

FINAL AWARD DENYING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-147328

Employee: Steven Lee Stroup

Employer: Nordyne Incorporated

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: Alleged December 16, 2004

Place and County of Accident: Alleged Butler County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 7, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Gary L. Robbins, issued January 7, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 11th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Steven Lee Stroup

Injury No. 04-147328

Dependents: N/A

Employer: Nordyne Incorporated

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: September 17, 2007

Checked by: GLR/kh

**SUMMARY OF FINDINGS**

- Are any benefits awarded herein? No
- Was the injury or occupational disease compensable under Chapter 287? No
- Was there an accident or incident of occupational disease under the Law? No
- Date of accident or onset of occupational disease? Alleged December 16, 2004
- State location where accident occurred or occupational disease contracted: Alleged Butler County, Missouri
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- Did employer receive proper notice? Not determined

- Did accident or occupational disease arise out of and in the course of the employment? No
- Was claim for compensation filed within time required by law? Yes
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted:  
The employee alleges he injured his neck due to repetitive trauma while working for Nordyne.
- Did accident or occupational disease cause death? No
- Parts of body injured by accident or occupational disease: Neck and body as a whole
- Nature and extent of any permanent disability: None determined
- Compensation paid to date for temporary total disability: \$0
- Value necessary medical aid paid to date by employer-insurer: \$0
- Value necessary medical aid not furnished by employer-insurer: None claimed
- Employee's average weekly wage: \$415.20
- Weekly compensation rate: \$276.80
- Method wages computation: By agreement

Amount of compensation payable: None

22. Second Injury Fund liability: N/A

- Future requirements awarded: None

Said payments shall be payable as provided in the statement of the findings of fact and rulings of law, and shall be subject to modification and review as provided by law. No payments are ordered in this case.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: No fees are ordered.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On September 17, 2007, Steven Lee Stroup, the employee, appeared in person and by his attorney, Kimberly A. Heckemeyer for a hearing for a final award. Its attorney, John P. Kafoury, represented the employer-insurer at the hearing. At the request of the parties the record was left open in order for the parties to submit additional records from Dr. Pyland. The parties submitted the additional information and the case was closed on October 9, 2007. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

- The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Nordyne Incorporated as a self-insured corporation.
- On or about the date of the alleged accident or occupational disease the employee was an employee of Nordyne Incorporated and was working under the Workers' Compensation Act.
- The employee's claim was filed within the time allowed by law.
- The employee's average weekly wage was \$415.20 per week. His rate for all purposes is \$276.80 per week.
- The employer-insurer paid \$0 in medical aid.
- The employer-insurer paid \$0 in temporary total disability benefits.

### **ISSUES**

- Whether on or about December 16, 2004 the employee sustained an accident or occupational disease that arose out of and in the course of his employment?
- Whether the employer received proper notice of the employee's accident?
- Whether the employee's injury was medically causally related to his accident or occupational disease?
- Whether the employer-insurer should be required to provide additional or future medical care?
- Whether the employer-insurer should be required to provide permanent partial disability benefits?

## EXHIBITS

The following exhibits were offered and admitted into evidence:

### Employee's Exhibits

#### A-Medical records in ten parts:

1. Orthopedic Associates
2. River City Imaging
3. St. Francis Pain Management
4. Physicians Alliance Surgery Center
5. PARC
6. Poplar Bluff Regional Medical Center
7. Ozark Physical Therapy
8. Cape Neurological Associates
9. St. Francis Regional Medical Center
10. Orthopedic Associates

#### B-Operational Method Sheet/OMS for a Grill/Jacket Bender

#### C-Deposition of Raymond F. Cohen, D.O.

### Employer-Insurer's Exhibits

1. Deposition of Robert Bernardi, M.D.

## STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

### STATEMENT OF THE FINDINGS OF FACT-

**Partial Chronology/Critical Dates-** (the Court **highlighted** relevant dates throughout the body of the award as the relationship of dates is viewed as being important in understanding the decision made by the Court. The Court also highlighted some of the statements made by the employee).

**December 2004-**the date that the employee listed as his date of accident or occupational disease on his claim form.

**December 16, 2004-**at trial, during direct examination, this is the date that the employee testified that he first noticed problems with his neck and upper extremity.

