

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

Injury No.: 03-015678

Employee: Melanie Days
Employer: Laclede Gas Company
Insurer: Self-Insured
Date of Accident: Alleged February 18, 2003
Place and County of Accident: Alleged St. Louis City

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 June 4, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued June 4, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge clearly erred in accepting the opinion of employer's medical expert, Dr. Ollinger, over

the evidence provided by employee's medical expert, Dr. Feinberg, and Dr. Hannaway, a neurologist. The administrative law judge used the evidence provided by Dr. Ollinger to find that employee failed to prove her carpal tunnel syndrome was an occupational disease arising out of and in the course of her employment. However, based on the competent and substantial evidence provided by Drs. Feinberg and Hannaway, it is clear that employee's excessive typing at work was a substantial cause of her carpal tunnel syndrome.

"An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020." Section 287.067 RSMo 2000. The employee must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. 1994). The employee bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999).

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry 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.

Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999) (citations omitted).

Employee worked as a service representative for employer. She testified that she used a keyboard between five-and-a-half to six hours each day at work. Employer presented evidence from an occupational therapist, Mr. Victor Zuccarello, who had performed a job analysis for employer's work place in 2003. Mr. Zuccarello determined that service representatives generated approximately 12,300 keystrokes each day.

Employee first began experiencing hand pain around September 2002. Employee complained of her pain and was sent to Dr. Ollinger by employer in February 2003. Dr. Ollinger diagnosed employee with carpal tunnel syndrome and suggested that employee see a different doctor for treatment. Additionally, Dr. Ollinger opined that employee's work was not a substantial cause of her carpal tunnel syndrome. One of the reasons for this opinion was his belief that there was no repetition in employee's work. Based on his odd belief that performing a task 12,300 times in a single day is not repetitive, I would find his opinion not to be as credible as the opinions of Drs. Hannaway and Feinberg.

Dr. Hannaway, examined employee on April 8, 2003. Based upon his examination and a review of employee's work history, Dr. Hannaway concluded that employee's "chronic keyboard work" was a substantial cause of her carpal tunnel syndrome. He then referred employee to Dr. Mackinnon for carpal tunnel release surgery. Dr. Mackinnon performed release surgery on employee's left wrist on September 5, 2003.

Employee saw Dr. Feinberg on March 14, 2006, for an independent medical examination. After examining employee and thoroughly reviewing her medical records and work history, Dr. Feinberg concluded that employee's work was a substantial cause of her carpal tunnel syndrome as well as her need for carpal tunnel release surgery and repeat EMG nerve conduction velocity testing.

Based on the above, I believe the competent and substantial evidence provided by Drs. Hannaway and Feinberg shows that the repetitive motion of excessive typing exposed employee to the hazard of carpal tunnel syndrome, that this exposure was greater than the exposure to the general public, and that there is a recognizable link between her repetitive and excessive typing and carpal tunnel syndrome.

Therefore, I would find that employee has met her burden to show that her excessive typing was a substantial cause of her carpal tunnel syndrome, and as such, has a compensable occupational disease. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny compensation.

John J. Hickey, Member

AWARD

Employee: Melanie Days Injury No.: 03-015678
Dependents: N/A Before the
Employer: Laclede Gas Company **Division of Workers'**
Additional Party: N/A **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Self-Insured
Hearing Date: March 20, 2007 Checked by: KOB:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: alleged February 18, 2003
5. State location where accident occurred or occupational disease was contracted: N/A
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? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Melanie Days Injury No.: 03-015678

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$963.98

19. Weekly compensation rate: \$642.66 / \$340.12
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.	\$0.00
22. Second Injury Fund liability: No	-----
TOTAL:	\$0.00
23. Future requirements awarded: None.	

Said payments to begin and to be payable and be subject to modification and review as provided by law.

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: -----.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Melanie Days	Injury No.:	03-015678
Dependents:	N/A	Before the	
Employer:	Laclede Gas Company	Division of Workers'	
		Compensation	
Additional Party:	N/A	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Self-Insured	Checked by:	KOB:tr

PRELIMINARIES

The matter of Melanie Days (“Claimant”) proceeded to hearing at the Division of Workers’ Compensation in the City of St. Louis to determine whether Claimant sustained an occupational disease arising out of and in the course of her employment. Attorney Ray Howard represented Claimant. Attorney Mark Anson represented Laclede Gas Company (“Employer”), which is self-insured.

The parties agreed that on or about February 18, 2003, Claimant was an employee of Employer, and earned an average weekly wage of \$963.98, which corresponds to rates of compensation of \$642.66 for total disability benefits and \$340.12 for permanent partial disability benefits. Venue, notice, and timeliness of the claim were not at issue. Employer disputed compensability, and paid no benefits prior to hearing.

