

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F610946 (05/19/06)**

**OLA McRAY, EMPLOYEE**

**CLAIMANT**

**MILWAUKEE ELECTRIC TOOL CORP., EMPLOYER**

**RESPONDENT**

**TOKIO MARINE & FIRE INS. CO., CARRIER**

**RESPONDENT**

**OPINION FILED SEPTEMBER 25, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 27, 2008, at Luxora, Mississippi County, Arkansas.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. BYRD, III, Attorney at Law, Little Rock, 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 May 13, 2008, 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.

While the claimant contended a specific incident injury, she asserts in the alternative either a compensable specific injury or continuous use injury. Respondents assert that from its

inception the claimant has contented a specific incident injury and that discovery and hearing preparation has been premised on same and maintain that they would be prejudiced at this point by the claimant's contention of a gradual onset. The objection of the respondents to the claimant's pursuit of her claim of compensability on an alternative basis was overruled.

The claimant objected to medical records offered by the respondents as not being timely filed in accordance with the May 13, 2008, Pre-hearing Order. On the assurance of respondents' attorney as an officer of the court that he hand delivered the exhibits to both the Commission and the attorney for the claimant on Friday, June 20, 2008, the objection of the claimant's attorney was overruled and the exhibits admitted.

The testimony of Ola McRay - the claimant, Jimmy Kennedy, along with the December 17, 2007, deposition of Dr. Gregory F. Ricca, coupled with medical reports and other documents comprise the record in this claim.

### **DISCUSSION**

Ola McRay, with a date of birth of April 10, 1957, completed the 11<sup>th</sup> grade and later obtained her GED. Prior to her employment by respondent, claimant worked at Baptist Memorial Hospital in Blytheville.

Claimant was employed by respondent-employer for approximately 12 years, having commenced same in 1994. Claimant worked on the assembly line when she commenced her employment with respondent. In describing her job duties on the assembly line claimant testified:

On the assembly line you have like, I worked the bandsaw. That's a very big tool like that. So we have a U-line. The line had to be a U-line. And each one of us every two hours we changed from the first line, the

first side right here and then we go to the next assembly part. We'd jump from one assembly part to the next one. And we'd have to have drivers, little pieces of tools, that was a very large tool right there that I had to do. That was the first job that they put me on. And I worked it from two, to two at night, to two in the morning. (T. 14).

The claimant worked on the assembly bandsaw line job for three (3) years. Claimant estimated the finished product weight at 50 pounds. Claimant's testimony reflects, in describing the specifics of the job activities:

No, you just assemble like screws and you put little wires around it and assemble the round boxes and stuff like that on it. By the time you get through with it it's about 50 pounds. (T. 15).

The testimony of the claimant reflects that the above job required the constant use of both hands.

After performing the bandsaw job for three (3) years, claimant testified regarding her next assigned job at respondent:

Then they sent to me, golly, I cannot remember that saw. Routers. It was a router and another little saw I can't think about it. But we had five cells of that. We had to learn all five of those cells right there. So sometimes they would switch me out from router, but I mostly was on routers all the time because I'm more faster on the router line. And the router line had like 24 drivers. They had 24 drivers on there. So I had to use a lot of drivers on that. (T. 15-16).

Claimant testified that there were 158 pieces to put together. With respect to the amount of time required to put the pieces together claimant's testimony reflects:

We had to be fast. It'd take like, like one assembly right here, it takes like seconds. We had to be through like in seconds. We had to be fast. You had to be rolling like this, rolling (indicating). And whoever's in the front, that's the one that who had to pull the whole line. And most of the time I had to be in the front because I was faster. So I had to pull the whole line. And sometimes I would do my assembly and then jump over here and do another person's assembly to get that die around, seconds we had to make it. (T. 16).

While the claimant did not have to lift as much as on the bandsaw she noted that it was the use of the drivers that had so much power. Claimant was doing the router job at the time she found out she had carpal tunnel in 2000.

The claimant attribute the use of the driver while working on the routers as the basis for her diagnosed carpal tunnel:

Them drivers right there, there was so many drivers so some of them would twist out, the power from some of them would twist your wrists around it like that. So I went to the doctor for the carpal tunnel. (T. 17).

The claimant reported the problem that she was having to her supervisor. Claimant noted that Rosemary called her and that she was provided with the hand bands/wrist splints, and ibuprofen for pain.

Claimant's testimony reflects that she was ultimately sent to Dr. Yoa, a Blytheville orthopedic surgeon, who performed surgeries on both hands. Claimant testified:

I had just them two. On both hands, he did just that one time. I couldn't continue to go to the doctor because they cut my insurance off. (T. 18).

Claimant maintains that while respondent-employer referred her to Dr. Yoa, her treatment was not filed on workers' compensation insurance but on short-term disability and her medical insurance.

The claimant was then moved to a machine job where she was running machines and the machine operator job. Claimant's testimony reflects, regarding her job duties as machine operator:

Machine operator you have to unload and load. It depends on what machine you're in. Some of them is pretty easy and some of them is hard. The one that I was running the day that I jumped off the skid

it's very large. It's large as this room right here. And I had to stand on a skid and so I had to bend over inside it to load it and we had seconds to do that because if we don't load it in seconds, like a second, the material would mess up in the machine and we'd have a faulty material. So I had to be real fast and slam the door real fast and then it goes off in a second and I'd open that door back up and slam again, take it off, jump off the skid, put it on another press and pack it up and go back and slam again. So, it was hard. Some of those were hard, some was easy. But they mostly had me running that big machine because we had a whole lot of new people come in. So I was the one that had a lot of seniority there. (T. 19).

Claimant testified regarding the weights entailed in performing the machine job:

Well on there we had to pack up and get a skid. It was the iron basket, they were called the iron basket. We had to unload them because they would stack them up right there by the machine and we had to kind of just jerk them off and then line them up by our machine so we could load our parts and stuff. I had to do that. And then I had to get that, the little parts that run your big machine it wasn't no more than about two pounds or something. It's just the part about that machine was so tall we had to stand on a skid. I had to hand inside just like this (indicating). I had to lower it like this (indicating). And I constantly had to do that and I had to keep this arm right here to make sure I closed the door fast enough so the material wouldn't be messed up. It was a large machine, a very large machine. (T. 19-20).

The testimony of the claimant reflects that Mike O'Malley was her supervisor, and that when he was not there the team leader, Jimmy Kennedy, served in the role of supervisor.

The testimony of the claimant reflects that she began having physical problems while discharging the job duties on the machine:

Yeah, uh-huh, yes. I had shoulder, real bad shoulder pains. See I started having real bad shoulder pains. I already had wrist pain and stuff so I had real bad shoulder pains, constantly doing that over and over. We didn't rotate on our machine. They made us stay on the machine. Like we was working eight hours, we had to stay on that one machine that whole day. (T. 20-21).

Claimant's testimony reflects that while on the machine, at first she worked 8-hour shifts, then it was changed to 12-hour shifts, and that since the employees were not rotated, she remained on

the machine the entire shift.

In addition to the physical problems with her shoulders while running the machine, claimant's testimony reflects:

Just that time when I stepped down, I had, I was going to Dr. Lazenby for my shoulders when I was over there and he was giving me ultrasound on my shoulders and stuff, I was going there. And when I stepped down like I said off that big machine when I was training the folks and I just heard a pop in my neck. And I just went and told Jimmy can he please relieve me off the machine. He told me that I had to ask someone. (T. 21-22).

Claimant explained that she had to stand on the skid because of the height in order to perform one task of her job on the machine, and that she had to step down off of the skid in order to go to another press on side, which was another task of the machine job. Thereafter, the claimant, after pressing a little hole in it, walked from the press over to her basket and loaded it. The claimant would then step back up on the skid and repeat the sequence.

The testimony of the claimant reflects that in May 2006, she stepped off the skid and heard her neck pop. Regarding her conversation with Mr. Kennedy, the lead man, claimant testified:

I told, I asked him, I said could he get someone to relieve me, that's what I asked him because I was hurting so bad. And he told me to go and get someone. So I couldn't do that because I wasn't the team leader. (T. 23).

The claimant continued working on the machine and completed her shift. Regarding the afore, the claimant testified:

Yeah, I stayed on that machine. When he didn't ask anyone to change me, I didn't go, I stayed on the machine. I just worked there the whole day and came back that last day and my arm was hurting so bad on the next big machine and I was hurting so bad and I left in four hours and

went to the doctor. (T. 23).

The claimant testified that the day following the incident she went over and talked to the assistant plant manager, Jerry Rogers. Claimant asserts that she informed Mr. Rogers that she needed to go to the doctor and was given permission to do so.

The testimony of the claimant reflects that sought and obtained treatment from Dr. Holly-Banks for her complaints. Following her examination and treatment with Dr. Holly-Banks claimant was provide a work release excusing her from work for three (3) days. Claimant maintains that she telephoned the designated telephone number of plant and relayed that she would not be in to work pursuant to release slip.

Claimant testified that regarding the sequence of events that occurred following the visit to Dr. Holly-Banks:

No, when I didn't return in three days John Peterson called over there and they had fired me because they said I hadn't called in for three days. And John Peterson sent Mortie, Mortie Lockett over there to my house and asked me said, what happened to me? He said he know that I was a good worker there, I would never do nothing like that. So I came to the office and I talked to Jerry Rogers and they gave me my job back because someone had said yeah I had called in over there but they didn't know where the papers was that I had called in. (T. 24).

The testimony of the claimant reflects that following the above, she returned to work and worked for a couple of days. Claimant testified:

No, I worked for, they changed me. When I went in they went and changed me on nights. And I started crying and I asked them why did they put all them new people back on me again and I just got from the doctor, I just came back to work. So they changed me and put me on night so I worked a couple hours on night and then I went home. (T. 25).

Claimant explained that the reason she went home was because she passed out at her machine

because she was hurting and sick. The testimony of the claimant reflects that the pain and hurting was in her shoulder and neck.

The testimony of the claimant reflects that the pain she experienced at the time she passed out at her machine was worse than that she previously experienced, which had resulted in the earlier visit to Dr. Holly-Banks. The claimant was ultimately referred by Dr. Holly-Banks to Dr. Ricca. The claimant's testimony reflects, regarding her medical treatment and providers:

Oh, no, I saw, I even took therapy. They sent me to therapy. I took therapy for four weeks. Dr. Holly-Banks, she sent me to therapy. I took therapy for four weeks. And then I saw Dr. Yoa for my shoulders and stuff again. He said he didn't, they didn't understand, he didn't know what was wrong with it. And Dr. Ricca was the fourth doctor I really seen. I was seeing so many. At one time they had me seeing so many at one time so that's the reason I get confused. They had me doing therapy. They had me seeing Dr. Ricca. They had me seeing Dr. Yoa. I was going back to Dr. Holly. They just had me from one doctor to another. (T. 26).

Claimant testified that the last day she worked was May 23, 2006 or May 24, 2006.

Claimant testified that she has not worked anywhere since she last worked for respondent, and maintains that she has not been able to work:

No, because I'm back and forth to the doctor. I go to the doctor like once a month. (T.28).

Claimant's testimony reflects that she sees Dr. Holly-Bank once a month, and that she also goes to UAMS. Claimant's medications include anti-depressants, nerve pills, Hydrocodone, as well as another kind of medicine. Claimant testified that the Hydrocodone eases her pain, adding:

Yeah, sometimes she adds, not Celebrex, it's another kind of pill she adds with it because the Hydrocodone don't really ease it by itself so she has to add another muscle relaxer or something in there with it. (T. 28).

Claimant described a side effect of the medication as making her sleep. The testimony of

the claimant reflects that she takes Hydrocodone pills every three hours.

The claimant attributes the loss of her house and automobile to the loss of her job. Claimant testified that she experiences constant pain in her neck and shoulder, which she attributes to her work-related injury. Claimant maintains that physical activity causes her symptoms to become worse, noting that she was placed on bed rest and directed to limit her activities. Claimant's testimony reflects that her overall condition has gotten worse.

The claimant denies that she has been in any other accident or sustained any other injuries since those suffered while working for respondent. Further, the claimant's testimony reflects that before she went to work for respondent she had not sustained an injury to her neck, shoulder, or hands.

During cross-examination claimant acknowledged that she identified May 19, 2006, as the date of injury on her workers' compensation claim form. Claimant's testimony reflects that she was assisted by Rosemary in the completion of the claim form:

Because Rosemary is the one that's over all that, over the medical part. She's the one over the medical part. (T. 32).

The claimant was questioned regarding the inconsistent accounts of her neck complaint as reflected in her answers to interrogatories in 2007 versus her testimony of stepping of a skid and the occurrence. In the discovery documents, claimant at one point identified the date of injury as May 13, 2006.(T. 34).

Claimant testified that she did not tell Jimmy Kennedy that she felt a pop in her neck, only that she was hurting real bad and to be released off the machine. Regarding her failure to tell Mr. Kennedy about the neck pop, claimant responded:

Because Jimmy is not the one I'm supposed to tell. I was supposed to go tell Jerry Rogers. Jimmy is just - -

Team leader, uh-huh, yeah. So Jerry Rogers was the one I went and talked to. (T. 35).

The testimony of the claimant reflects that she did not attach great significance to the neck pop initially, attributing it to the way she had moved. The claimant further testified, regarding the neck pop:

Uh-huh, yeah. But, you know, a lot of things we do it hurts real bad there. So, you know, I wouldn't think that I had hurt myself that bad, you know, until when I went to the doctor. Then she thought that I had just a pulled muscle. (T. 35).

The testimony reflects that Jimmy Kennedy was the team leader when no one else was there. Regarding such occasions, claimant testified:

Because that was on the weekend. No one be there with us on the week end. It's just us and our team leader. (T. 36).

After noting that May 19, 2006, was a Friday, claimant offered:

Well he must, he wasn't there. I'll tell you that he wasn't there. There wasn't nobody but Jimmy there. It wasn't nobody but Jimmy there. Really there wasn't nobody but Jimmy there. Because I mean that was a 12-hour shift. (T. 36).

Claimant acknowledged that she did not complete any paperwork on the date that she felt her neck pop.

The claimant underwent an MRI on her neck and as a result of the findings she was sent to Dr. Ricca. Claimant maintains that she informed Dr. Ricca that the problem with her neck began as a result of a specific incident at work. Further, the claimant asserts that she informed Dr. Ricca of her prior physical therapy/chiropractic care before the neck pop. (T. 37). Claimant

added:

He knew. I told him about it. He might not have - -

Yes, I told him about the help I was already getting. And that it didn't help so that's the reason I was sent to him. I told him. I had to tell him. (T. 37).

The claimant was initially seen by Dr. Ricca in June 2006, relative to her neck complaints. The testimony of the claimant reflects that she did not tell Dr. Ricca about the "pop" in her neck:

I just told him about that I was hurting real bad. I was having real bad pain and stuff and that they had sent me to the therapy and everything, that I had went to the chiropractors and everything. (T. 38).

Regarding the importance of relaying to Dr. Ricca the history of stepping of the skid, the pop and onset of excruciating pain in the neck, claimant testified:

When he took the MRI he said he just about knew everything that was wrong with it. When he looked at it he told me he said it was an unusual case. (T. 38).

Claimant acknowledged that she did not tell Dr. Ricca specifically what occurred or happened, only that she had gotten hurt at work.

The testimony of the claimant reflects that in January 2006, she was seen by Dr. Lazenby due to left shoulder pain. While the records of Dr. Lazenby reflects that the claimant's chief complaints were cervicalgia (neck) and brachial neuritis (shoulder) claimant denies any neck complaints at the time:

No, huh-uh. I was going for, he didn't do nothing but my shoulder. He did an ultrasound I remember that's all he did, ultrasound. Because I remember I asked him could he get lower right here (indicating) and he said he couldn't get too low beside my heart. I remember that real well. That's all I remember, that I was going for my shoulder to Dr. Lazenby. (T. 39).

Claimant concedes that she was seen by Dr. Lazenby approximately 10 to 11 times between

January and April 2006. Claimant asserts that Dr. Lazenby was aware that her complaints for which she was seeing him were related to her work. The testimony of the claimant reflects:

Yeah, I told him, uh-huh. Because most of the time I scheduled after I got off of work. Sometimes I'd get off work and I went right to Dr. Lazenby. (T. 41).

With respect to a April 18, 2006, entry in the records of Dr. Lazenby regarding the scheduling of an MRI , claimant testified:

No, he couldn't do that. He told me he couldn't do an MRI. (T. 41).

The testimony of the claimant reflects that her regular health insurance covered her chiropractic treatment with Dr. Lazenby. Claimant added:

Uh-huh. We get a thousand dollars a year for the use of chiropractors, uh-huh. (T. 41).

The claimant acknowledged that she did not file any kind of workers' compensation claim relative to the early visits to Dr. Lazenby.

The testimony of the claimant reflects that she first went to Dr. Holly Banks-Giles in mid-March 2006, with complaints of pain in both sides of the neck. When the claimant was again seen by Dr. Banks-Giles in May 2006, she also relayed complaints of shoulder pain. Claimant asserts that she told Dr. Banks-Giles that her complaints on neck and shoulder pain were the results of her work activities. Claimant added:

Yeah, my doctor, they knew. It might not be written down but they knew. (T. 42).

The medical in the record reflects that on May 2, 2006, Dr. Banks-Giles scheduled the claimant for a cervical MRI. Claimant acknowledged that the cervical MRI was already scheduled prior to her May 19, 2006, injury. The testimony in the record reflects that Dr. Yoa

treated the claimant for carpal tunnel syndrome, and that once the results of the cervical MRI were received, referred the claimant to Dr. Ricca. Regarding her medical treatment by Dr. Yoa, the claimant testified:

My carpal tunnel, yeah. And he checked my shoulders a couple of times. He said he couldn't do anything so that's when he referred Ricca, him and Dr. Holly. I just know everything just got worser. (T. 44).

In June 2006, the claimant underwent surgery under the care of Dr. Ricca. Claimant disputes that the surgery went well and was a success. Claimant's testimony reflects, regarding the afore:

Oh, I kept going and going and he didn't see me no more because my insurance had cut off. I have excruciating pain in my head, in my neck. (T. 45).

Regarding her understanding of whether her continuing problems were related to the surgery, claimant testified:

That's what we thought it was. When he did the surgery he thought it would clear everything up. But it didn't though. I even went back like three more times to him and he did some CT's and did some x-rays to see how everything was looking. (T. 45).

The claimant maintains that the injury, pop to the neck, occurred on May 19, 2006, and that she last worked for respondent on either May 23, 2006, or May 24, 2006. Claimant testified that the last day that the passing out incident at her machine occurred the last day that she worked. Claimant's testimony reflects, regarding the afore:

Uh-huh. I just got real sick and I told Jerry, I told him that I was going home. And I went home and then I went to the doctor the next day and she told me that I couldn't go back to work, Dr. Holly Banks did.

Right. On the 24<sup>th</sup> I think it was; I went the next day. My last day was the 23<sup>rd</sup>, right, and I went that next day. And then I went back and I

talked to Jerry about when she was getting ready to set up my surgery and she was telling me that I might have to do light duty. So Jerry told me, said he didn't have no light duty there that I should just go ahead on and file for disability because he didn't have anything like that for me. (T. 46).

The claimant testified that if she saw Dr. Yoa on May 24, 2006, rather than Dr. Holly, she relayed the history of passing out at work.

During further examination, the claimant testified that the machine operation job was a difficult job do perform:

Yeah, it was worse than the assembly line. I wish I had stayed on the assembly line because it was worser. Wh had to do more heavy lifting than we did on the assembly line. I wish I had stayed. I would have been on my job now. (T. 47-48).

Claimant asserts that it was working the machine that hurt her. Claimant maintains that the onset of her injury was working on machine #2.

The testimony of the claimant reflects that she has someone drive her to Little Rock for her treatment at UAMS. Claimant identified Dr. Smith as her regular doctor at UAMS.

Claimant maintains that the medical treatment that she is receiving at UAMS is attributable to her injury sustained in the employment of respondent. Claimant described the nature of the medical treatment she is receiving at UAMS:

They're going to give me a nerve block right now for my pain. They wanted to go ahead on and do surgery again. They found out that -- (T. 51).

The testimony of the claimant reflects that her medical treatment has not been filed on workers' compensation.

With respect to the termination of her employment with respondents, claimant's testimony reflect:

When I went and talked to Jerry and he told me that he didn't have no light duty for me that it was best for me to go ahead on and sign up for disability. (T. 51).

Claimant testified that she went ahead and applied for Social Security disability. Claimant has not been approved for Social Security disability benefits.

The testimony of the claimant reflects that once her insurance coverage as an employee of respondent-employer ceased, due to the fact that she was no longer employed by same she was unable to return to Dr. Ricca for further treatment.

Jimmy Kennedy, who has been employed at Nucor-Yamato Steel since March 23, 2008, testified that he was employed by respondent-employer for 15 ½ years. Mr. Kennedy testified that he decided to leave the employment of respondent because the facility is closing.

Mr. Kennedy testified regarding his job title/position for respondent in 2006:

My main job title was tool room, we went to a different schedule and I got moved into a team leader position. (T. 54).

The testimony in the record reflects that the shift changed sometime in early 2006. Mr. Kennedy testified:

We went from working regular eight-hour shifts, five days a week to working a four on, four off schedule.

Four 12-hour days and then we was off four days. (T. 54).

The testimony of Mr. Kennedy reflects that the shift change occurred in February 2006, noting:

I remember the reason they changed it was they wanted to run the machines seven day a week, 24 hours a day. And I remember the first month that we ran it they made a significant amount less parts than what they made in January.

The numbers from the best I remember in January we made, in our department, made 1.3 million parts. In February we missed that by roughly

310, 311,000. (T. 55).

Eventually the respondent returned to the 8-hour shifts.

The testimony of Mr. Kennedy reflects that at the point the shift changed to 12 hour shifts he began working with the claimant. Mr. Kennedy had worked with the claimant previously in the same department. When the shift changed the claimant and Mr. Kennedy were on the same crew. With respect to the number of people on the afore crew, Mr. Kennedy testified:

I believe we had eight. We had eight machines and if I remember right we had enough people to run every machine. (T. 56).

Mr. Kennedy's testimony reflects, regarding his job duties as team leader:

Basically my responsibility was to make sure that the parts that they scheduled needed run. We was set up on and running and I had to run the machines. (T. 56).

Mr. Kennedy denies that he was a supervisor.

The testimony of Mr. Kennedy reflects that respondent-employer was doing injection mold. Mr. Kennedy maintains that there was rotation on the machines:

Over rotation was, they rotated everyday. The machines were numbered one through eight and say if an operator is running number one one day, the next day they come in, they would be on number two. That way the operator wasn't running the same thing every day. (T. 57).

Regarding rotating on machines within the same shift/day, Mr. Kennedy testified:

Most of the time they did but it was, you know, if it was a hard machine to run or if it, you know, say a little hard to run because you hurt your back or something we'd let them rotate every two hours, every four hours. (T. 57).

The testimony of Mr. Kennedy reflects, regarding his actions if someone on his crew got hurt during the shift:

Well when we was on our four on and four off shifts if the managers, if it was on a day when the managers were there then, you know, we would get them, they'd get involved and they would take care of it and involve human resources. (T. 57).

Mr. Kennedy testified that once the injury was reported then the manager or HR pretty much took care of it. In the event the injury occurred on the night shift or on the weekend, when the managers or HR was closed, Mr. Kennedy's testimony reflects, regarding the policy:

Well if they got hurt bad enough where they needed medical attention we would call an ambulance. But we also notified, if we could get hold of our manager, notify the manager or HR. (T. 58).

The testimony of Mr. Kennedy reflects that he worked with the claimant on the same crew from February through sometime in May 2006. Mr. Kennedy testified that he recalled the claimant complaining about her wrist while work, noting that he was aware that she had had surgery for carpal tunnel. Mr. Kennedy testified that the claimant did wear braces on her wrists while working.

Mr. Kennedy testified that he had no recollection of the claimant complaining about her neck hurting from running the machine while working in February, March, or April 2006. With respect to the claimant complaining of her shoulder hurting from running the machine during the afore period, Mr. Kennedy testified:

Maybe her shoulder but I don't specifically remember, but as far as the neck, I don't remember the neck. (T. 59).

Mr. Kennedy testified that he does not remember the claimant coming to him in May 2006, and saying that her neck was hurting from running the machine, and requesting to be taken of the machine.

The testimony of Mr. Kennedy reflects that if someone had come to him and stated that

they were injured on their machine and needed to be taken off of it he was not in a position as team leader to tell them that they could not leave the machine. Regarding his actions as team leader if someone needed to go take a break or go seek medical attention, Mr. Kennedy testified:

Well if they needed to take a break, if there was a machine that needed to run, I could move somebody else over to run it or I could get on it and run it myself. There were several times that, you know, we had machines that had to run nonstop that we would run through breaks. (T. 61).

Mr. Kennedy testified that he never contacted HR or anybody in the front office with regard to a complaint by the claimant of being injured on the job.

During cross-examination, Mr. Kennedy testified that he was never asked by HR or any of the supervisory personnel if the claimant was complaining about physical problems while on the job. Mr. Kennedy testified that the managers and engineers did not go on the four on four off schedule, just the operators. As such, if the four on encompassed a weekend, the supervisory personnel were not present.

Mr. Kennedy's testimony reflects that it was not unusual for individuals working the machines to have some aches and pain, noting:

Right. We had a couple machines that were pretty big that, you know, some operators had trouble with. (T. 63).

Mr. Kennedy concedes that on his crew, he and the claimant were senior people. Regarding the assistance rendered to new people on the machines by senior people, Mr. Kennedy's testimony reflects:

The way they were set up with the system they had, there was a pay for knowledge system, you certified and mastered your, in each job band, certain jobs in each band. If we had like, like her and I were the senior people and we had new people come in, you know, she would be one of the masters on our crew, then she would be required to help train

the people. (T. 63-64).

Mr. Kennedy testified that he does not remember the claimant working on one of the stations/machines every day, adding:

She could have. The rotation that they did everyday was pretty much up to the operators to make sure that they did rotate.

If management come to me and said they needed to [keep senior people in a certain position] then yes I would. But me personally I try not to keep one person on the same thing all the time. (T. 64).

Mr. Kennedy worked as a team leader. With respect to description of supervisor team leader, the testimony of Mr. Kennedy reflects:

My job title, I was touring (phonetic) so as long as I had, all the machines were running I still had, most I had to work on I had to fix so I wasn't actually running a machine I was over here, you know, repairing molds and getting them ready to run. I still had to take care of that part of it also. (T. 64-65).

Mr. Kennedy further testified:

If all the machines had to run or if we had a machine that wasn't as important I could shut it down and we could move somebody over to that machine. (T. 65).

The testimony of Mr. Kennedy reflects that while he recalls the claimant complaining about her hands and her shoulder, he does not recall her complaining about her neck. Mr. Kennedy testified that he do not specifically the claimant coming to him in May 2006, and telling him about having a problem and hurting. Mr. Kennedy added, regarding the afore:

If she come up and said, you know, she was hurting I don't doubt that. But any specific thing, like hurting in her, I don't remember. (T. 66).

Mr. Kennedy testified that he does not remember a time when the plant was busy and the

claimant came and asked to be relieved or switched to another job and he responded that she had to go find a replacement. Regarding the availability of replacements on the weekend, Mr.

Kennedy's testimony reflects:

Usually replacements, if we did find a replacement it was usually, you know, see if we could find another operator that was there that could switch with her. It wasn't, we didn't have anybody that we could call in or anything like that. (T. 66).

In the event the claimant asked to home or leave early, Mr. Kennedy testified:

If she had, they were free to go anytime they wanted to. All I was required to do was make sure their time was filled out and turn it in. (T. 67).

Mr. Kennedy testified that he does not specifically remember the claimant asking to leave early or to go home, not around May 2006.

Regarding the claimant being taken off of his crew, Mr. Kennedy's testimony reflects:

As far as I know she wasn't. As far as I can remember we worked together until we came off the four on, four off. (T. 67).

Mr. Kennedy testified that they came off the four on/four on sometime around the end of June 2006. Mr. Kennedy does not remember the last day the claimant worked.

Mr. Kennedy testified that it would not be uncommon for an individual with a work-related injury to talk with Jerry Rogers about it, noting that he was the Human Resource Manager. Further, Mr. Kennedy testified that it would not be unusual for Rosemary to help individuals fill out insurance papers.

Mr. Kennedy denies that he was the supervisor/foreman over the claimant. Mr. Kennedy acknowledged that there were two machines that were so large that a platform was built up for the operator to stand on. Mr. Kennedy's testimony reflects that the claimant worked on one of

the large machine, adding that operators rotated through.

Mr. Kennedy testified that if the claimant had come to him, as team leader, and said that she was hurting he would have reported it to the supervisor. Mr. Kennedy further testified:

If it was on a weekend I would try and get hold of them [supervisor] at home. We had, we were given the numbers for our manager and HR to contact them on hours that they were not there. (T. 71).

The medical in the record reflects the claimant's treatment under the care of Dr. Holly Banks-Giles, Dr. Mark Lazenby, and Dr. Joseph Yoa, all of whom provided medical treatment to the claimant prior to the present claimed injury, as well as the records of Dr. Gregory Ricca and Dr. Anand Prem, who provided medical treatment subsequent to the claimed injury.

The records of Dr. Lazendy, a chiropractic physician, reflects that the claimant received treatment beginning January 26, 2006, relative to neck and shoulder complaints of pain. A review of the records of Dr. Lazendy relative to the claimant reflects that as of a visit of April 11, 2006, a recommendation was made regarding an MRI scan. While the records of Dr. Lazenby reflects numerous entries regarding the disc in the cervical spine, they are devoid of a history of a work-related injury being reported by the claimant. The April 18, 2006, entry in the records of Dr. Lazendy regarding the claimant reflects plans to schedule a cervical MRI. The note also reflects suspicion of "HNP". (RX. #1, p.4). A May 23, 2006, entry in the records of Dr. Lazendy regarding the claimant reflects that the results of the MRI scan and plans to schedule surgery with Dr. Ricca in Jonesboro. (RX. #1, p. 4). Dr. Lazenby records regarding his treatment of the claimant are devoid of any history of a "pop" to the claimant's neck while at work in May 2006. Indeed following the May 23, 2006, entry/visit, the claimant was not again seen by Dr. Lazenby until June 15, 2006.

The medical records of the Osceola Family Clinic, where Dr. Holly Banks-Giles, the claimant primary care physician, practiced contained in the record reflect that the claimant was seen at that facility on March 10, 2006; April 28, 2006; and May 2, 2006, all prior to the claimed injury of May 19, 2006. The March 10, 2006, entry reflects that the claimant provided a history of her muscles swelling and hurting all over:

**HPI**

Patient comes in with complaint of hurting on both sides of her neck and down into her chest for two days. She says that she wakes up with pain and her muscles are swelling. . . . She has stayed at home from work for the past two days because of this pain.

\* \* \*

**Musculoskeletal symptoms:** Soft tissue swelling, shoulder symptoms, and back symptoms.

\* \* \*

**Neck:**

Neck : there is tension in bilateral sides over the trapezius muscles and tenderness over the occiput (CX. #1, p. 1-2).

Dr. Banks-Giles diagnosed the claimant's complaint as trapezius strain during the March 10, 2006, visit. The April 28, 2006, records of Dr. Banks-Giles reflects that the claimant was seen on that date with chief complaints of shoulder pain and pain from carpal tunnel. The April 28, 2006, records reflects that the claimant had been going to physical therapy and the chiropractor for shoulder pain. (CX. #1, p. 3-4). A May 2, 2006, clinic note of Dr. Banks-Giles reflects that a cervical MRI was scheduled for the claimant on behalf of Dr. Lazenby. The claimant was not again seen by Dr. Banks-Giles until July 10, 2006, which was after her June 27, 2006, cervical disc surgery by Dr. Ricca.

The medical records reflect that the claimant was seen by Dr. Joseph Yoa, a Blytheville orthopedic surgeon, on May 4, 2006, with complaints relative to bilateral hand pain. Dr. Yoa's records reflect, in pertinent part, regarding the claimant's symptoms:

gradual: progressively worse, especially since working 12 hour/day since Jan. 2006. (CX. #1, p. 49).

The May 4, 2006, office note of Dr. Yoa relative to the claimant recited that physical therapy provided temporary relief and that chiropractic wrist splint gave the claimant temporary relief. The clinic note also contain entries reflecting neck pain, that the claimant dropped objects, had difficulty gripping especially with the right hand, left chest swelling since January 2006, and right shoulder swelling. Following his examination of the claimant during the May 4, 2006, visit, Dr. Yoa assessed the claimant's complaints as bilateral shoulder strain, RC tendonitis; bilateral Guyon's canal syndrome and cubital tunnel syndrome; swelling left anterior chest with tenderness and pain in the left pectoralis muscle with resistive testing, which may represent pectorlis muscle strain. The assessment of Dr. Yoa further offered that the much of the claimant's symptoms may be due to the long work hours she has while using both upper extremities extensively. (CX. #1, p. 51).

The claimant was next seen by Dr. Yoa on May 15, 2006, in follow-up. Dr. Yoa's assessment of the claimant's complaints was unchanged from the previous visit. (CX. #1, p. 52-54). The claimant was again seen by Dr. Yoa on May 24, 2006. Dr. Yoa's records are devoid of any reference to "neck pop" experienced by the claimant at work. Dr. Yoa did have access to the results of the claimant' May 22, 2006, cervical MRI, which disclosed posterior disc protrusions centrally C3-4, C4-5 and C6-7. The record reflects a referral for neurosurgery consultation.

(CX. #1, p. 56-57).

The medical records reflects the presence of a June 19, 2006, off work slip relative to the claimant from Dr. Gregory F. Ricca directing that she remain off work until August 7, 2006.

(CX. #1, p. 19). The June 20, 2006, office note of Dr. Ricca, regarding the visit of the same date reflects, in pertinent part:

Ms. McRay is a 49 yo woman who states she injured herself at work about 3 months ago while loading and unloading a machine. Since she is short she has to lean on a bar on her abd and reach out in front of her. She ran it for 12 hours. The next day she noticed quite a bit of left shoulder pain. The pain has progressed since. She had PT 2x per week which helped. Ms. McRay has not worked since 5/23/06. Numbness/ tingling in her hands and feet. Neck is sore. Hears tinnitus in both ears. She never had this before. Hands feel weak. She has bilateral CTS and Ms. McRay thinks that someday Dr. Yoa is going to operate on this. (RX. #1, p. 14).

The record also contains the December 17, 2007, deposition testimony of Dr. Ricca. (JX. #1).

Pertinent in the testimony of Dr. Ricca is the fact that if the claimant received physical therapy ro neck and shoulder pain in January 2006, it would affect his conclusion with regard to whether the work incident caused the problems that the claimant was having in the neck and shoulder area.

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

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 19, 2006, the relationship of employee-employer-carrier existed among the parties, when the claimant earned an average weekly wage of \$424.00, yielding compensation

benefit rates of \$283.00/\$212.00, for temporary total/permanent partial disability.

3. The claimant has failed to sustain her burden of proof by a preponderance of the credible evidence that she suffered an injury to her neck within the course and scope of her employment as a result of a specific injury on May 19, 2006, or as a result of a gradual onset injury.

### **CONCLUSION**

The claimant asserts that while within the course and scope of her employment with respondents she sustained an injury to her cervical spine, as a result of either a specific incident or gradual onset, which required medical treatment and rendered incapacitated from engaging in gainful employment. Claimant seeks medical and indemnity benefits, both temporary total and permanent physical impairment, as well as controverted attorney fees. Respondents deny that the claimant sustained a compensable injury to her neck.

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

Neither the duration nor the specifics of the claimant's employment duties with respondents are disputed. Claimant maintains that she suffered a specific incident injury on May 19, 2006, when while stepping of a skid she experienced a pop in her neck and corresponding severe pain. Claimant maintains that the pain was such that she request of the team leader to be relieved from her duties at her machine. The claimant attributes the need for cervical disc surgery, which was performed on June 27, 2006, and the resulting period of temporary total incapacitation and 11% permanent physical impairment, to the May 19, 2006, work-related

injury.

While the claimant denied that she had received treatment, medical or chiropractic, for her neck prior to May 19, 2006, the medical and chiropractic reports in the record are to the contrary. Claimant asserts that she relayed the work-related nature of her injury, and specifically the “pop” in her neck to each of her treating physicians subsequent to the event. Again, a review of the medical records relative to the period subsequent to the May 19, 2006, date are to the contrary, being devoid of such an entry.

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

As noted above, contrary to the assert of the claimant, the credible evidence reflects that the clamant registered complaints relative to her neck and shoulder in January 2006, and received chiropractic treatment relative to same. The pertinent chiropractic records are devoid of any history associating the need for the treatment to the claimant’s work activities. The claimant provided inconsistent, if not conflicting histories of her injury and treatment to her treating

surgeon, Dr. Ricca.

Relative to her assertion of a specific incident injury or either May 13, 2006, or May 19, 2006, it is noteworthy that the claimant testified that after obtaining medical treatment for the symptoms associated with the “pop” in her neck she was directed to remain off work by the treating physician for three (3) days. The record does not reflect the presence of documentation of the claimant having obtained treatment on May 14, 2006, or May 20, 2006. Claimant asserts that her employment was terminate by respondents for her failing to call or contact same for three (3) days and that she was only reinstated when evidence/information surfaced that she in fact had called in. Again, the record is devoid of corroborating testimony or document regarding the afore. Since the basis of the claimant’s claim of workers’ compensation benefits derive from the “pop” in her neck which resulted in the medical treatment and three (3) days off work, the absence of corroborating documentation and or testimony is baffling, if not fatal to the claim.

Claimant asserts, in the alternative, that her cervical spine injury is the product of gradual onset or overuse. In order to prove compensability of a neck injury which is not caused by a specific incident or which is not identified by time and place of occurrence, the claimant must prove the injury arose out of and in the course of her employment, that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death, that the injury was the major cause of the disability or need for treatment and the injury must be established by medical evidence supported by objective findings. The claimant has failed to establish by a preponderance of the evidence that the major cause of the disability she suffered or the need for treatment is the produce of a work related injury. The claimant’s claim for workers’ compensation benefits as a result of an injury to her neck is respectfully denied and

dismissed.

**IT IS SO ORDERED.**

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**Andrew L. Blood, ADMINISTRATIVE LAW JUDGE**