

TEMPORARY AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 08-042592

Employee: Sharon Beckton
Employer: AT&T
Insurer: American Home Assurance Company
c/o Sedgwick Claims Mgmt. Services

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 3, 2010, as supplemented herein.

Introduction

The issues stipulated in dispute at the hearing were: (1) occupational disease; (2) arising out of and in the course of employment; (3) medical causation; (4) future medical care; (5) notice; and (6) whether employee was employed by employer on the date of alleged injury.

The administrative law judge made the following findings: (1) Dr. Schlafly's opinion is more credible than Dr. Crandall's; (2) employee met her burden to show repetitive typing is the prevailing factor causing her right-side carpal tunnel syndrome and need for surgery; (3) the thirty-day notice period under § 287.420 began to run on October 24, 2008; (4) employee provided timely written notice of her injury to employer via her claim for compensation filed May 27, 2008; (5) notice was deficient because employee put the wrong beginning date of injury on her claim for compensation; (6) employer did not employ employee on May 15, 2008; (7) employer was not prejudiced by the deficiency in employee's notice, and thus employee's claim is not barred by § 287.420; and (8) employer is liable for future medical treatment as may be deemed necessary to cure and relieve the effects of the bilateral carpal tunnel syndrome.

Employer filed an Application for Review alleging the administrative law judge's award is "against the overwhelming weight of the factual lay and medical evidence in that the Award is not supported by sufficient factual evidence on the record for making an Award of a compensable occupational disease by repetitive motion trauma resulting in the temporary award for future surgery," and setting forth various arguments in support of this proposition.

We agree with the result reached by the administrative law judge, but because we wish to supplement the administrative law judge's findings with regard to the issue of notice under § 287.420 RSMo, we issue the following decision.

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Discussion

Employer argues that the administrative law judge improperly resolved the issue of notice under § 287.420 RSMo. That section provides, in pertinent part, as follows:

No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

The foregoing section imposes six requirements on the method and manner of notice employees must provide employers in occupational disease or repetitive trauma cases: (1) written notice, (2) of the time, (3) place, and (4) nature of the injury, and (5) the name and address of the person injured, (6) given to the employer no later than thirty days after the diagnosis of the condition. *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009). Employer argues it was prejudiced because employee failed to satisfy the second and sixth of the foregoing requirements. We reject employer's arguments for the following reasons.

Timeliness of notice

Here, employer argues that the administrative law judge erred in finding the 30-day notice period should run from Dr. Schlafly's diagnosis of work-related carpal tunnel syndrome on October 24, 2008. Employer argues the deadline should instead run from May 5, 2008, because employee "knew in her own mind that she had CTS" on that date and "knew that the only cause in her own mind was her keystroking at work starting in 2005 and increasing for a year before May 2008." In support of these arguments, employer cites *Allcorn v. Tap Enters.*, 277 S.W.3d 823 (Mo. App. 2009). Employer misreads *Allcorn*.

The *Allcorn* court held that the 30-day notice period under § 287.420 does not begin to run "until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure." *Allcorn*, 277 S.W.3d 823 at 829. The *Allcorn* court found that the date the employee's evaluating physician rendered a causation opinion was the appropriate date to begin the 30-day notice period, even though that opinion was not rendered until several months after the filing of the employee's claim for compensation. *Id.* at 830. Applying the holding of *Allcorn* to the case at hand, we find the administrative law judge correctly determined the 30-day notice period to run from October 24, 2008, the date that Dr. Schlafly rendered his opinion that employee's right carpal tunnel syndrome was caused by her work activities. This is because Dr. Schlafly's opinion represents the first time a diagnostician in this case made the requisite causal connection between employee's carpal tunnel syndrome and her work activities for employer.