**January 25, 2005-**Dr. William P. Thorpe, M.D., performed the employee's third surgery on his right knee.

**February 24, 2005-**the date that the employee testified that he woke up with neck pain.

**February 26, 2005-**the date the employee first sought medical care for his neck and/or shoulder.

**September 28, 2005-**date when the employee first saw Dr. Ray and the date he claims he first became aware that his injury was job related.

**October 4, 2005-** Dr. Joel Ray, M.D., performed a cervical fusion surgery on the employee.

**October 28, 2005-**at trial, this is the date that the employee claims that he first notified his employer of his injury

**November 4, 2005-**the date the employee filed his claim with the Division of Workers' Compensation. The employee claimed that he injured his neck, shoulder, back and body as a whole due as he subjected himself to extraordinary strain while operating a "Grill Jack Bender" machine in the process of manufacturing air conditioning jackets.

**December 8, 2005-**the employer-insurer filed an answer denying the employee's claim.

### Testimony of the Employee-

Mr. Stroup/the employee began working at Nordyne, Incorporated in **2002**. He testified that prior to his employment at Nordyne, he never had any medical problems with his neck or upper extremities. The employee also testified about

other injuries and surgeries that he had prior to his employment at Nordyne. In 1995, the employee had right knee surgery due to non-work related activities. Dr. William P. Thorpe performed that surgery. In 1997 he had a second knee surgery that was also performed by Dr. Thorpe. He also had a right wrist ganglion cyst surgery before he began employment at Nordyne. He indicated that he took a pre-employment physical before he began employment with Nordyne and they knew of these pre-existing problems.

Mr. Stroup described his job duties while working for Nordyne. He testified that he began working on a Grill Jacket Bender in 2003. He described this machine as one that took metal wire and bent it into a fence type structure that was used to make a grill that was installed around air-conditioning units that Nordyne manufactured. In **2003**, Nordyne changed the process and instead of making a wire fence grill, full metal jacket grills were made out of a solid piece of sheet metal. He indicated that the full metal jacket grill was made out of a piece of sheet metal that was more difficult to work with due to size and bulk. He testified that weight was not a significant factor.

The employee described the process in working with the sheet metal. He said that he picked the sheet metal sheet up off the floor and slid it into the Grill Jacket Bender that was about shoulder level, engaged the machine and then removed the material from the machine and stacked it. He indicated that he did this about 35-40 times an hour. He further testified that the largest sheet metal sheets measured 40 x 92 inches, and this size is what made them difficult to carry. He indicated that he had to use his back and upper body to carry the sheets and this caused stress and tension in his body. On direct examination, Mr. Stroup claimed that he operated the Grill Bender Machine by himself for most of the time, and although he asked for help in carrying the long jackets, he only got help when he got behind. He further testified that he rarely got behind.

On direct examination, Mr. Stroup testified that **December 16, 2004** was the date that he first noticed problems with his neck and upper extremity. He listed **December 2004** as his date of injury when he filed his claim with the Division of Workers' Compensation on **November 4, 2005**. The employee indicated that he did not file his claim until after he had talked to an attorney. On cross-examination Mr. Stroup testified that he worked on the grill jacket bender machine in 2002, 2003, 2004 and 2005 and that job caused tension and stress to his neck. **He says that he knew right off the bat that the stress and tension was from lifting at Nordyne.** He testified that he did not report the knee pain or the neck problems to Nordyne in December 2004, as he knew that the plant would close for two weeks and he could recover. He said that he took two weeks off and returned to work in January 2005, but was experiencing right knee pain. Mr. Stroup further testified that he began having knee pain in 2004 that gradually got worse. **He testified that he had right knee pain on December 16, 2004, and at that time his pain level was 8.**

The employee indicated that he did not report the neck injury to Nordyne until **October 28, 2005**. **September 28, 2005** is the first date that the employee testified that he saw Dr. Ray and **October 4, 2005** is the date that Dr. Ray performed neck surgery.

Mr. Stroup indicated that he began getting treatment for his right knee with Dr. Thorpe in January 2005, and that Dr. Thorpe performed knee surgery on January 25, 2005. This is the employee's third knee surgery. Mr. Stroup testified that he was off for a period of time, was given Vicodin after the knee surgery for the pain, and began physical therapy on March 30, 2005. He indicated that he did nothing to hurt his neck since December 16, 2004.

On **February 24, 2005**, the employee testified that he woke up and had an episode where his neck and right shoulder bothered him. **He further testified that he had a stiff neck like he had in December 2004.** He indicated that he had some Vicodin left over from his knee surgery and took that when he first felt the neck and shoulder pain. On **February 26, 2005**, the employee testified that he went to Poplar Bluff Regional Medical Center due to stiffness and pain in his neck and shoulder. He indicated that he was referred to an orthopedic surgeon and given a prescription.

Mr. Stroup testified that Dr. Thorpe released him to return to work and he returned to work at Nordyne sometime in late March 2005. He stated that he went to work with a stiff neck and right shoulder pain and only worked for ten days as work made his problems worse. In addition, Mr. Stroup testified that Dr. Thorpe referred him to Dr. Burns.

Dr. Bernard C. Burns, D.O., is a physiatrist who practices in Cape Girardeau. Mr. Stroup testified that Dr. Burns took him off work and provided off work slips that were provided to Michelle Shelton. He indicated that he advised her that

Dr. Burns could not give a full diagnosis and said that he should rest until Dr. Burns could figure out what was going on. He further testified that at the time he saw Dr. Burns his right arm was almost paralyzed and it was hard to lift his right shoulder. Mr. Stroup testified that Dr. Burns treated him for several months and gave steroid injection treatments. **He indicated that his shoulder was his biggest concern at that time and that he processed his bills through his general health insurance. He testified that he did not tell his employer that he thought his problems were related to work with the grill jacket bender. He indicated that he was receiving short-term benefits during this time period.**

In September 2005, the employee testified that Dr. Burns referred him to Dr. Joel Ray, M.D. as a surgical referral. He saw Dr. Ray for the first time on **September 28, 2005**. He testified that Dr. Ray performed neck fusion surgery on **October 4, 2005**. The employee testified that he had never told Nordyne of his problems up to that time. **The employee said that based on what Dr. Ray told him, his opinion changed and he then believed that his injury was from heavy lifting.** Based on what Dr. Ray said, the employee testified that he notified Nordyne of his injury.

The employee testified that he applied for disability insurance on April 6, 2005 due to problems with his neck and shoulder. In his application for disability insurance the employee was required to answer questions on a form. **When the employee was asked the question when did you first notice and what is the nature of your disability, the employee answered. "February 24, 2005 wake up could not lift arm".**

At trial the employee was asked why he did not report his neck problems of December 2004 to the medical providers that treated him prior to September 2005-in the Court's opinion he was not able to give any real answer to the question.

The employee agreed that he signed a document with Nordyne on June 12, 2003, acknowledging that he received and accepted responsibility to read the employee's handbook. Page twenty-five of that handbook under the caption Safety Rules and Policies states, "You must report all injuries, no matter how slight, to your supervisor immediately; and before going to a doctor or hospital for a work-related injury or illness, you must have prior management approval".

At trial the employee described the problems he was having with his neck and upper extremity.

### **Medical Records-**

In support of his case the employee offered medical records from several medical providers. (The Court **highlighted** some statements in the medical records that are important in understanding the decision made by the Court).

The records from Physicians Alliance Surgery Center contain some of the medical records of Dr. Thorpe. Records show that on January 25, 2005, Dr. Thorpe performed a right knee ACL surgery.

The records from St. Francis Regional Medical Center also contain some of the medical records of Dr. Thorpe. In a record dated February 28, 2005; Dr. Thorpe saw the employee for a follow-up appointment regarding the employee's right knee surgery. The doctor reported that the employee said he was doing well. Dr. Thorpe's report also states, "He woke up last Thursday with extreme right shoulder pain. He had no injury". Dr. Thorpe gave the employee cortisone shot in the right shoulder and indicated that the shoulder showed signs of rotator cuff impingement. On March 2, 2005, Dr. Thorpe reported that the employee had less than adequate results with the Cortisone shot and added, "I frankly can't explain his right shoulder problems. On exam, he does have impingement right shoulder by exam but he had no injury. He woke up from sleep approximately a week ago with pain". Dr. Thorpe ordered an MRI of the shoulder. None of his records contain any notation that the employee reported that his neck and shoulder pain began in December 2004 while he was working at Nordyne.

Medical Records from Poplar Bluff Medical Center dated February 26, 2005 indicates that the employee was admitted to the hospital complaining of pain. It specifically states, "Pain: Patient rates pain as 5 on

a one-to-ten scale with ten as the worst pain ever. Pain is located in the right, shoulder. Onset of pain was was 2-4 days ago. Pain radiates to the neck. ..." A history was taken from the employee and he reported no known injury. These records also contain no notation that the employee's neck and shoulder problems began while working at Nordyne in December 2004.

An MRI of the right shoulder was done by RiverCity Imaging on March 2, 2005. In part it indicates, "Clinical History: There is no history of an injury. He has been symptomatic for less than three weeks. He has never had any surgery or fracture of this joint. His complaints are pain and limitation of motion. He is currently on Naproxen". Impression: "Anterolateral Deltoid Strain".

After the MRI was done, Dr. Thorpe saw the employee on March 7, 2005 and ordered physical therapy for two weeks. As of March 21, 2005, Dr. Thorpe released the employee from care for his right knee, but noted that his right shoulder still had pain. Dr. Thorpe further reported that the MRI was negative; the employee reported that the therapy was not helping and referred the employee to Dr. Burns reporting, "We will refer him to Dr. Burns for his unexplained right shoulder pain that is not associated with an injury".

Medical records from Ozark Physical Therapy are dated February 2, 2005 indicate that the employee stated that his right knee pain began on January 25, 2005. He testified at trial that his knee pain began while working for Nordyne at least as of December 2004. He received nine sessions of physical therapy for his knee from February 2nd to March 1st 2005. He also received physical therapy for his right shoulder from March 2nd to March 18th 2005.

Medical records from Orthopedic Associates indicate that the employee received EMG testing of the right upper extremity on April 25, 2005. The History portion reads: "Onset of right upper extremity symptoms in late February. It began with severe pain which progressed through severe numbness now reporting only weakness". An MRI was ordered to rule out C5-6 radiculopathy. No records report that the employee's neck and shoulder pain began while working at Nordyne.

On April 29, 2005, RiverCity Imaging performed MRI testing of the employee's cervical spine. That report reads, **“Clinical History: The patient was injured in February of this year”**. Impression: Large extradural defects at C4-C5 with prominent soft disc protrusions particularly at C4-C5 encroaching on the right neural canal. The employee also filled out a Patient Registration Form for RiverCity Imaging dated March 2, 2005. **In the insurance information section the employee indicated that his group health carrier/Blue Cross Blue Shield was responsible.** He also filled out a Questionnaire Form that was in a check the answer format. Mr. Stroup left blank the questions "Is this exam being done because of an injury? How did the injury happen? He checked don't know when asked which of the following best describes the injury? **He also checked less than 3 weeks when asked, "If no injury, how long have you had this problem?" Again there are no indications that the employee's neck and shoulder problems are related to a work event at Nordyne.**

Dr. Burns records are generally contained in the records from Cape Neurological Associates. He first saw the employee for right shoulder pain on April 5, 2005. **His records do not mention a work related event and do not indicate that the employee reported that his neck and shoulder pain began in December 2004 while working on the grill jacket bender.**

Dr. Ray performed cervical fusion surgery on the employee on October 4, 2005. He first saw the employee on September 28, 2005. At that time he prepared a letter that he sent to Dr. Burns. Dr. Ray's letter indicated that he spent considerable time with the employee discussing the employee's situation with him. In his letter he reported that the employee had neck and bilateral arm pain that have been present since February. Again there is no mention that the employee's problems began in December 2004 while working for Nordyne. Dr. Ray indicated that he would hold off

scheduling surgery pending notification of the employee's insurance company.

The employee's attorney sent him to be evaluated by Raymond F. Cohen, D.O. Dr. Cohen saw the employee on one occasion on December 14, 2006. Dr. Cohen saw the employee, took a history from the employee, reviewed medical records and prepared an initial report dated December 14, 2006. Dr. Cohen prepared a supplemental report dated May 27, 2007 after he reviewed the findings of Dr. Bernardi. He testified that Dr. Bernardi's report did not change his opinions. Dr. Cohen testified by deposition on September 11, 2007.

Dr. Cohen agreed that histories are important in giving his opinion and testified that you need to rely on the truthfulness of a patient when they report a history to you. He indicated that in the history provided by the employee, the employee indicated:

1. his job involved the repetitive lifting of sheets of sheet metal which was awkward. Dr. Cohen testified that the employee gave a medical history that he felt was of an occupational type of job that could and does cause disc herniations. Dr. Cohen indicated that he did not look at a job description provided by Nordyne and saw no video that showed the employee's work activities.
2. **another coworker would assist the employee in loading the sheet metal sheets into the grill bender.**
3. the employee did not report the size of the sheets or how heavy they were
4. the employee indicated that after working there two to two and one half years he gradually began to have neck stiffness daily that became more uncomfortable.

He also testified that in formulating an opinion it is important to evaluate and review medical records and to conduct a physical examination. Dr. Cohen provided three diagnoses that he says are a direct result of an occupational disease from the employee's work up through December 2004:

1. occupational disease of the cervical spine or cumulative or repetitive disorder trauma.
2. status post cervical spine surgery for disc herniations at C4-5 and C5-6
3. right cervical radiculopathy

Dr. Cohen further opined that:

1. he knows of no post work injury accidents
2. work is a substantial factor in the employee's disability
3. the medical treatment that the employee received was medically necessary and reasonable
4. the employee will need anti inflammatory medications for the rest of his life
5. the employee has a 45% permanent partial disability of the cervical spine from his work related injury
6. the employee has a 10 pound lifting restriction
7. the employee should do no repetitive or forceful work with his right arm or any work where he keeps his head and neck in any type of sustained or awkward position
8. the employee has a 45% preexisting permanent partial disability of the right knee
9. the right knee condition combined with his work related injury synergistically creating an greater overall disability than their simple sum
10. the cervical and knee conditions created an obstacle for the employee to gain employment in the open labor market.
11. the employee will not be able to return to heavy labor
12. it is his opinion that the employee's neck condition is as a result of occupational disease and not one traumatic event

During cross-examination, Dr. Cohen agreed that in his review of medical records, he saw no medical record reporting that the employee had any right shoulder or neck pain prior to February 2005-the symptoms came on suddenly while the employee was off work. He also indicated that he was unaware of how long the employee had been off work prior to waking up with the neck pain. He further agreed that when the employee first reported his pain, he reported an onset date of 2-4 days earlier, and that nowhere do the medical records indicate that the employee reported that he had these types of problems from working at Nordyne. Dr. Cohen testified that he was aware that December 2004 was the date that the employee filed as his date of injury when he filed his claim. Dr. Cohen agreed that someone could sneeze, or sleep wrong on his or her neck and herniate a disc.

The employer-insurer sent the employee to be evaluated by Robert Bernardi, M. D. Dr. Bernardi saw the employee on one occasion on March 7, 2007. Dr. Bernardi saw the employee, took a history from the employee, reviewed medical records and prepared a report dated March 7, 2007. Dr. Bernardi had the initial report of Dr. Cohen when he saw the employee. Dr. Bernardi testified by deposition on August 22, 2007.

Dr. Bernardi is a board certified neurosurgeon. Dr. Bernardi provided opinions as a result of his involvement in this case. He was asked whether the employee's work incident or work related duties were substantial factors in the development of his resulting cervical condition. Dr. Bernardi testified that he did not believe that any work event was a substantial factor in the development of the employee's symptoms or the need for surgery. In support of his opinion he indicated that nowhere in the medical records or to Dr. Bernardi did the employee describe any specific trauma or accident as bringing on his symptoms. He further testified that there is no injury at all that started these symptoms. **He testified that there is no way a work incident in December 2004 can have a two month delay between the injury itself and the onset of radicular pain or nerve root pain. He further testified that there is no temporal relationship between the injury and the onset of symptoms.**

Dr. Bernardi testified that from a patient's point of view, most disc herniations happen spontaneously-people wake up one morning with pain and are not aware of the particular events that brought it on. He testified that trauma that could bring on a disc herniation could be trivial-so trivial as not to be noticed. He says it does not have to be a well-defined event. Dr. Bernardi testified that he did not find a contemporaneous medical history with regard to the employee's injury. He indicated this is important as he feels there should be some temporal relationship between the event that occurs and the onset of pain. He testified that in order to say A caused B there must be some relationship-a fixed relationship between the events and the development of the symptoms. **He further testified that in this case there is at least a two-month delay between when the employee stopped working and the onset of symptoms.** Dr. Bernardi testified that such a type of delay does not occur with a herniated disc in the neck or low back.

Dr. Bernardi also testified that:

1. he does not believe that the employee's neck surgery was medically causally related to work. He testified that the employee's neck surgery was not medically causally related to the alleged work duties or work incident.
2. the medical care that the employee received was reasonable.
3. the employee is at MMI.
4. the employee does not need any more medical care.
5. he would not put any work restrictions on the employee.
6. he rated the employee as having a 15-20% permanent partial disability to the body as a whole.

## **RULINGS OF LAW-**

### **Accident and Medical Causation-**

In order to properly determine the outcome in an award, the Court sometimes has to focus closely on both the factual evidence and apply the law in order to reach a decision. Sometimes the nature of the case causes a decision to be made by focusing more on the application of the law as the factual evidence is clear, and sometimes the nature of the case causes the resolution to be reached by focusing primarily on the factual evidence and there is no need to focus on the law. The latter is the type of focus that this case requires.

In evaluating the evidence in any case, this Judge looks for evidence that supports a legal position/"tells a story, that is both credible and consistent. In addition, evidence that supports a legal position must do so both logically, and chronologically. Verbal evidence and written evidence should support and compliment each other and should document the premise that the evidence is trying to prove. If the evidence supporting a legal position or premise is not credible, is not logical, is not consistent, or does not fit together chronologically, then the legal position-the story supporting the premise must fail. This resolution of this case primarily focuses on the evidence and does not require any lengthy legal analysis.

Based on the Court's analysis of all of the evidence in this case, the Court does not find the evidence presented by the employee to be credible, consistent, logical or fit together in a chronologically manner. The Court does not believe and finds that the employee has not presented evidence showing that he had an accident or incurred an occupational

disease that arose out of and in the course of his employment. The Court finds that the employee has not presented evidence that has shown that his work at Nordyne was a substantial factor in causing his medical problems. The Court further finds that the employee has not shown that his injury was medically causally related to his accident or occupational disease. The Court therefore denies the employee's claim in all respects. The Court bolded many dates and many statements contained in medical records, as it is those dates and those statements that detail why the employee's claim was denied. It is the inconsistencies in those dates and statements that document the fallacy in the employee's position that he has a compensable workers' compensation claim. The Court's rationale for this decision follows.

The employee claims that he has a workers' compensation occupational injury claim derived from his work related activities at Nordyne in December 2004. Specifically he testified that his operation of a Grill Jacket Bender caused injuries to his neck and upper extremity that resulted in surgery on October 4, 2005. The Court could engage in a long discussion of the definition of accident and whether the employee has offered sufficient evidence to show that his work activities were a substantial factor in causing his injuries. In this case that is not necessary, as the Court does not feel that the testimony of the employee is credible, nor does the Court feel that the evidence offered by the employee supporting his testimony is sufficient to meet his burden of proof on either accident or medical causation. The actions and statements of the employee as evidenced by the medical records create enough inconsistencies/ red flags that the Court does not believe the testimony of the employee and more importantly does not believe that the employee has proven that he incurred a work related occupational disease from his work activities at Nordyne in December 2004.

The Court finds the testimony of Dr. Bernardi to be more credible than the testimony of Dr. Cohen. Dr. Bernardi opined that the employee's problems with his neck were not related to his work at Nordyne. As Dr. Bernardi pointed out, he did not find a contemporaneous medical history to the employee's injury. The Court believes he was absolutely correct when he stated that there should be some temporal relationship between an event that occurs and the onset of pain. He testified that there was a two-month delay between when the employee stopped working (December 16, 2004) and when he reported the onset of pain (February 24, 2005). He further opined that this type of delay does not occur with a herniated disc in a person's neck or low back. Even without any other inconsistencies, this is a critical piece of evidence that shows a major fallacy in the employee's case that cannot be ignored or explained away. Dr. Bernardi testified that there is no way that a work incident in December can have a two-month delay before the onset of radicular pain. This is a critical difference between the medical opinions of Dr. Bernardi and Dr. Cohen, as Dr. Cohen agreed that the employee awoke from sleep one morning with severe neck pain, but indicated that he did not know how long the employee had been off work prior to waking up with the neck pain. Based on all of the evidence as a whole and specifically on this contradiction of opinions, the Court finds the medical testimony and opinions of Dr. Bernardi to be more credible than the medical testimony and opinions of Dr. Cohen.

The employee testified that he worked on the Grill Jacket Bender from 2002 to 2004. His direct testimony was that he did not know that those work activities caused problems to his neck and upper extremities until he saw Dr. Ray on September 28, 2005. **Yet, at trial, he also testified that he knew right off the bat that the stress in his neck was from lifting and his work with the Grill Jacket Bender at Nordyne.** The records further show that the employee time after time stated that his problems with his neck began on February 24, 2005 when he woke up with pain.

The employee received a great deal of medical care from a variety of medical providers in 2005. It defies logic and common sense to believe that the employee went from December 2004 or even February 24, 2005, to September 28, 2005, and never reported in any manner, to any medical provider, that the problems with his neck or upper extremities may have been caused by his work at Nordyne. This is especially true as the employee testified that he knew that the work on the Grill Jacket Bender caused problems with his neck in 2002, 2003, and 2004-right off the bat. If he was experiencing problems with his neck from lifting sheet metal and working on the Grill Jacket Bender in 2002, 2003 and 2004, then in almost a year of medical treatment the employee never mentioned work as a possibility of the source of his problems. While he may not have had a medical diagnosis of a herniated cervical disc, the employee certainly knew that work was causing stress and pain in his neck for an extended period-he testified so. It defies logic to find that the employee has a compensable work related injury on this information alone. But when you look at the evidence there are more inconsistencies. Why did the employee fail to report his claim to his employer until after the diagnosis by Dr. Ray on September 28, 2005? Why did the employee fail to report his claim to his employer until after surgery on October 4, 2005? Why did the employee file his claim only after he sought legal counsel? Why did the employee

wait to report the accident to his employer until October 28, 2005? Why did the employee process his medical care through his general group health insurance? Why did the employee fill out all insurance claim forms and deny a work related accident? If the employee's work related injury began in December 2004, why did he not have any problems for two months when he was not working and then all of a sudden wake up on February 24, 2005 with neck pain that he in the end tries to say is the same type of pain that he felt at work in December 2004, and therefore he has a work related injury? If it was the same pain as he felt from work in December 2004, then why did he not say so somewhere in his medical treatment? The employee would answer these questions by saying that after his meeting with Dr. Ray on September 28, 2005 his opinion changed and his opinion from that point on was that injury was from heavy lifting at Nordyne. This is another statement of the employee that the Court finds is incredible.

At trial the employee specifically testified as to the process he went through in working the Grill Jacket Bender. He indicated that it was the bulk of the sheet metal sheets when carrying them that caused the stress and tension in his body. He went on to emphasize that he operated the Grill Jacket Bender by himself as he asked his supervisor for help several times but would only get help when he got behind and that was rarely. Yet when he gave his history to Dr. Cohen, the employee described his job duties and was reported as saying that another person on the line would help the employee line up and guide the sheet metal into the Grill Jacket Bender. Since the employee's position that carrying the bulky sheet metal sheets by himself is the source of his injury, this is another inconsistency in the employee's evidence.

Another area of concern involves the medical reports and the information they contain about the source of the employee's neck problems. Both Dr. Bernardi and Dr. Cohen agree that the employee reported the source of his neck pain as beginning on February 24, 2005 when he woke up with pain. They also agree that nowhere in the medical records is there any report by the employee that he had these same symptoms while working at Nordyne. Those same records indicate that the employee said such things as the onset of pain was 2-4 days ago and that he had been symptomatic for less than three weeks.

Another area of inconsistency involves that employee's statements regarding his right knee pain. The employee testified that he had right knee pain while working at Nordyne in December 2004 and before. Yet in the medical records he reported that his knee pain began on January 25, 2005.

All of the inconsistent evidence reported in the statement of facts and in the rulings of law tells a story, and that story is that the employee's need for surgery did not result from and was not caused by his work activities at Nordyne. When you analyze all of the factual evidence in this case, you find that there is not a logical flow of evidence documenting an occupational injury derived from the employee's employment at Nordyne. The employee's evidence is not credible, is not consistent or logical and does not fit together chronologically.

This case is denied in its entirety including any claim against the Second Injury Fund.

#### **Notice, Future Medical Care and Permanent Partial Disability-**

As the Court has ruled that the employee did not have a work related accident, the determination of the issues of Notice, Future Medical Care and Permanent Partial Disability is moot and will not be addressed by the Court.

#### **ATTORNEY'S FEE**

No attorney fees are ordered in this case.

#### **INTEREST**

No interest is due in this case.

Date: \_\_\_\_\_

Made by:

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Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Mr. Jeffrey W. Buker  
*Division Director*  
*Division of Workers' Compensation*