, and Ms. Kathy Sowards, her supervisor:

I told them I'd been to the emergency room and the doctor said that he thought that I had carpal tunnel, and I asked him what I needed to do to take care of that. (T. 131).

Claimant acknowledged that there was no conversation during the meeting about how the carpal tunnel syndrome occurred. Claimant maintains that she relayed to the supervisory personnel in the meeting that she though her carpal tunnel complaints happened at work:

Yes. I told her that doing the eyelets I felt that with the twisting and stuff, that it was causing my hands to - - I didn't what I called it at the time, but I said freeze up. (T. 132).

The medical in the record reflects that the claimant was seen at the emergency room of St. Bernard's Regional Medical Center on April 13, 2006. The patient chart note generated as a

result of the April 13, 2006, emergency visit reflects, in pertinent part:

HPI: 25 yo F c/o onset 3-4 mos ago after starting a job that involves repetitive handwork, of pain, cramping, and numbness in hands. Progressively worsening, she has frequent nocturnal pain and spasms. Sx began when working with hands. resting improves Sx. no prior hx of similar problem.

* * *

EXTREMITIES: moderate tenderness in the median N distribution of both hands, L<R. Increased with forced dorsiflexion of wrist. (CX. #1, p. 25).

The discharge summary reflects a diagnosis of carpal tunnel syndrome, for which the claimant was provided prescriptions for Medrol Dosepak and Vicodin ES. Further, the discharge summary reflects that the claimant was to follow-up with her family physician as soon as possible, to return to work in 2-3 days, and to refrain from repetitive gripping/squeezing/lifting until her symptoms improved. (CX. #1, p. 24).

Finally, the record reflects the presence to a April 21, 2006, correspondence from respondent-employer terminating the claimant's employment. The afore correspondence reflects, in pertinent part:

We regret to inform you that your services with Wolverine World Wide have been terminated effective Monday, April 17, 2006, due to excessive absenteeism. According to our attendance policy and procedures, a probationary employee can be terminated for any unexcused absence. Specifically, you had unexcused absences on 2/18/06 and 4/12/06, in violation of our rules. (RX. #1, p. 20).

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, 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 or about November 15, 2005, relationship of employee-employer-carrier existed among the parties.
3. On or about November 15, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits at the rate of \$255.00/\$191.00, for temporary total/permanent partial disability based on an average weekly wage of \$382.00.
4. On or about November 15, 2005, the claimant sustained a compensable gradual rapid repetitive injury in the form of bilateral carpal tunnel syndrome arising out of and in the course of her employment.
5. The claimant was temporarily totally disable for the period commencing April 13, 2006, and continuing until such time as she reaches the end of her healing period, save for time she worked at several convenience store in between April 2007 and July 2004.
6. The evidence preponderates that during the three (3) month period that the claimant received unemployment benefits subsequent to her April 17, 2006, firing by respondent she was yet within her healing period and correspondingly entitled to temporary total disability benefits. Pursuant to Ark. Code Ann. §11-9-506 (b), claimant is entitled to the difference between his weekly temporary total disability benefits rate and his weekly unemployment disability rate.
7. The respondent shall pay all reasonable hospital, and medical expenses arising out of the compensable November 15, 2005, bilateral carpal tunnel syndrome of the claimant, to include the April 13, 2006, St. Bernard's Regional Medical Center emergency room visit.

8. The respondents have controverted this claim in its entirety.

CONCLUSIONS

The claimant asserts that she sustained a gradual onset injury in the form of bilateral carpal tunnel syndrome within the course and scope of her employment with respondent which, while first manifesting symptoms in mid-November 2005, resulted in medial treatment and temporary total incapacitation on April 13, 2006. Claimant asserts compensability of her claim and reserve all other issues entitlement to medical and indemnity benefits. Respondents deny that the claimant sustained a compensable injury.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation as a result of an injury having been sustained subsequent to the effective date of the afore provision. Claimant asserts a gradual onset injury as the basis for her workers' compensation claim.

The Arkansas Supreme Court has recognized that carpal tunnel syndrome is a gradual onset injury, and as such, it is not necessary for the claimant to prove that her injury was caused by rapid repetitive motion. *Kilow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.w.2d 190 (1998). In order to prove compensability of her claim, claimant must prove by a preponderance of the evidence that the injury arose out of and in the course of her employment, that the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death, and the injury was a major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102 (4)(A)(ii) & (E)(ii). Further, a compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102 (4)(D). *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000).

In the instant claim, there is no evidence in the record to reflect that the claimant experienced difficulties, limitations, or restriction relative to her upper extremities prior to her initial August 1, 2005, employment by respondents. Other than a stay-at-home-mom, claimant's prior pertinent work history consisted of working as a cashier in a convenience store. Until her employment by respondent claimant had never worked in a factory setting.

There is not a dispute regarding the claimant's assigned employment duties during her employment by respondents. Further, the evidence preponderates that the claimant's job duties entailed hand-intensive activities, particularly the eyeletting job. Claimant performed the eyeletting job for several weeks after she began working for respondents in August 2005. Because of a lack of confidence and proficiency, claimant was moved from the job to one of inspection. In mid-October 2005, claimant was returned to the hand-intensive, repaid repetitive eyeletting job. Claimant successfully performed the job from mid-October 2005, until she was laid off in December 2005.

The credible evidence in the record reflects that by mid-November 2005, claimant commenced to experience symptoms of hand/wrist, and that within the next two weeks she was experiencing symptoms in both hands/wrist. Claimant did not report her symptoms to supervisory personnel of respondents. During the period that the claimant was laid off from work from approximately mid-December 2005, until she returned to work for respondents in February 2006, she did not seek employment or otherwise injure her upper extremities. During the afore period, the period of lay-off, claimant's hands/wrists symptoms improve.

The evidence of whether the claimant was called back to the employment of respondent following her lay-off or whether the claimant was actually rehired by respondents in February

2006, in not conclusive. New hires of respondent are probationary employees for the first ninety (90) days. Accordingly, while the claimant completed her probationary period following her August 1, 2005, employment, and, as such was not a probationary employee at the time of her December 2005, lay-off. Respondents assert that the claimant was rehired on February 1, 2006, and, as such had to complete another ninety (90) day probationary period. It is noteworthy that the only completed employment application relative to the claimant contained in the record is dated July 29, 2005. (RX. #1, p. 3; 13). Further, the evidence in the record reflects the presence of only one Hire Form, dated August 1, 2005, relative to the claimant. (RX. #1, p. 12).

Documents in the record reflecting that the claimant underwent orientation on two (2) occasions and completed two (2) Medical History forms are only indicative of the fact that claimant worked for respondents on two separate occasions.

One of the defenses to the present claim put forth by respondents is that the claimant was a probationary employee at the time her employment was terminated in April 2006, and that her asserted injury was raised when she had an unexcused absence. As a probationary employee, according the inconsistent policy reflected in the testimony of supervisory personnel of respondents, employment could be terminated for any absence during the probationary period. Nevertheless, the April 21, 2006, employment termination letter forwarded to the claimant by Ms. Kendra Fite, the Human Resources Manager, cited “any unexcused absence” as a basis for termination. (RX. #1, p. 20). In the instant claim, the evidence discloses, as espoused by the supervisory personnel testifying during the hearing, that substantial discretion may be exercised in applying the policy. Further that the policy is subject to being applied arbitrarily.

In the April 21, 2006, employment termination letter the dates of February 18, 2006, and

April 12, 2006, are cited as unexcused absences. The evidence in the record reflects that February 18, 2006, was a Saturday. Claimant was issued a Discipline Notice in February 2006, for failing to work on a scheduled Saturday. In all probability the afore document was authored and presented to the claimant on 20th , though the second number in the date appears to have been changed to a 4. There is credible testimony in the record to reflect that there was snow on the ground which prevented not only the claimant from working on Saturday, February 18, 2006, but other employees as well. Further, the evidence preponderates that the claimant received permission from supervisory personnel to leave work to enroll her son in school on April 12, 2006, and that she notified supervisory personnel of respondent of her status when she was unable to return as planned.

Since respondents asserted that the claimant was a new hire subsequent to February 1, 2006, and subject to a ninety (90) day probationary period it is incumbent upon them to produce to that effect - - specifically an employment application and Hire Form. Respondents have to present credible evidence that the claimant was probationary employee subsequent to February 1, 2006. The totality of the evidence preponderates that respondents use the pretext of the claimant's status as a probationary employee to terminate her employment when presented with credible documented evidence of a work-related injury.

The medical evidence reflects that the claimant presented at the emergency room of St. Bernard's Regional Medical Center on Thursday, April 13, 2006, with complaints of bilateral hand numbness, pain, swelling, cramping/spasms. Claimant's complaint was diagnosed as carpal tunnel syndrome following her examination by the attending emergency room physician. Claimant present a credible history relating the four month onset of her symptoms to her

employment with respondent. Claimant was provide prescriptions for Medrol Dosepak and Vicodin ES, and directed to remain off work for 2-3 days, to see her family physician, and to refrain from repetitive gripping/squeezing/and lifting until her symptoms improved.

Respondents were notified of the claimant's April 13, 2006, emergency room visit, as well as the fact that she would not be at work on that day, in accordance with the direction of the emergency room physician.

Respondent was closed on Friday, April 14, 2006, for Good Friday, and on the weekend, Saturday April 15, 2006, and Sunday, April 16, 2006. Respondents' next business day was Monday, April 17, 2006. Claimant present on Monday, April 17, 2006, with the doctors' note regarding her April 13, 2006, emergency room visit. Claimant reported her injury to respondents and requested workers' compensation benefits associated with the injury. Instead, the claimant's employment was terminated under the pretext of excessive absenteeism. Respondents did not offer or make available access to medical treatment in connection with her document work-related injury. It is noteworthy that while the respondents did not list the April 13, 2006, date as an unexcused absence of the claimant, it nevertheless did not file a claim form/incident report in connection with same.

The evidence preponderates that the clamant sustained a gradual onset injury in the form of bilateral carpal tunnel syndrome, arising out of and in the course of her employment with respondent with symptoms which first manifested on or about November 15, 2005, and which resulted in the need and receipt of medical treatment on April 13, 2006, as well as incapacitation from engaging in gainful employment. The evidence further preponderates that the claimant's injury was the major cause for the need medical treatment. Respondents have controverted this

claim in its entirety.

The parties have reserved the issues of temporary total disability and medical benefits growing out of this claim. The evidence preponderates that the claimant sustained a compensable injury in the form of bilateral carpal tunnel syndrome, a scheduled injury, on or about November 15, 2005. Since the claimant has been unable to obtain medical treatment relative to her compensable injury she remains within her healing period. Likewise, save for a short period in 2007, claimant has been unable to work due the compensable injury.

An employee who has suffered a compensable scheduled injury is entitled to temporary total or temporary partial disability benefits during the healing period or until the employee return to work. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). It is undisputed that the claimant did receive unemployment disability benefits at the weekly rate of \$180.00, for a period of three (3) months subsequent to the April 17, 2006, termination of her employment by respondents. Nevertheless, the evidence preponderates that the claimant was still within her healing period and incapacitated from engaging in gainful employment, and correspondingly entitled to temporary total disability benefits during the time she received the unemployment benefits. Ark. Code Ann. §11-9-506 (b) provides that the claimant is entitled to the difference between her temporary total disability rate and her unemployment compensation rate, to the extent that the temporary total disability exceeds the unemployment benefits.

AWARD

Respondents are herein ordered and directed to pay to the claimant appropriate temporary total disability and medical benefits growing out of her compensable bilateral carpal tunnel

syndrome sustained in the employment of same on or about November 15, 2005. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay maximum attorney fees to the clamant's attorney on the controverted indemnity benefits herein awarded.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE