NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206497

TRUDY NICHOLS, EMPLOYEE	CLAIMANT
WHIRLPOOL CORPORATION, EMPLOYER	RESPONDENT
HELMSMAN MANAGEMENT SERVICES, INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 13, 2003

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE MICHAEL HAMBY, Attorney at Law, Greenwood, Arkansas.

Respondents represented by HONORABLE TOM HARPER, JR., Attorney at Law, Fort Smith, Arkansas.

Decision of the Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by respondents from an opinion filed herein by an Administrative Law Judge on November 20, 2002.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 14, 2002, and contained in a pre-hearing order filed August 15, 2002, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of $557.60 which would entitle claimant to a compensation rate of $372.00 for total disability benefits is also hereby accepted as fact.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left arm, shoulder, and neck while employed by the respondent.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. Claimant is entitled to temporary total disability benefits from May 22, 2002 through May 28, 2002, and again from July 24, 2002 through a date yet to be determined.

6. Respondent has controverted claimant's entitlement to all unpaid disability benefits.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

In reaching our decision, we note that in their brief on appeal, the respondents raise three general reasons as to why the claimant's gradual onset injuries are not compensable: (1) the alleged injuries occurred while claimant was not working for the respondent employer; (2) alternatively, the alleged injuries were not the result of rapid repetitive motion; and (3) there is no medical evidence supported by objective findings establishing compensability of the alleged injuries. The respondents also contend that in the event compensability is found, the claimant nevertheless failed to prove entitlement to temporary total disability benefits from May 31, 2002, to a date yet to be determined.

Initially, the respondents assert that in order to conclude that claimant's neck, shoulder and arm difficulties are causally related to her job activities, the Administrative Law Judge "had to rely entirely on claimant's credibility as to how, when, where and why her left arm, shoulder and cervical spine injuries occurred." We find that this statement is inaccurate, as there is ample evidence in the record other than claimant's hearing testimony which indicates to us that the claimant's problems are causally related to her work activities.

First, the claimant consistently reported both to her treating physicians and to the respondent employer that her difficulties started with her job activities. The clinic notes of Dr. Von Phomakay dated May 21, 2002 state that the claimant at that time attributed her problems to her job activities. *CX1, p. 37*. Additionally, a clinic note of Dr. Thomas Cheyne dated August 7, 2002 indicates that claimant again related her ongoing problems to her work activities. *CX1, p. 8*. Furthermore, the First Report of Injury completed by respondent employer on May 31, 2002 indicates that claimant reported problems with her left shoulder and the left side of her neck. *CX1, p. 40*.

Second, the claimant's treating physicians attributed claimant's problems to her work duties, and we find no evidence that claimant ever related an inaccurate history to them. Dr. Phomakay stated in his clinic note of May 21, 2002 that in his opinion, the claimant's symptoms were related to her work activity. *CX1, p. 37*. Additionally, Dr. Cheyne stated in his deposition testimony that the claimant's symptoms are consistent with a nerve root irritation which extends down into her left arm, and that such an injury was most likely trauma related. *Deposition of Dr. Cheyne, p. 14*. In light of this evidence,

we find that the most likely cause of claimant's injuries is her work for the respondent employer.

Beyond asserting that the claimant produced no evidence except her own testimony on the issue of causation of injury, the respondents also argue that the claimant's problems were caused by a camping trip taken on Memorial Day Weekend 2002. In support of this argument, they state that "there is no medical documentation with a history reflecting left shoulder or cervical complaints prior to the Memorial Day Camping trip." A review of the 2002 calendar reveals that Memorial Day was on Monday, May 27, 2002. Therefore, "Memorial Day Weekend" would have been from Friday, May 24, 2002 through Monday, May 27, 2002. The above-cited clinic note of Dr. Phomakay, dated May 21, 2002, thus pre-dates "Memorial Day Weekend," and states in relevant part as follows:

> Pt is a 29-yr-old white female complaining of rt wrist and rt hand numbness on and off while she was working at Whirlpool. She also complains of left upper arm and left chest pain with movement for the last 10 weeks since she worked at Whirlpool. She is building the wires.

It is thus clear that the claimant was at least complaining of muscoloskeletal problems in her left upper extremity and

chest prior to Memorial Day Weekend. With this argument, the respondents essentially ask the Commission to conclude that because claimant took a camping trip on Memorial Day Weekend 2002, and because the claimant first made the specific complaint of left shoulder and neck pain shortly thereafter, it is probable that the claimant’s left shoulder and neck injuries occurred on the camping trip. After our review of the evidence in the record, we are unwilling to draw this conclusion. Initially, we note that there is insufficient evidence in the record which indicates that claimant was injured on this camping trip, or even engaged in any strenuous activity during the trip which might possibly cause a neck or shoulder injury, for that matter. Furthermore, the record is clear that claimant was having muscoloskeletal problems in her left upper extremity and chest prior to this camping trip. Therefore, we conclude that the claimant’s left shoulder and neck injuries are more likely than not attributable to her work with respondent employer, and not to the Memorial Day Weekend camping trip.

The respondents further assert that the finding of the Administrative Law Judge that claimant’s work was of a “rapid and repetitive” nature was erroneous because the testimony of Mr. Butch Thompson was that there is virtually

half a minute, out of every minute, when the claimant is not doing anything, because the travel time necessary to move the equipment to claimant’s station was half a minute. The respondents interpret Mr. Thompson’s testimony to be that there is 29 seconds out of every minute when claimant was not doing anything. However, our review of Mr. Thompson’s testimony on this point leads us to conclude that the respondents’ interpretation of Mr. Thompson’s testimony is erroneous. Mr. Thompson did not testify that there were 29 seconds out of every minute in which the claimant was doing nothing. Rather, he testified that there was a 29-second cycle time between jobs, meaning essentially that each job took 29 seconds to complete, counting the “travel” time in which claimant was at rest. He clearly testified that the claimant completed two jobs per minute. Instead of testifying, as the respondents claim he did, that the claimant was at rest for 29 seconds out of every minute, he testified that one job took 29 seconds to complete, and *some* part of that 29 seconds was “travel” time in which the claimant was essentially waiting. Therefore, the assertion by respondents that claimant’s job duties were not rapid and repetitive is based entirely upon a misinterpretation of Mr. Thompson’s testimony.

__________The respondents also assert that the claimant failed to prove compensable injury by evidence of objective medical findings. The Administrative Law Judge correctly noted that Dr. Hoyt indicated that he observed muscle spasms in claimant's cervical area on May 30, 2002 and on June 13, 2002. The respondents appear to concede in their briefs on appeal that observation of these spasms constitutes objective medical findings under the law, but rather argue that the spasms are not causally related to the claimant's work activities. We note that case law clearly establishes that the claimant must only prove the existence of injury with evidence of objective medical findings. Wal-Mart Stores, Inc.v.VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999); Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). It appears that therefore this argument of respondents is essentially a continuation of their argument that claimant's injuries are not causally related to her job duties. In this vein, they again argue that the muscle spasms, since they were first observed after the claimant's camping trip, were probably related to the camping trip instead of the claimant's work duties. As indicated above, we find insufficient evidence in the record from which to conclude that any of claimant's difficulties

are causally related to the camping trip she took on Memorial Day Weekend. Furthermore, as discussed above, we find that a preponderance of the evidence indicates that claimant's neck and left upper extremity problems, including the observed muscle spasms, are causally related to the claimant's job duties.

The respondents assert that even if compensability is found, the claimant failed to prove entitlement to temporary total disability benefits beyond August 7, 2002, the date Dr. Cheyne first examined claimant. In support of this assertion, the respondents state that even though Dr. Cheyne's written reports indicate that the claimant was to remain off work during the course of his treatment, his deposition testimony contrarily indicates that there was light duty work which Ms. Nichols could have done throughout his treatment. They further state that Dr. Cheyne indicated in his deposition testimony that the only reason he took claimant off work was because the injury was considered non-work related. Thus, the respondents assert that Dr. Cheyne's deposition testimony was to the effect that the claimant was not totally incapacitated to earn wages beyond August 7, 2002.

Our review of Dr. Cheyne’s testimony indicates that it does not in any way indicate that claimant’s entitlement to temporary total disability benefits ended on August 7, 2002. Dr. Cheyne was asked the question of whether he was familiar with Whirlpool’s light duty program. He then responded that it was his understanding that they have a light duty program if the injury in question is considered work-related, but that if Whirlpool does not consider the injury work-related, the worker is not eligible for the light duty program. *See Deposition of Dr. Cheyne*, *p. 11*. Dr. Cheyne did indeed testify that the claimant could have worked with restrictions from the time he took her off work; however, since the claimant was not eligible for the respondent employer’s light duty program due to the fact that Whirlpool considered it a non-work related injury, light duty work was never made available to the claimant. Therefore, Dr. Cheyne’s testimony simply does not indicate that claimant is not entitled to temporary total disability benefits beyond August 7, 2002.

We therefore affirm the November 20, 2002 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued

benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of $500.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant sustained a compensable injury to her left arm, elbow, shoulder, and neck. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent-employer and began performing a new job on the refrigerator assembly line in March of 2002. This job required the

claimant to push various wires onto a plug assembly. The claimant testified that approximately two weeks after she began this new job, she developed pain in her left wrist and elbow. The claimant contends that the pain progressively worsened and eventually radiated into her shoulder and neck. The claimant has been diagnosed with right-sided carpal tunnel syndrome and the respondents accepted this injury as compensable. Benefits have been paid accordingly, and this condition is not at issue in the present claim. What is at issue is the complaints that the claimant has with respect to her left arm and, more specifically, the cervical spine.

The claimant initially sought medical treatment from the respondent-employer's first-aid station on April 2, 2002. The sign-in sheet on that date indicates that the claimant listed her complaint as pain in her left elbow. The claimant was evaluated by Lisa Jones, an LPN employed by the respondent-employer. The complaint was logged in as a non-occupational injury and the nurse's note reflects that the claimant was getting used to her new job while she was working temporarily for a volunteer lay-off employee. The claimant again went to the first-aid station on May 21, 2002. The claimant went to the first-aid station twice that day. However, the respondent's nurse's records only

indicate that the claimant was complaining of right hand and shoulder problems. There were no cervical complaints recorded or otherwise noted. May 21 was the last day that she worked prior to that Memorial Day holiday.

The claimant sought treatment from Dr. Phomakay on May 21, 2002. Dr. Phomakay's records indicate that the claimant only gave a history of right and left upper arm problems. His records fail to note any shoulder or neck complaints. The claimant testified that her left shoulder and neck complaints began before her examination by Dr. Phomakay. However, Dr. Phomakay's records fail to indicate such.

Over the Memorial Day weekend, the claimant went on a camping trip with her family. The claimant denied that she had any sort of injury during that trip.

The claimant offered the testimony of Butch Thompson, the claimant's supervisor. Mr. Thompson testified that the claimant did not report the injury or injuries to him, although he was who she was supposed to report them to. He testified that he was available at all times. Mr. Thompson testified that when the claimant returned to work on May 29, after the Memorial Day holiday, an anonymous note was left on his desk stating the claimant was having

problems. The claimant was approached by Mr. Thompson to see if she needed to go to first-aid, based upon the contents of that anonymous note. The claimant stated she did not need to go to first-aid. Mr. Thompson testified that the claimant looked like a person who had a crick in her neck. He noted that he had not seen the claimant's neck that way before she left for the Memorial Day holiday. She also did not complain about her job causing her neck problems before she left for the holiday.

Lisa Jones, a plant nurse, testified that the claimant sought treatment from the first-aid station on April 2, 2002, complaining of a left elbow condition. She also noted that the visit on May 21, 2002, dealt with only the right hand pain and not left. The first records from the first-aid station that reflect that the claimant complained of a neck problem was on June 13, 2002. Mr. Jones testified that the claimant's physical condition appeared to be much worse after the claimant returned to work from the Memorial Day holiday. Before the holiday, the claimant could move around, talk, and move her head. After the holiday, the claimant's neck was stiff and her condition was totally different.

Ann DuPlantis, the head of the medical department at the respondent-employer, testified that the claimant's physical condition was much worse after the Memorial Day holiday. Ms. DuPlantis testified that she visited with the claimant on May 23, 2002, two days after she was examined by Dr. Phomakay. She stated that the claimant complained only of numbness in her right hand and that the claimant did not know if it was job-related. The claimant wanted to be off work and decided that when she returned if she was still having right-hand symptoms, she would report it as worker's compensation. At that time, the claimant did not indicate to Ms. DuPlantis that she had any neck problems. The May 23, 2002, conversation was in the presence of Karen Buchella, a union representative. At the time of that May 23 conversation, the claimant mentioned that she planned to go camping with her family over the Memorial Day holiday weekend. Ms. DuPlantis noted that it was after that holiday weekend that the claimant returned to work and was unable to turn and move her head. She stated that it was like the claimant had a really big crick in her neck. The claimant's condition was so dramatic Ms. DuPlantis ordered the claimant to undergo a drug test, which was positive. However, union

rules were not complied with, therefore no disciplinary action resulted.

The claimant testified that at that May 23 meeting, only two days after she was examined by Dr. Phomakay, she could not move her neck or head. However, Ms. DuPlantis' testimony is in direct contradiction to the claimant's. Ms. DuPlantis did not notice any problem with the claimant until she returned from the Memorial Day holiday.

The claimant continued to work for the respondent-employer until July 24, 2002. On that date, Dr. Hoyt indicated that the claimant should remain off work until she was evaluated by Dr. Axelsen. The claimant ultimately came under the care of Dr. Cheyne. Dr. Cheyne's medical reports indicate that the claimant has remained off work at his request since that time. Dr. Cheyne has performed numerous medical tests on the claimant and all of these have yielded negative results. Specifically, the claimant has undergone an MRI and x-rays, which all yielded normal results. In fact, Dr. Cheyne stated in his deposition that all the claimant's diagnostic tests were normal.

In my opinion, a review of the evidence indicates that the claimant has failed to prove by a preponderance of

the evidence that she sustained a compensable gradual onset injury. Specifically, I find that the claimant has failed to prove that she sustained a compensable injury supported by objective findings. Although I note that the claimant was at one point diagnosed with having muscle spasms, this was a full four months after the claimant's alleged problems began and she was no longer working at the time of those muscle spasms being noted in the medical records. Further, Dr. Cheyne testified in his deposition that:

> Q. Just one follow-up.
>
> How -- if, in fact, the trauma, alleged trauma produced swelling or fluid or a spasm, how soon after the alleged trauma would you expect something like that to show up?
>
> A. Well, in my experience, which has been many, many years of seeing this type of thing, muscular spasm is fairly common early on in injury, usually within the first few days.
>
> Q. So it would be unusual, say, if no physician noted this until two and a half months after the alleged trauma, even though there had been treatment in between?
>
> A. I would say it would be unusual, yes.

Further, Dr. Cheyne was unable to give a medical opinion based upon a reasonable degree of medical certainty when questioned about the claimant’s symptoms.

> Q. Have you treated injuries similar to this in your career?
>
> A. Many.
>
> Q. Some work related; some not?
>
> A. Yes.
>
> Q. So there are many causes for this type of condition?
>
> A. Yes.
>
> Q. Are some of them nontrauma related?
>
> A. If a person has an underlying problem in the neck, be it a disc protrusion or maybe significant degenerative change, they can generate symptoms, such as this, without any trauma at all, yeah.
>
> Q. Does Ms. Nichols have degenerative problems in her neck?
>
> A. No.
>
> Q. Okay. So your suspicion is that this maybe trauma related or is it trauma related?
>
> A. Most like (sic), yes.
>
> Q. And the only way have you connected to her work is based on what she told you?

A. That's correct.

Q. So while trauma related, it could have happened on the job or off the job?

A. Yes.

A medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (E417617). The commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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JOE E. YATES, Commissioner