To the extent employer argues that employee's treating doctors rendered causation opinions sufficient to trigger the notice requirement in May 2008, we are not persuaded. Employer points to the treatment record generated in connection with the nerve

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conduction study on May 15, 2008, performed by Dr. Samudrala, in which the doctor notes: “[Employee] does a lot of typing.” Employer suggests that stray comments such as these from the treating doctors should have been sufficient to convince employee that her condition was work-related, and argues this triggered the notice requirement. Stated another way, employer is arguing that the notice period began to run as soon as employee “knew in her own mind” that she had carpal tunnel syndrome and that work was the likely cause. In a case involving conflicting medical expert opinions on the issue of medical causation, employer asks us to find that employee’s own lay opinion as to whether work caused her condition should provide a sufficient causal connection to trigger the 30-day notice requirement. To adopt this argument would place the burden on employee to determine the cause of her occupational disease. But employee is not a diagnostician, and we find her own thoughts or opinions in May 2008 as to whether her carpal tunnel syndrome was work-related did not trigger the 30-day notice requirement under § 287.420.

Content of notice and prejudice to the employer

The administrative law judge found that employee’s written notice via her claim for compensation was deficient because the claim lists May 15, 2008, as the date of accident or occupational disease. Employer argues employee failed to show employer was not prejudiced by this deficiency.

The administrative law judge and employer appear to be under the impression that § 287.420 requires employees to list the “date of onset” or “beginning date of injury” when providing notice to employer of occupational diseases or repetitive motion injuries. We find no such requirement in the statute. Rather, the plain language of § 287.420 requires only that employees provide notice of the “time of the injury.” See § 287.420 *supra*.

Determining the “time of injury” in occupational disease or repetitive motion cases can be complicated where, as here, there is a gradual onset of the claimed injury. Historically, courts have used different touchstones, such as the date a condition becomes compensable or the date a condition first becomes disabling, in order to determine the date of injury in occupational disease cases. See, for example, *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 452-56 (Mo. App. 2010) (discussing past cases and holding that, for purposes of determining the maximum compensation rate, the date of injury of an occupational disease is the date the employee becomes disabled). The *Allcorn* court looked at the opinion of the employee’s evaluating physician that the employee sustained an occupational disease due to work exposure “through April of 2006,” noted the employee’s written notice listed the day prior to the first day employee began working for employer, and found that employee’s notice was deficient by “one day.” *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 830 (Mo. App. 2009). The *Allcorn* court concluded a prejudice analysis was needed because where the employee’s notice was improper with regard to the “time of injury,” the employee failed to meet the requirements of the statute. *Id.* at 830-31.

Here, employee was diagnosed with bilateral carpal tunnel syndrome after an EMG and nerve conduction study on May 15, 2008, but there is no other significance to this date. Dr. Schlafly did not render a causation opinion that specified an exact time of injury, nor did he identify any time period “through” which employee was injured. The evidence shows that

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employee was not performing her normal duties for employer as of May 15, 2008, and so it appears there was no occupational exposure as of that date. Given these considerations, we agree with the administrative law judge that employee's notice is deficient because she did not provide the "time of injury" for purposes of § 287.420 RSMo. It is necessary, therefore, to determine whether employer was prejudiced by employee's failure to provide notice that met with the requirements of § 287.420.

Employee testified that she told a supervisor named Edmund Lowe about her hand complaints in March or April 2008. According to employee, Mr. Lowe initially told her to go to whatever doctor she chose, and then directed her to go to Concentra and see employer's workers' compensation doctors. We find employee credible. We find that employee told her supervisor, Mr. Lowe, about her hand complaints in March or April 2008. Accordingly, we find that employer had actual notice of employee's hand complaints as of March or April 2008. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994).

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo. App. 2000) (citations omitted).

Because we have determined that employer had actual notice of employee's hand complaints as of March or April 2008, employee has made a prima facie showing of absence of prejudice and the burden shifts to employer to show it was prejudiced. We find no evidence to suggest that employer was prejudiced by failure to receive written notice of the time of employee's injury. This is an occupational disease case alleging a gradual onset of injury, thus there was no accident for employer to investigate nor any witnesses to interview before memories faded. We note that employer had employee examined by its physicians at Concentra on June 5, 2008, only 21 days after employee was first diagnosed with carpal tunnel syndrome. Given these circumstances, we are persuaded employer had a fair opportunity to investigate employee's claims, have her treated to minimize her injuries, and gather evidence for its defense, despite employee's failure to specify the correct "time of injury" on her written notice to employer.

In sum, we find that employer was not prejudiced by failure to receive written notice of the time of injury, and that employee otherwise complied with the requirements of § 287.420.

Decision

Based upon the foregoing, we conclude that employer was not prejudiced by any failure on the part of employee to comply with the requirements of § 287.420. Employee's claim for compensation is not barred by that section.

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The award and decision of Administrative Law Judge Suzette Carlisle, issued December 3, 2010, is attached and incorporated to the extent it is not inconsistent with this supplemental opinion.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 9th day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

VACANT

Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Sharon Beckton Injury No.: 08-042592
Dependents: N/A Before the
Employer: AT & T **Division of Workers'**
Additional Party: N/A **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: American Home Assurance Company
c/o Sedgwick Claims Mgmt. Services
Hearing Date: September 9, 2010 Checked by: SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: Leading up to April 20, 2008
5. State location where accident occurred or occupational disease contracted: St. Louis City, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
10. Describe work employee was doing and how accident happened or occupational disease contracted: Claimant performed repetitive typing activities as a coach leader and manager for Employer.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Bilateral wrists and hands
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? Approximately \$400.00
16. Value necessary medical aid not furnished by employer/insurer? None

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Injury Number: 08-042592

17. Employee's average weekly wages: \$819.37
18. Weekly compensation rate: \$546.27/\$389.04
19. Method wages computation: Stipulated

COMPENSATION PAYABLE

20. Amount of compensation payable:

Future medical care is awarded pursuant to the award.

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark Cordes

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sharon Beckton

Injury No.: 08-042592

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: AT & T

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional N/A

Insurer: American Home Assurance Company
c/o Sedgwick Claims Management Services

STATEMENT OF THE CASE

Pursuant to Section 287.450 RSMo a hearing was held on September 9, 2010 at the Missouri Division of Workers' Compensation (DWC), St. Louis office, at the request of Sharon Beckton (Claimant) to determine if Claimant is entitled to receive medical treatment and to determine if Claimant was employed by Employer on the alleged date of injury. Attorney Mark Cordes represented Claimant. Attorney Robert Evans represented AT & T (Employer) and American Home Assurance Company (Insurer), c/o Sedgwick Claims Management Services. Venue is proper and jurisdiction lies with the DWC. The Second Injury Fund is not a party to the case. The record closed on September 17, 2008.

Claimant's Exhibit A and Employer's Exhibits 1-5 were admitted.¹ Any notations contained in the Exhibits were present when admitted. Any objections contained in the depositions but not sustained in this award are overruled.

STIPULATIONS

The parties stipulated that on or about May 15, 2008:

1. The alleged injury occurred in St. Louis City;
2. Claimant and the Employer operated under the Missouri Compensation Law;
3. The Insurer fully insured Employer's liability²;
4. The Claim for Compensation was timely filed;
5. Employer paid no medical or temporary total disability (TTD) benefits;

¹ Mr. Cordes objected to Exhibit 4 as irrelevant because it contained wages in 2005, which did not reflect wages earned or hours worked leading up to the injury in 2008. The objection was later withdrawn. Mr. Evans responded that the wage statement represented the method of payment. Mr. Evans requested that the record remain open to obtain a supplemental wage statement for wages incurred after November 30, 2005 through the last date Claimant was paid. The record remained opened until September 17, 2010. Mr. Evans called on September 17th at approximately 4:20 p.m. to state that he would not submit an updated wage statement. The record closed at that time.

² All references in this award are to the 2009 Revised Statute of Missouri supplemental addition unless otherwise stated.

STIPULATIONS (Cont.)

6. Claimant's average weekly wage was \$819.37;
7. The TTD rate was \$546.27 and the permanent partial disability (PPD) rate was \$389.04; and
8. Employer paid no TTD benefits and approximately \$400.00 in medical benefits

ISSUES

Parties identified the following issues for disposition:

1. Whether Claimant sustained an occupational disease?
2. If so, did Claimant's condition arise out of and in the course of her employment?
3. Is Claimant's bi-lateral carpal tunnel syndrome medically and causally related to her work activities?
4. Was Claimant employed by Employer on May 15, 2008?
5. Did Employer receive proper notice?
6. Is Employer liable for future medical care?

SUMMARY OF THE EVIDENCE

Based on the entire record, Claimant's testimony, demeanor, medical records, and the applicable law in the State of Missouri I find Claimant sustained an occupational disease which arose out of and in the course of employment. Claimant was not employed by Employer on May 15, 2008, but Employer received proper notice and shall provide future medical care.

FINDINGS OF FACT

All evidence was reviewed but only evidence supporting this award is discussed below:

1. **Claimant** is a 53 year old female, 5 feet 4 inches tall, and weighs about 170 pounds. Claimant had a hysterectomy in 1995 and she takes medication for high blood pressure. Claimant started smoking at age 16 and currently smokes about five cigarettes per day.
2. Employer hired Claimant in April 1998 as a consultant selling Employer's products. She answered telephone calls, wrote sales agreements and typed them in the computer for 40 hours per week as an hourly employee for two years. She did not have problems with her hands during the first two years of employment.
3. Between 2002 and 2003 Claimant was promoted to a backfill assistant manager position. She walked the floor and helped sales consultants place orders. She performed this task for six months and there was limited computer work. Claimant had no hand complaints while performing this job.
4. Claimant was promoted to a salaried management position as a coach leader. She counseled 15 to 20 consultants on handling calls and documenting conversations in the

computer. Documentation included sales advice, and areas that needed improvement by the next meeting.

5. She sat in front of two rows of consultants that sat in glass cubicles. To request assistance, consultants raised their hands and Claimant walked to their desk, looked at the screen, identified the problem, wrote notes, calmed customers, and made recommendations. Later she updated the computer system. Notes included the consultant's name, date and time of the call, problems, and solutions. The length of handwritten notes varied, and typed notes averaged two pages. On a busy night she may assist three to four consultants per hour, up to six hours per night.
6. Claimant worked from 3:00 p.m. until midnight. There were lunch breaks and initially two other breaks. However, as a manager breaks were not always taken. Claimant supervised the entire call center from 10:00 p.m. until midnight.
7. After the consultants left at midnight, Claimant typed notes for three hours and occasionally until 6:00 a.m. She was not paid for overtime. Her supervisor could look in the system and see if notes were up to date. She made a diligent effort to keep notes updated.
8. Also, Claimant logged into the computer system from home to document and view files, monitor calls, flag calls for follow up with employees, and send notes to employees. Claimant has no record of the number of hours she worked over 40 hours per week, but she estimated she worked 40 and 60 hours per week.
9. Follow-up meetings were scheduled with consultants within a week of the initial meeting. The maximum number of employees management counseled was 60 when managers were absent. Claimant wrote notes and typed them into the computer. She typed 72 words per minutes, but had no idea how many key strokes were made. Typing was consistent unless notations were not input on a regular basis.
10. Claimant met with her manager on Saturday or Sunday to get feedback about the notes she input for consultants.
11. Claimant was required to do "coach by walking," where she coached employees on the floor, hand wrote notes, and later typed updates into the computer.
12. When Claimant was not performing "coach by walking," she typed notes from daily reviews with consultants, month-end reports, and agendas and summaries for team meetings.
13. Claimant averaged four to five consultant interviews per day, lasting from 5 to 20 minutes or more per consultant. Also, she sat with consultants on telephone calls and made notations about ways they could improve. Several days later, she followed up with the consultant and updated the computer file.

14. Claimant typed meeting summaries into the computer. She typed Best Practice reports for her team which included monthly sales promotions. There was one meeting a week for an hour, and Claimant typed an agenda, and described the campaigns, which took two to four hours to prepare.
15. Fifteen minute huddles took place with the entire team at the beginning or end of the shift and consultants were encouraged to make suggestions. An end of the month meeting was held to show sales and improvements. Claimant typed a report for meetings that included a summary of sales for each campaign and tips on how to sell the products. A verbal exchange with consultants also took place.
16. Claimant coached other manager's consultants as needed and typed notations about conversations and promotional items. At times, Claimant supervised up to six additional consultants.
17. Prior to 2008, Peggy Taylor, M.D., her personal physician, prescribed a diet pill, developed a diet plan, and Claimant lost weight. Dr. Taylor also treats Claimant with prescription medication for high blood pressure and high cholesterol and she takes medication for both.
18. A year before she left employment, Claimant noticed tingling in her index, and long fingers, and thumbs of both hands. Claimant developed cramps when writing, but did not report it for fear she would be fired.
19. Claimant was off work under the Family Medical Leave Act (FMLA) from December 10, 2007 to January 17, 2008 and January 25, 2008 to February 17, 2008.³ Claimant took Zoloft for depression after her boyfriend died, her mother became ill, and she abused alcohol. She also took Tylenol for knee pain.
20. During Claimant's absence other supervisors managed her staff, but some did not make computer entries. When Claimant returned to work, she spent a lot of time typing entries through March, 2008.
21. To update files, Claimant followed up with the managers and obtained online sales results for December and January, and typed updates. Claimant did not know how many consultants were involved, the amount of time involved, and keystrokes involved. She developed cramps but continued to work and took pain medications and muscle relaxers.
22. Claimant last worked for Employer on April 20, 2008 when she took a voluntary buyout. For two months, Employer permitted Claimant to use the facility and computer to apply for jobs within the company.
23. In May 2008, Claimant reported hand problems to Dr. Taylor, who referred Claimant for a nerve conduction study. Dr. Taylor suggested Claimant report her hand complaints to Employer.

³ Claimant was out of work from 12/10/07 to 1/15/08 Claimant was out of the office.

24. Claimant first mentioned her hand complaints to associate director, Mr. Lowe, in March or April, 2008, and Mr. Lowe referred her to Concentra, and another nerve conduction study was performed.
25. Claimant saw Dr. Crandall on July 7, 2008 and he performed a nerve conduction study, and recommended surgery for both hands. She saw Dr. Crandall again in February 3, 2010 and more nerve conduction studies were performed. Dr. Crandall told Claimant surgery should have been performed two years earlier.
26. Hand complaints include numbness, difficulty picking things up, combing hair, pain in the morning and night, and decreased ability to type. Symptoms have not improved since she stopped working for Employer.
27. On October 24, 2008, Claimant saw Dr. Schlafly, and more nerve conduction studies were performed.
28. Claimant signed a voluntary buyout, effective April 20, 2008 on her 10th anniversary. Claimant received unemployment compensation benefits for 99 weeks from April, 2008 through June 2010. Claimant is ready and willing to work. She has looked for work on the internet, Career Builders, submitted applications, and interviewed with Bank of America. She has not worked anywhere else since she stopped working for Employer.
29. Claimant requests Employer provided the CTS surgery recommended by Drs. Schlafly and Crandall.

Medical Evidence

30. In May 2008, **Dr. Taylor** referred her for nerve conduction test. On May 15, 2008, **Suseela Samudrala, M.D.**, diagnosed moderate CTS of the right wrist, minimal CTS on the left.
31. Employer authorized treatment at Concentra on June 5, 2008. Claimant gave a history of wrist and hand tingling and numbness for five weeks. She reported typing four to five hours per day for the past 10 years. **Asokkomar B. Patel, M.D.**, diagnosed CTS; non-work related based on Claimant's history, and referred Claimant to her primary care physician.

Expert Opinion Evidence

32. **R. Evan Crandall, M.D.**, is a board certified in plastic surgery. On July 7, 2008 Dr. Crandall examined Claimant and testified at the Employer's request. Repeat nerve conduction studies in February 2010 show a deterioration of the values since the 2008 study.

33. Dr. Crandall diagnosed bilateral CTS and recommended surgery for both hands, but concluded it was not work related because Claimant did not have sufficient physical activity to “cause or contribute to or be the prevailing factor of carpal tunnel syndrome.”
34. Dr. Crandall relied on two studies from Denmark and New Zealand related to the relationship between CTS and typing. Dr. Crandall did not know the work habits and work stations of workers in New Zealand and Denmark. He assumed work stations in Denmark were similar to workstations in the United States because of his preference for House of Denmark Furniture.⁴
35. Other articles in evidence include:
 - a. “The frequency of carpal tunnel syndrome in computer users at a medical facility,”
 - b. “A Case-Control Study of Obesity as a Risk Factor for Carpal Tunnel Syndrome in a Population of 600 Patients Presenting for Independent Medical Examination,”
 - c. “Obesity as a Risk Factor for Slowing of Sensory Conduction of the Median Nerve in Industry” - A two-part study in 1984 and 1989 revealed the risk for abnormal nerve conduction averaged 3.5 fold and 4.2 fold greater, respectively, in obese workers than slender workers. The study suggests individual characteristics, not job-related factors, are the primary determinants of slowing sensory conduction of the median nerve and CTS.
36. Dr. Crandall testified it would be speculation to conclude Claimant did a lot of typing without knowing “quantitatively or qualitatively the number of keystrokes made. It is important to know the type of work performed. Also, Claimant was a supervisor and did not have enough time or volume of keystrokes to be at risk for developing CTS by “any known standard of the government or literature.” Claimant did not type continuously and she constantly attended meetings. In addition, Dr. Crandall concluded writing does not cause CTS.
37. Dr. Crandall opined Claimant’s age, gender, and obesity combined to be the prevailing factor to cause CTS. Dr. Crandall opined both age and gender are risk factors for development of CTS due to the impact of hormone balance on females. Age alone cannot cause CTS. However, Claimant’s CTS is a symptom of her hysterectomy and a major problem for post menopausal women. Menopause effects estrogen and can cause CTS.
38. At 205 pounds, Dr. Crandall found Claimant to be morbidly obese in 2005, which is “an important” risk factor that can cause CTS, according to Dr. Crandall. He acknowledged Claimant now weighs 170 pounds which is considered obese.
39. **Bruce S. Schlafly, M.D.**, is a board certified orthopedic surgeon who examined Claimant on October 24, 2008, and testified at the request of Claimant’s attorney. Claimant gave a

⁴ The articles include; “Computer Use and Carpal Tunnel Syndrome-A 1 Year Follow Up Study,” and an article from the Association of Obesity, Gender, Age and Occupation with Carpal Tunnel Syndrome.

history of typing half the day while working full time with some overtime. After Claimant returned to work she reported a heavy work load to catch up.

40. Dr. Schlafly diagnosed right carpal tunnel syndrome (CTS) and recommended surgery based on a positive Phalen's test on the right and decreased sensation to the pinwheel on the right index finger. No diagnosis was made on the left because Claimant's physical findings were insufficient to confirm the minimal CTS findings on the electrical studies.
41. Dr. Schlafly testified it is a well established statistical likelihood that women between 40 and 60 have a greater risk of developing CTS than men. Studies show smokers, have an increased risk of developing CTS. Other risk factors for developing CTS include diabetes and rheumatoid arthritis, and pregnancy.
42. However, Dr. Schlafly did not find hyperlipidemia and hypertension to be risk factors for developing CTS. Dr. Schlafly disagreed with articles that find obesity to be the number one predictor for symptomatic CTS because the conclusion has not been established, and he has performed carpal tunnel surgery on patients who are not obese.
43. Dr. Schlafly testified a correlation between two items does not mean that one caused the other. Statistical correlation does not establish cause and effect; however, if it is present, an inquiry can be made whether a cause and effect relationship exists.
44. Dr. Schlafly opined Claimant's repetitive work with her right hand at work was the prevailing factor that caused right CTS and the need for surgery. He noted her symptoms existed prior to her work absence, but increased with increased duties after she returned.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the competent and substantial evidence presented during the hearing, and the applicable law of the State of Missouri, I make the following rulings of law:

Claimant sustained an occupational disease which arose out of and in the course of employment

Claimant asserts she developed CTS from repetitive typing at work. Employer contends Claimant developed CTS as a result of being a female between the ages of 40 and 60, obesity, not from her work activities.

Claimant has the burden to prove all essential elements of a claim, including causation. *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. 1998). When a worker seeks compensation for carpal tunnel syndrome, she must submit a medical expert who can establish the probability that working conditions caused the disease. *Id.* A claimant's medical expert in an occupational disease case must establish within a "reasonable probability" that the disease was caused by conditions in the work place. *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 902 (Mo.App. 1999) (Citations omitted).⁵ 'Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt.' *Thorsen v. Sachs Elec. Co.* 52 S.W.3d

⁵ Abrogated on other grounds by *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 41 (Mo. 1995).

611, 620 (Mo.App. 2001) (*Citations omitted*).⁶ Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). (*Citations omitted*).

Section 287.067.1 and 3 states:

- 1) **“Occupational disease”** is defined as... an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

- 3) An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The ‘prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Carpal tunnel syndrome is an occupational disease. *Townser v. First Data Corp.*, 215 S.W.3d 237, (Mo. App. 2007). To prove an occupationally induced disease rather than an ordinary disease of life involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. *Id* at 241-242. “[T]he claimant must establish, generally through expert testimony, the probability that the occupational disease was caused by conditions in the work place. . . . A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. The opinion may be based on a written report alone.” *Id.* at 242.

In this case, all doctors agree Claimant has CTS and recommend surgery, however they disagree on causation. I find Dr. Schlafly’s opinion is more credible than Dr. Crandall’s opinion. Dr. Crandall’s conclusion is not persuasive that Claimant lacked the time and volume of work needed for typing to be a risk factor given her job title. Despite the history Claimant provided to Dr. Crandall, he concluded the CTS was not work related because as a manager, she did not type continuously for more than four hours, and make approximately 60,000 keystrokes per day, as required by OSHA for hand intensive work. Although Dr. Crandall did not know how many keystrokes Claimant typed each day, he concluded: . . .”I have not once ever in my experience seen a person at this level be shown ergonomically to have a risk factor for CTS, ever.” Dr. Crandall discredited Claimant’s history of typing three hours or more and acted as a fact finder

⁶ This is one of several cases cited herein that were overruled on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect.

by stating: "...she claimed she spent half of her day typing at the computer." I find Claimant credibly testified she typed between sessions with consultants, after work, and at home, and the record contains no contrary evidence.

On the contrary, Dr. Schlafly opined Claimant's repetitive work with her right hand was the prevailing factor that caused CTS. Dr. Schlafly based his opinion on a detailed history of Claimant's use of the computer to update consultant files, and type monthly, quarterly, and yearly reviews, with the use of a mouse, for one-half the work day, and at home, during a 40 to 60 hours work week. He considered the "catch up" work she performed after a two month absence and Claimant's increased symptoms after she returned to work. In addition to Claimant's assigned work she also typed daily notations for other consultants when their manager was absent. Breaks were not always taken due to her work load.

Dr. Crandall's opinion is not credible that Claimant's personal risk factors were the major cause for CTS (age, gender and obesity), which he supported by numerous medical studies. Dr. Schlafly agreed that woman between the ages of 40 and 60 have an increased risk of developing CTS, but found statistical correlation does not equal causation. However, once a statistical correlation is made, and inquiry can be made whether a cause and effect relationship exists. But Dr. Schlafly has seen no survey of hand surgeons regarding the articles referenced by Dr. Crandall or verification of the impact of obesity on CTS. Although Dr. Crandall believed most doctors agree with the studies, the record contains no evidence the studies were validated by any scientific, medical or governmental authority. Furthermore, Claimant credibly testified her symptoms and typing increased after her return to work, and her weight decreased during the same period.

I find Claimant to be generally credible. Her CTS symptoms developed before 2008 but increased after she returned to work in February 2008. After her return she typed "catch up" notes that were not updated during her two month absence, in addition to her regular typing.

During a work shift, Claimant met with up to four consultants an hour for five to 15 minutes each. For the last two hours of each shift, Claimant addressed all consultant questions. She sat with them, listened, wrote notes, and offered suggestions, without a break during busy times. Required to keep consultant contacts updated in the computer, Claimant testified credibly that she typed between meeting with consultants, and for three hours or more after consultants left for the day. Also, Claimant typed daily, weekly and monthly updates, agendas, and campaign information for her consultants and other consultants as needed. Wage records in evidence show Claimant averaged 44 to 48 hours per week in 2004 and 2005, and Claimant testified she worked up to 60 hours per week to keep up with typing in 2008.

Based on credible testimony by Dr. Schlafly and Claimant, medical reports and medical records, I find Claimant met her burden to show repetitive typing is the prevailing factor that caused right CTS and the need for carpal tunnel surgery on the right hand.

Employer was not prejudiced by a Deficient Notice and Claimant was not employed by Employer on May 15, 2008

On October 24, 2008, Dr. Schlafly issued an opinion that Claimant's repetitive work for Employer with her right hand is the substantial and prevailing factor that caused right CTS and the need for right carpal tunnel surgery. I find the thirty day period of Section 287.420 began to run on October 24, 2008. Claimant gave written notice of her injury to Employer when she filed the Claim for Compensation on May 27, 2008 and the DWC sent Employer notice of the claim on May 30, 2008. Because Claimant gave written notice of the time, place and nature of the injury before Dr. Schlafly's causation, it is clear that Claimant gave the notice "no later than thirty days after the diagnosis of the condition."

I find notice is deficient because the Claim for Compensation (Claim) did not provide the correct "time of injury." The Claim established a date of occupational disease as May 15, 2008, but Claimant was a manager by 2003, and her last day of work was April 20, 2008. I find Employer no longer employed Claimant on May 15, 2008; however, it does not impact Employer's liability. Except for the incorrect beginning date of injury, the claim properly included the place; nature of injury; and name and address of the employee.

Section 287.420 states in part: "No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice."

The evidence shows Claimant worked continuously for Employer from 1998 until 2008, and sustained cumulative injury. Claimant has not worked since she left Employer's employment, and there are no known activities or hobbies that may contribute to the condition. Claimant requests treatment but has not obtained it, therefore, I find the notice, which was otherwise proper, caused no prejudice to Employer due to the error regarding the beginning date of the occupational disease, which, due to its insidious nature, is usually difficult to pinpoint. *See Allcorn v. Tap Enterprises, Inc.*, 277 SW.3d 823 (Mo. App. 2009). I find Claimant's claim is not barred by Section 287.420.

Employer is Liable for Future Medical Treatment

In cases involving the award of future medical benefits, the medical care must flow from the accident in order for the employer to be held responsible. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo. App. 1997). For an award of temporary disability and future medical aid, proof of cause of injury is sufficiently made on reasonable probability, while proof of a permanent injury requires reasonable certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995).

The reports and testimony of Drs. Schlafly and Crandall confirm Claimant needs carpal tunnel surgery. Dr. Crandall recommends bilateral carpal tunnel releases. Dr. Schlafly recommends a right wrist release and relates the need for surgery to Claimant's work activities. I find that Claimant is entitled to, and Employer shall direct and provide, such future medical benefits as may be determined to be necessary to cure and relieve the effects of the bilateral CTS.

CONCLUSION

I find that Claimant sustained an occupational disease which arose out of and in the course of employment, and is medically causally related to her work activities. Employer was not prejudiced by an incorrect date of injury on the Claim for Compensation. Therefore, the Claim for Compensation is not barred by Section 287.420 and Employer shall provide future medical treatment.

This is a temporary award addressing limited issues. Other issues are deferred. The Division of Workers' Compensation retains jurisdiction over the matter until all issues are fully resolved by way of final award or settlement.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation