

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305078

BRENDA HUGHES,
EMPLOYEE

CLAIMANT

HOLLAND GROUP, INC.,
EMPLOYER

RESPONDENT NO. 1

ROYAL AND SUNALLIANCE
INSURANCE CO., INSURANCE CARRIER

RESPONDENT NO. 1

TRAVELERS INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 21, 2005

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

Claimant represented by the HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 1 represented by the HONORABLE RANDY P.
MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE PHILLIP
CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 2, Travelers Insurance Co., appeals an
administrative law judge's opinion filed September 23, 2004.
The administrative law judge found that the claimant had
sustained a recurrence of a prior compensable injury, and
that Respondent No. 2 was liable for benefits. After
reviewing the entire record *de novo*, the Full Commission

reverses the opinion of the administrative law judge. The Full Commission finds that the claimant sustained a compensable ulnar nerve injury which became manifest while Respondent No. 1, Royal & Sunalliance Insurance Company, was "on the risk." We find that Respondent No. 1 is liable for reasonably necessary medical treatment, to include prospective surgery for the claimant's ulnar nerve injury. The Full Commission finds that the claimant did not sustain a compensable neck injury, and that the claimant to date did not prove she was entitled to temporary total disability compensation.

I. HISTORY

Brenda Dianne Rita Hughes, age 40, testified that she had been employed at Holland (formerly Binkley Industries) for nine years and about six months.

The parties stipulated that the claimant sustained a compensable injury on June 21, 1999.

Dr. P.B. Simpson, Jr. began treating the claimant on June 30, 1999 for numbness and paresthesia in the claimant's left hand. Dr. Simpson noted at that time, "She has no (sic) had any radicular pain with movement of her neck. Spurling's

maneuver and hyperextension are completely negative."

Dr. Simpson noted following diagnostic testing that the claimant had "a terminal latency of 5.28 at her wrist on the left side." On July 9, 1999, Dr. Simpson performed a "division of left flexor retinaculum for left carpal tunnel syndrome." Dr. Simpson's pre-operative and post-operative diagnoses were "left carpal tunnel syndrome."

The claimant followed up with Dr. Simpson following surgery. Dr. Simpson noted on July 23, 1999, "She is postop from a left carpal tunnel release. She has excellent apposition of her thumb to her little finger and no atrophy of her thenar or hypo thenar eminence. She has no numbness or paraesthesias and no arm pain. She does not think that she can return to work at this time because of her left hand." Dr. Simpson nevertheless reported on July 23, 1999:

She is being released from my care to return on an as needed basis. She may return to her regular duties beginning August 6, 1999. At that time, she will have reached maximum medical benefit and have a 1% PPD to the body as a whole.

Dr. Jacquelyn Sue Frigon administered nerve conduction velocities on August 10, 2000, and the following impression resulted:

The left ulnar conduction, both motor and sensory is normal.

For the median nerves there is Martin-Gubner anastomosis present bilaterally. This is making the overall function of the thenar muscle dependent on both the median and ulnar nerve. There continues to be marked carpel (sic) tunnel syndrome. On the right median nerve there is moderate carpel tunnel syndrome, meaning 5.1 terminal latency. With the left median nerve, the sensory conduction velocity on this side is at the upper limits of normal and I believe is a true median response.

The claimant sought treatment on September 1, 2000 for bilateral hand and arm pain, in addition to pain going into the left side of her neck.

The claimant returned to Dr. Simpson on September 6, 2000, at which time the claimant complained of bilateral hand and arm pain. Dr. Simpson reported:

She has had a left carpal tunnel release....This lady does not have any evidence of carpal tunnel on that side. She is not having any paresthesias or numbness.

She has had pain in her joints in the left shoulder. She was throwing plates with her left arm. She could hardly raise the arm. This is not carpal tunnel but muscular or ligamentous....

I will release her from my care to see her back on a prn basis. She does have a right carpal tunnel and has not had surgery for that and does not desire that at this time.

Dr. G. Thomas Frazier examined the claimant on November 6, 2000. Dr. Frazier recommended an injection of the claimant's left carpal tunnel in addition to other conservative treatment. Dr. Frazier reported to a representative of Respondent No. 2 on January 22, 2001:

Brenda Hughes returned today for follow-up of her left carpal tunnel release that was performed by Dr. Simpson in July 1999. When I saw her in November 2000, she underwent a left carpal tunnel injection and subjectively showed some improvement following this. Her symptoms however recurred once she returned to work on the assembly line at Binkley Industries in Dumas. She has noted no nocturnal symptoms in her left hand, but does have persistent nocturnal symptoms in her right hand....

It is my assessment that Ms. Hughes has evidence of recurrent left carpal tunnel syndrome and possible right carpal tunnel syndrome.

I discussed treatment options at length with Ms. Hughes. I have told her that even if she should undergo repeat surgery which would include external neurolysis of the median nerve and possible coverage with a hypothenar fat pad flap that this will not guarantee that she can return to work on an assembly line performing repetitive grasping or lifting activities. I have told her that she should consider a permanent job change to a less repetitive type activity. However if her symptoms persist, she may wish to consider surgical treatment....

The parties stipulated that an employment relationship existed on February 28, 2003. The claimant testified, "I was working on the seat-rise jig. We were building small parts for the tractor-trailer parts." The claimant testified on direct examination:

Q. Now, briefly tell us what that does, or how do you do it?

A. We have two side plates. We put the bottom plate in the jig, you take two side plates and you tack them in, and you've got two wire pads, you put one in the front and one in the back. You take and you mash the jig together, then you take the hammer and you beat it until you know it's right, and then you take the welding machine and you tack one, two, three, one on each side and the bottom on the front and the back.

Q. Do you do all this with your hands?

A. Uh-huh....Yes, sir. And then you turn the jig around and you tack the back part, then when you turn it back around, you take it out.

Q. What does it weigh when you take it out?

A. It depends on - we do different sizes.

Q. What's the heaviest size?

A. The heaviest size is 0-8's.

Q. What will that weigh? If you put it on the scale, what would you estimate that it would weigh?

A. Probably about, I assume about five to ten pounds.

Q. And do you do this all day, every day?

A. Yes.

Q. What happened to you on the 28th of February of 2003?

A. I was having a pain in my arm.

Q. Where in your arm?

A. In my left arm, and it was going all the way up into my neck and shoulders.

Q. And back in 1999 you had had problems in your arms as well, is that correct?

A. Yes, sir.

Q. Both sides, am I correct about that?

A. Yes, sir.

Q. And where in your arms were you having the problems in 1999 when Travelers Insurance Company was the workers' comp carrier?

A. It was mainly going from my fingertips up to my elbow....

Q. Before February 28th of 2003, had you had any problem involving your upper arm or your shoulder or your neck, that you can recall?

A. No, sir.

Q. What was different about how you felt on February 28th, as opposed to how you felt a day before or a month before?

A. The difference was the pain was going all the way up into my arm into my shoulders and my neck, and my neck was like, you know, pressure to my neck and my neck was hurting real bad.

The record contains an Accident Report dated February 28. The claimant's written description of "what happened" was "same injury." The Report did not describe a specific incident. The claimant complained of left-hand pain, from her neck to her left hand. It was indicated that the claimant could return to modified work on March 1, 2003.

Nerve Conduction Velocity Studies on the left were performed on March 14, 2003, with the following impression:

The findings for the medial nerve and radial nerve are completely normal. This study rules out carpal tunnel syndrome as the cause. The ulnar nerve is abnormal and the nerve conduction velocity of the left ulnar nerve from above the elbow to below elbow is markedly prolonged indicating a possible ulnar nerve entrapment at the elbow. Distally the ulnar nerve is normal with a 60.1M/sec nerve conduction velocity which is normal and the sensory components are within normal limits distally. As indicated before, this does represent an abnormality between the locations above the elbow to below the elbow.

The claimant was assessed with left ulnar nerve entrapment syndrome on or about March 26, 2003. It was

indicated that the claimant could return to light-duty work on March 27, 2003.

Dr. Reza Shahim examined the claimant on April 9, 2003 and stated, "I believe Ms. Hughes is symptomatic from ulnar neuropathy. She may benefit from ulnar nerve transposition. Since she has significant neck and shoulder symptoms I would like to obtain an MRI of her cervical spine to rule out cervical spondylosis as a cause of her symptoms."

An MRI of the claimant's cervical spine without contrast was taken on April 17, 2003, with the impression, "Moderate enlargement of the right ligamentum flavum at the C6 level producing mild to moderate canal stenosis on the right at this level."

Dr. Shahim opined on May 12, 2003:

Since she had EMG evidence of left ulnar neuropathy which was moderate to severe at the level of the elbow and since she has significant axial pain I have recommended an MRI of the cervical spine and I reviewed the MRI with her. She has disc disease and ligamentous hypertrophy at C5-6 level, which results in moderate thecal sac compression. There is distortion of the spinal cord on the right side at the C5-6 level due to posterior facet and ligamentous hypertrophy. I believe Ms. Hughes is symptomatic both from cervical cord compression at C5-6 and also left ulnar neuropathy at the elbow.

My recommendation to her would be to undergo cervical decompression posteriorly at C5-6 on the right side and at a second stage surgery, undergo a left ulnar nerve transposition....We will plan on proceeding with a posterior cervical decompression at C5-6.

It was indicated on October 10, 2003 that the claimant could return to sedentary work on October 10, 2003.

Dr. Shahim stated on November 3, 2003, "Ms. Hughes' symptoms began after a work related injury. She has had bilateral arm symptoms and has undergone a left carpal tunnel release. Despite the left carpal tunnel release, her left arm symptoms have continued. Certainly, her left arm symptoms are related to the left ulnar neuropathy diagnosed on her EMG study in March of this year, and she would benefit from left ulnar nerve transposition. She has significant canal stenosis and would most likely require a posterior decompression with possible lateral mass fixation at C5-6."

The claimant testified that she had not undergone surgery from Dr. Shahim but was interested in undergoing surgery. "I can't continue doing the job that I'm doing with

the pain that I have, because I still have pain," the claimant testified.

The parties deposed Dr. Obama Asemota on February 19, 2004. Dr. Asemota, a general practitioner, testified that he treated the claimant's left wrist beginning in June 1999, and that he continued to follow up with the claimant following her 1999 left-wrist surgery. Dr. Asemota testified that he saw the claimant beginning on February 28, 2003 for "the same type of complaints," and that he diagnosed left carpal tunnel syndrome at that time. The attorney for Respondent No. 1 questioned Dr. Asemota:

Q. Did you order any additional tests after this evaluation on February 28th?

A. That's when we did the nerve conduction test again....She had the nerve conduction test done on 3-14 of 2003.

Q. And what were the results of those?

A. Okay, the findings for the median nerve and the radial nerves are completely normal. That's the - we're talking about the left radial nerve. This study rules out carpal tunnel syndrome as the cause. The ulnar nerve is abnormal, and the nerve conduction velocity of the left ulnar nerve from above the elbow to below the elbow is markedly prolonged, indicating it was possible ulnar nerve entrapment at the elbow....

Q. So you interpreted this study as abnormal?

A. Yes sir.

Q. At least part of it, right?

A. Yes....That was the ulnar nerve....

Q. And was that consistent with her previous complaints that she had in '99 or 2000?

A. Yes.

Q. Did this appear to you to be a recurrence of her previous problems?

A. Not really, no.

Q. Why not?

A. Well, I think I would say persistent of a previous problem....

Q. I thought I heard you say there is some persistence of her previous problem which has led to her problems in 2003. I was going to ask you to amplify all that if you can.

A. Yeah. I'm not too sure what has happened here, but we now - what I'm looking at is that there are two pathologists (sic). One is there, and one is here.

Q. You're pointing one to your wrist and one to ur elbow, right.

A. Yes....The one there was the first one that was tackled, the median nerve.

Q. In 1999.

A. That's right. And then - well, we now did this nerve conduction test in 2003, it showed that the nerve had been released and - that the median nerve had been released. But that the ulnar nerve was giving her trouble....

Q. What do you attribute that to?

A. Is that there is a problem there, an entrapment somewhere in the elbow.

Q. Can that be a continuation of her symptoms or problems dating back to 1999?

A. It could be.

Q. Can it just progressively get worse?

A. Yes, certainly. It does that.

Q. Is that what you believed happened in this case?

A. Yes....The reason is that most - the ulnar nerve has a different pattern of symptoms than the median nerve. But when both of them are involved the one that is more severe, predominant. And then when you relieve that, then the other one gradually creeps up....

Q. When she saw you in 2003, she didn't report to you a new injury, but rather as you put it, it was the same injury as before.

A. That's - she was complaining of the same problem.

Q. Same. And you believed it was the same injury as 1999.

A. Yes.

The claimant's attorney questioned Dr. Asemota:

Q. And the problem that developed in 2003 or surfaced at least was to what nerve? The ulnar?

A. The ulnar nerve.

Q. So the ulnar nerve was never tested nor was it focused upon medically until 2003. Am I correct?

A. That's right.

Q. How probable is it that the ulnar nerve was not involved in 1999?

A. It's possible, especially because between the surgery in 2000 and - 2000 or so, 2000 and something when she came to complain, she complained about the right hand and not the left....

Q. Well, are you able to say other than just speculating that the ulnar nerve was involved in '99?

A. No, I can't.

Q. But there is no speculation that the ulnar nerve was involved in 2003, correct?

A. No, that's not. The '99 episode, incidently we didn't look at the ulnar nerve. But it could be there not that bad at the time. At the time she got relief from the surgery, she doesn't pay attention to it, and then the right hand started giving her problems. But it's - I'm just thinking that it probably was there. I'm not sure.

The claimant contended that she sustained a compensable injury on February 28, 2003. The claimant contended that she

was entitled to temporary total disability compensation from February 28, 2003 through a date to be determined, and that she was entitled to reasonably necessary medical treatment.

Respondent No. 1, Royal & Sunalliance Insurance Company, contended that the claimant did not sustain a compensable injury on February 28, 2003. Respondent No. 1 contended that if the claimant sustained a compensable injury on February 28, 2003, then liability for that claim would rest with Respondent No. 2. Respondent No. 1 contended that any injury sustained by the claimant on February 28, 2003 would constitute a recurrence of an injury the claimant sustained on June 21, 1999, when Respondent No. 2 was "on the risk."

Respondent No. 2, Travelers Insurance Company, contended that any injuries the claimant sustained on February 28, 2003 would constitute an aggravation or new injury, and would therefore be the liability of Respondent No. 1.

A hearing was held on June 25, 2004. The claimant testified:

Q. Are you still having the same problems in that left arm and shoulder now that you were having the 28th of February of '03?

A. Yes, sir.

Q. Has it gotten any better or worse or stayed the same?

A. It hasn't gotten any better.

Q. Are you continuing to work?

A. Yes, sir.

Q. I believe you told me that the only times that you have missed up until now would be the times that you've had to take off and go to the doctor or for some type of medical treatment, is that correct?

A. Yes, sir.

On cross-examination by counsel for Respondent No. 1, the claimant agreed that she was working as a full-time welder, without restrictions.

The administrative law judge found, in pertinent part:

1. Claimant's February 28, 2003, injury is a recurrence of her compensable June 21, 1999, injury.
2. Claimant is entitled to treatment, both past and future, for complaints associated with the recurrence of her June 21, 1999, injury.
3. Claimant is entitled to additional temporary total disability benefits for appropriate periods

beginning February 28, 2003, and continuing to a date yet to be determined.

4. Respondent carrier No. 2 bears liability, as said respondent was on the risk at the time of claimant's June 21, 1999, compensable injury.

Respondent No. 2, Travelers Insurance Co., appeals to the Full Commission.

II. ADJUDICATION

A. Ulnar Nerve Injury

The claimant contended before the administrative law judge that she sustained a compensable injury on February 28, 2003. On appeal, the claimant contends that "an event or events" occurred on February 28, 2003, causing problems in the claimant's neck, shoulder, and arm above the elbow. Ark. Code Ann. §11-9-102(4)(A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;

(ii) An injury causing internal or external physical harm to the body and arising out of and

in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

There is a two-pronged test for interpreting whether the claimant's work duties were caused by rapid repetitive motion: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. See, Malone v. Texarkana Pub. Schs., 333 Ark. 343, 969 S.W.2d 644 (1998).

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence, and for injuries falling within the definition of compensable injury under subdivision (4) (A) (ii), the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4) (E).

In the present matter, the preponderance of evidence does not indicate that the claimant's problems beginning in February 2003 were the result of a specific incident identifiable by time and place of occurrence pursuant to Ark. Code Ann. §11-9-102(4)(A)(i). The claimant's credible testimony and the medical records both show that the claimant's symptoms were gradual in nature and not the result of an accidental injury. The Full Commission instead finds that the claimant sustained a compensable injury to her left ulnar nerve, as the result of rapid repetitive motion, culminating on February 28, 2003. The claimant sustained a compensable left carpal tunnel injury in June 1999. Dr. Simpson performed surgery, subsequently assigned an impairment rating, and pronounced maximum medical benefit in July 1999. The Full Commission recognizes that the claimant's left arm complaints continued after she returned to work. In January 2001, Dr. Frazier assessed "recurrent left carpal tunnel syndrome." Dr. Frazier advised the claimant to find "less repetitive type" work.

The claimant testified that she was building small parts for the respondent-employer on February 28, 2003. The

Full Commission finds from the claimant's credible description of her job duties that her work can be characterized as rapid and repetitive. We note Dr. Frazier's prior description of the claimant's employment duties as "assembly line" work. The Arkansas Court of Appeals has previously determined, "it is a matter of common sense that reasonable minds would expect work on an assembly line to move at a swift or quick pace." See, Kildow v. Baldwin Piano & Organ, 58 Ark. App. 194, 948 S.W.2d 100 (1997).

Respondent No. 1, Royal, contends that any injury sustained by the claimant on February 28, 2003 would constitute a "recurrence" of the claimant's June 21, 1999 compensable injury. A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). The record in the present matter does not show that the claimant's ulnar nerve injury, which became manifest on February 28, 2003, was a recurrence of

her 1999 carpal tunnel injury. The parties stipulated that the claimant sustained a compensable injury on June 21, 1999, at which time Respondent No. 2 was "on the risk." Dr. Simpson treated the claimant in 1999 for a left carpal tunnel injury, not an ulnar nerve injury. Dr. Simpson pronounced maximum medical benefit and released the claimant in July 1999. The claimant's new injury became manifest on February 28, 2003. Nerve conduction velocity studies in March 2003 explicitly ruled out carpal tunnel syndrome as the cause of the claimant's symptoms. Instead, this diagnostic testing found that the claimant's left ulnar nerve was abnormal. Dr. Shahim did not recommend additional treatment for the claimant's left carpal tunnel. Instead, Dr. Shahim recommended surgery to the claimant's left ulnar nerve. Based on the record before the Commission, we attach minimal weight to Dr. Asemota's testimony that he thought the claimant's 2003 symptoms constituted "the same injury as 1999."

In accordance with Ark. Code Ann. §11-9-102(4)(A)(ii), the Full Commission finds that the claimant proved she sustained a left ulnar nerve injury, causing physical harm

to her body and arising out of and in the course of employment, and which was not caused by a specific incident or identifiable by time and place of occurrence. We find that the claimant's ulnar nerve injury was caused by rapid repetitive motion and was established by medical evidence supported by objective findings. The Full Commission finds that the claimant's compensable ulnar nerve injury was the major cause of her need for treatment. We find that Respondent No. 1, Royal, shall promptly provide such reasonably necessary medical treatment in connection with the claimant's compensable ulnar nerve injury, including the surgical treatment proposed by Dr. Shahim.

B. Neck

The claimant did not prove that she sustained a compensable neck injury. The Full Commission has determined that the claimant did not sustain an "accidental injury" pursuant to Ark. Code Ann. §11-9-102(4)(A)(i). Ark. Code Ann. §11-9-102(4)(A)(ii)(b)(Repl. 2002) provides that a worker sustains a compensable gradual onset injury if the injury is a back injury. The applicable statute does not mention gradual onset injuries involving the "spine" or

"neck." See, Hapney v. Rheem Mfg. Co., 342 Ark. 11, 25 S.W.3d 411 (2000). Respondent No. 1 is not liable for any medical treatment provided in connection with the claimant's non-compensable, degenerative cervical spine condition.

C. Temporary Disability

The claimant's compensable injury was a scheduled injury pursuant to Ark. Code Ann. §11-9-521. An employee who has suffered a scheduled injury is to receive temporary disability compensation during her healing period or until she returns to work. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Compensation to an injured employee shall not be allowed for the first seven (7) days' disability resulting from that injury, excluding the day of injury. Ark. Code Ann. §11-9-501(a)(1). In the present matter, the record does not demonstrate that the claimant has been off work for seven (7) days at any time following her scheduled injury. We note the claimant's credible testimony that she had missed work only during those times when an appointment for medical treatment was scheduled. At the time of the hearing in June 2004, the claimant testified that she was working without restrictions

for the respondent-employer. The preponderance of evidence before the Full Commission at this time does not demonstrate that the claimant is entitled to temporary total disability compensation.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant's February 28, 2003 injury was a recurrence of the claimant's June 21, 1999 injury. The Full Commission finds that the claimant sustained a compensable ulnar nerve injury which became manifest on February 28, 2003. Respondent No. 1, Royal, is liable for reasonably necessary medical treatment provided in connection with the claimant's compensable ulnar nerve injury, including the treatment recommendations of Dr. Shahim. The claimant did not prove that she sustained a compensable neck injury, and Respondent No. 1 is not liable for any treatment provided in connection with the claimant's neck or cervical spine. The record before the Commission at this time does not demonstrate that the claimant is entitled to temporary disability for her compensable scheduled injury. For prevailing on appeal to the Full Commission, the claimant's

attorney is entitled to a fee of five hundred dollars (\$500). See, Ark. Code Ann. §11-9-715(b)(2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority opinion. I concur in the finding that the claimant sustained a compensable ulnar nerve injury which became manifest while Respondent No. 1, Royal & Sunalliance Insurance Company, was "on the risk". I, also, concur with the majority's finding that Respondent No. 1 is liable for reasonably necessary medical treatment, to include prospective surgery for the claimant's ulnar nerve injury. And lastly, I concur with the majority's finding

that the claimant to date did not prove she was entitled to temporary total disability compensation. I must dissent with regard to the claimant's neck injury. Upon my de novo review of the entire record, I find that the claimant did prove by a preponderance of the evidence that she sustained a compensable gradual onset neck injury.

Ark. Code Ann. §11-9-102(4)(A) defines

"compensable injury":

- _____ (i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical service or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;
- (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not identifiable by time and place of occurrence, if the injury is:
 - (a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

The Arkansas Supreme Court in Malone v. Texarkana Pub. Schs., 333 Ark. 343, 969 S.W.2d 644 (1998), explained that because the legislature had not established guidelines necessary to the determination of what constitutes "rapid and repetitive motion", that determination is made on a case-by-case basis. The Court provided guidance for the Commission, stating that to determine rapid repetitive motion requires a two-pronged test: (1) the task must be repetitive, and (2) the repetitive motion must be rapid. More specifically, "as a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly." Id. at 350, 969 S.W.2d at 647-48.

_____ A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). The claimant's burden of proof shall be a preponderance of the evidence, and for injuries under subdivision (4)(A)(ii), the resultant condition is compensable only if the alleged compensable injury is the

major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4) (E).

In my opinion, the preponderance of the evidence indicates that the claimant's problems beginning in February 2003 were not the result of a specific incident identifiable by time and place of occurrence pursuant to Ark. Code Ann. §11-9-102(4) (A) (i). The claimant's credible testimony and the medical records both show that the claimant's symptoms were gradual in nature and not the result of an accidental injury. _____

_____The Arkansas Supreme Court has held that requirements to show gradual onset back injuries do not apply to the neck or cervical spine. Hapney v. Rheem Manufacturing Co., 342 Ark. 11, 26 S.W.3d 777 (2000); See Ark. Code Ann. §11-9-102(4) (A) (i).

To prove a gradual onset injury to the neck or cervical spine under Ark. Code Ann. §11-9-102(4) (A) (ii) (a) (Supp. 1999), a claimant must prove, by a preponderance of the evidence, that the injury: (1) arose out of and in the course of employment; (2) caused internal or external physical harm to the body requiring medical services; (3)

was caused by rapid repetitive motion; and (4) was the major cause of the disability or need for treatment. High Capacity Prods. V. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

The majority found that from the claimant's credible description of her job duties that her work can be characterized as rapid and repetitive. The majority indicated that the Arkansas Court of Appeals had previously determined that, "it is a matter of common sense that reasonable minds would expect work on an assembly line to move at a swift or quick pace." See, Kildow v. Baldwin Piano & Organ, 58 Ark. App. 194, 948 S.W.2d 100(1997).

In Rodman v. ACX Technologies, Full Commission Opinion filed July 8, 1999 (AWCC No. E804579), noted that the Court of Appeals stated that we "must consider the positioning of the part of the body as well as the number of movements the claimant has to undergo to determine if the movement is 'rapid and repetitive.'" See, Patterson v. Frito-Lay, Inc., 66 Ark. App. 159, 992 S.W.2d 130 (1999). In Rodman, the claimant failed to prove gradual onset cervical injury where there was no evidence as to the position of her neck or cervical spine during the repetitive tasks she

performed with her upper extremities. The Commission in Rodman further found that the claimant had failed to prove that the repetitive motion of her upper extremities were performed rapidly under the two-prong test set forth in Malone v. Texarkana Public Schools.

The claimant testified that she was building small parts for the respondent-employer on February 28, 2003.

Q. Okay. Now, briefly tell us what that does, or how do you do it?

A. We have two side plates. We put the bottom plate in the jug, you take two side plates and you tack them in, and you've got two wire pads, you put one in the front and one in the back. You take and you mash the jig together, then you take the hammer and you beat it until you know it's right, and then you take the welding machine and you tack one, two, three, one on each side and the bottom on the front and back.

...

Q. Conversation or testimony has been given today about one of the things you've worked on, it sounds like you're saying C-rise jig, is it actually seat, s-e-a-t?

A. Yes.

Q. Does it have something to do with a seat?

A. No, it's a jig, and they just called it seat rises. It's a jig that it sets up even with me and I'm taking apart, I put the bottom plate in, I put the two side plates, I put the two back wire pads in.

Q. And it holds these things in place?

A. Once I take and push it together up above my head, over my head I push it together, then I knock it, you know, take the hammer and knock it where the plate is even when I take it up, then I hold it down and tack the front - I'm at the back and I turn it around and I tack the front.

The Supreme Court reconsidered its decision that gradual onset for back injuries specified in Ark. Code Ann. §11-9-102(4)(A)(ii)(b) applies to injuries to the neck or cervical spine. The Court stated that the case that it relied upon, Newburg v. Thomas Industries, 852 S.W.2d 339 (Ky. App. 1993) was not controlling here stating:

"Its employment of the definition of 'back' used in the 1977 Guides is no longer recognized. Instead, the more current Guides appear to admit that definition of 'back' used in the 1977 Edition and correctly employ the term 'spine' when dealing with a determination of impairments."

The Court found that the Commission was correct in rejecting the claimant's argument that she sustained a compensable back injury under Ark. Code Ann. §11-9-102(4) (A) (ii) (b). However, the Court found that the claimant's neck injury was compensable and that the claimant proved by a preponderance of the evidence that she had a rapid repetitive motion injury pursuant to Ark. Code Ann. §11-9-102(4) (A) (ii) (a) (Supp. 1999). See, Hapney v. Rheem Manufacturing Co., Full Commission Opinion filed December 12, 2000 (AWCC Nos. E311438 & E602464).

As stated above, the majority found that from the claimant's credible description of her job duties that her work can be characterized as rapid and repetitive. The claimant's credible testimony indicates that she has to do much of her work above her head. This is evidence as to the position of her neck or cervical spine during the repetitive tasks she performed with her upper extremities.

An MRI of the cervical spine taken on April 17, 2003 showed:

"Moderate enlargement of the right ligamentum flavum at the C6 level producing mild to moderate canal stenosis on the right at this level."

An office report by Dr. Reza Shahim from May 12, 2003 states:

"She has disc disease and ligamentous hypertrophy at C5-6 level, which results in moderate thecal sac compression. There is distortion of the spinal cord on the right side at the C5-6 level due to posterior facet and ligamentous hypertrophy. I believe Ms. Hughes is symptomatic both from cervical cord compression at C5-6 and also left ulnar neuropathy at the elbow."

The above are clearly objective evidence of an injury to the claimant's neck. Dr. Reza Shahim was asked in his deposition:

- Q. Do you feel like her complaints of pain, then, are in consequence of both things we're talking about here, the cord distortion and the ulnar problem?
- A. Yes. I think her hand numbness and weakness is due to the ulnar neuropathy, but it's hard to distinguish. Her neck and shoulder symptoms would not be caused by her ulnar neuropathy. It would have to be coming from her neck. So I think part of her symptoms are due to part of each problem basically.

In my opinion, the claimant has shown by a preponderance of the evidence that her neck injury was the major cause of her need for treatment.

In accordance with Ark. Code Ann. §11-9-102 (4) (A) (ii), it is my opinion that the claimant proved she sustained a neck injury, causing physical harm to her body and arising out of and in the course of employment, and which was not caused by a specific incident or identifiable by time and place of occurrence. I find that the claimant's neck injury was caused by rapid repetitive motion and was established by medical evidence supported by objective findings. I find that the claimant's neck injury was the major cause for her need for treatment. It is my opinion, that the claimant proved by a preponderance of the evidence that she sustained a compensable neck injury, and that Respondent No. 1, Royal, should be liable for reasonably necessary medical treatment and all other benefits due the claimant in connection with her compensable neck injury.

For the foregoing reasons, I concur in the finding that the claimant sustained a compensable ulnar nerve injury which became manifest while Respondent No. 1, Royal &

Sunalliance Insurance Company, was "on the risk". I, also, concur with the majority's finding that Respondent No. 1 is liable for reasonably necessary medical treatment, to include prospective surgery for the claimant's ulnar nerve injury. And lastly, I concur with the majority's finding that the claimant to date did not prove she was entitled to temporary total disability compensation.

I must respectfully dissent with regard to the claimant's neck injury. In my opinion, the claimant proved by a preponderance of the evidence that she sustained a compensable gradual onset neck injury for which Respondents No. 1 would be liable for appropriate benefits.

SHELBY W. TURNER, Commissioner