The issues are: 1) Did Claimant sustain an occupational disease arising out of and in the course of her employment; 2) Is Claimant’s medical condition causally related to her work activities; 3) Is Claimant entitled to recover temporary total disability benefits covering a period of time from September 5, 2003 through October 5, 2003; and 4) What is the nature and extent of Claimant’s permanent partial disability?

SUMMARY OF THE EVIDENCE

Live Testimony

Claimant is a 46 year old woman who has worked for Employer for 21 years. Currently, Claimant is a correspondence representative, and her job duties include replying to customer emails, writing letters, handling bill inquiries, and other administrative tasks. Prior to 2005, Claimant worked in customer service answering phones. It was in this position that Claimant said she developed the symptoms of pain and numbness in her hands, elbows, shoulders, and head, for which she now seeks compensation.

As a customer service representative, Claimant used a phone, keyboard, computer monitor, pens, paper, calculators, and staplers. Her job was to input and transmit information regarding customer accounts and to help resolve issues. Claimant testified that in her typical 8-hour workday, with some overtime, she was constantly keyboarding 5 ½ to 6 hours a day. She indicated she worked 5 to 6 days per week and 20 to 24 hours overtime in a month. She testified that her other job tasks included gripping, pulling, and pushing paperwork. When questioned on the amount of paperwork she processed in a day, Claimant testified she had "piles" of paperwork, but indicated she only handled 5 to 10 files per day on an average, and each file contained 10 sheets or less of paper. Claimant initially worked on an old computer or CRT and only recently obtained personal computers; but in both cases, the keyboards required less force than old fashioned typewriters.

Claimant testified that the symptoms of numbness, tingling, swelling, and pain in her arms, hands, and shoulders developed over time without her recognizing that the symptoms were related to her work. She took over the counter medicine such as Aleve. She awoke with numbness and swelling. In 2003, when she took a temporary job in the keypunch data processing department (from February 15 to February 23, 2003) the symptoms were aggravated and intensified.

In February 2003, Claimant reported the symptoms to Employer in writing (Exhibit F). Employer referred Claimant to Dr. Ollinger who, after a physical, history, and brief hand exam suggested she see a doctor for carpal tunnel syndrome. Dr. Hanaway, her family doctor, referred her to Dr. Susan McKinnon, who in September 2004 performed a left carpal tunnel release. Her similar right hand problems were not surgically treated. Claimant also has a burning or aching pain in her shoulders. Her elbows are also affected, and she has headaches. Currently, she has daily pain, limited range of motion, numbness, swelling, stiffness in the neck and shoulders, and burning in her neck and arms.

Following surgery, Claimant returned to work at light duty for four weeks while also attending therapy. When she returned to work full time, she still had problems, but got no reaction when she informed Employer of the problems. Thereafter, Employer performed an ergonomic analysis and made some equipment changes, like providing a computer tray which lowered her arms to a more comfortable position. Claimant used her sick leave and did not receive temporary total disability benefits.

Claimant testified she never counted the number of keystrokes, the time between calls, or the minutes per call doing her job. Claimant acknowledged Employer's goal in 2003 was for each customer service representative to handle 90 to 100 calls per day. Claimant did not tell any of the doctors about the week she worked in data processing which she has claimed aggravated her symptoms. She testified that the carpal tunnel surgery did not reduce her pain level. The phone usage in customer service involved using an earpiece the majority of the time which allowed her to use the phone without holding the phone to her ear. Claimant does not do her nails, wear rings, or wear bracelets because of the swelling in her hands.

Wilbert Peebles, a 16 year employee of Employer, is the Assistant Manager of Labor Relations. He was the point man in coordinating a company wide physical demand analysis ("PDA") of jobs under contract for Employer. His purpose was to aid in evaluation of sick leave and worker's compensation cases. The PDAs would allow employees to provide a document illustrating the job requirements of his or her individual position for medical purposes. It also outlined the essential functions of each job. Every job classification under the union contract was evaluated. Victor Zuccarello was the individual with whom Mr. Peebles worked in coordinating evaluations. All the reports were filed through him.

John Lair, a 12 year employee of Employer, is currently the manager of Credit and Collections. However, from 1995 through at least 2003, he was either the supervisor or assistant manager of Customer Relations and is familiar with the work performed by Claimant. Mr. Lair explained contents of Exhibit 4, the daily statistics for customer service representatives. The information is kept automatically and is used to manage and supervise employees on a daily and monthly basis. The headings were as follows: ADC is the number of incoming calls. Average Talk Time is the average length of the call speaking with a customer. The After Call column is the time period in which the customer service representative inhibits receiving new calls by pressing a button to finish the entry for the prior call before accepting a new call. Available Time is the time the rep spends waiting for a new call. Aux/Other tracks time away from the phone, and mostly consist of breaks and lunch. Extension Calls is the number of outbound calls made, both within and outside the company. The Average Extension Time is the average of the calls made on the extension. The Total Time Staffed is the time from when a representative signs in first thing at the beginning of the shift to the sign out per day. A full workday should consist of approximately 525 minutes which reflects an 8-hour workday plus a 45 minute lunch. Any time over 525, roughly, is overtime.

Medical and Occupational Evidence

Dr. Barry Feinberg performed a one-time medical evaluation on March 14, 2006, and his report was admitted into evidence by agreement (Exhibit A). He took a history from Claimant that was basically consistent with her trial testimony,

but he noted her symptoms intermittently increased in the six months prior to February 2003, instead of with a temporary job change. The records he reviewed included medical records, reports and a Job Analysis. Dr. Feinberg's physical exam revealed several positive findings in the upper extremities bilaterally, as well as tenderness and tension in the upper back and neck, but other findings were unremarkable. The diagnoses were bilateral carpal tunnel syndrome, musculoskeletal pain syndrome of the upper extremities and left sided cervical pain. Dr. Feinberg concluded with minimal analysis that Claimant's condition is causally related to her work activities, which are a substantial factor in the cause of her complaints and need for additional testing. Dr. Feinberg assigned a disability rating of 25% of the left wrist, 15% of the left shoulder, and 20% of the right elbow.

The records and report of **Dr. Susan Mackinnon** indicate she diagnosed Claimant with bi-lateral carpal tunnel syndrome on July 25, 2003, and she performed a release of the left carpal tunnel on September 5, 2003 (Exhibit B). Dr. Mackinnon noted Claimant's obesity, hysterectomy and smoking habit but she did not record any work activities other than identifying her customer relations position with Laclede Glass (sic). The records do not address causation, work-relatedness or disability.

On April 8, 2003, Claimant saw **Dr. Joseph Hanaway**, a neurologist, who diagnosed "bilateral carpal tunnel syndrome with a history of keyboard work for many years" based on Claimant's self-reported history, exam and pictures of her workspace (Exhibit C). He directed conservative treatment for several months, and advocated repositioning her workspace. In a November 18, 2004 letter to Claimant's attorney, Dr. Hanaway concluded, with little analysis, that Claimant's "chronic keyboard work" was a substantial cause in the development of her disability of 25% of the bilateral upper limbs at the wrist.

Mr. Victor Zuccarello, an occupational therapist and certified ergonomics evaluation specialist, testified by deposition on behalf of Employer (Exhibit 1). Mr. Zuccarello testified that he participated in a project to update and expand the physical demands analysis ("PDA") data for a hundred or more jobs within Laclede Gas, including Claimant's. Employer wanted the updated PDAs to use in a traditional manner, to list the general physical demands and essential job functions for employment and medical evaluation purposes. The PDA project was company-wide, and independent from this claim. Based on observation, interviews and data analysis (including information such as contained in Exhibit 4), Mr. Zuccarello identified the essential and marginal functions of the job of "Service Representative Telephone Days" (Exhibit 1, attachment 1). He concluded that a service representative generated approximately 12,300 keystrokes per day, and that typing was not a "continuous" function since multiple breaks occurred between sets of keystrokes. Mr. Zuccarello did not address causation.

Dr. Henry Ollinger, a plastic surgeon, testified by deposition on behalf of Employer (Exhibit 2). Based on his examination, the history, and the report of Victor Zuccarello, Dr. Ollinger concluded Claimant suffered from idiopathic carpal tunnel syndrome with risk factors of post-operative menopausal status of 8 to 9 years, and morbid obesity. He explained Claimant's work does not contain elements of significant force, repetition, awkward posture, contact stress or vibrations associated with causing carpal tunnel syndrome. Because the physical aspects of a job that may produce injury in general and carpal tunnel in particular do not exist, Claimant's work is not the proximate cause or substantial factor for a carpal tunnel syndrome which has alternate explanations. Regardless of the Zuccarello report, Dr. Ollinger testified the degree of finger movement described by Claimant herself was not near the threshold for enough keying to be a cumulative injury for carpal tunnel syndrome.

FINDINGS OF FACT AND RULINGS OF LAW

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); *see also Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). Based on the substantial and competent evidence, I find Claimant did not meet her burden of establishing her work activities were a substantial factor in the cause of her carpal tunnel syndrome.

Although the evidence is consistent regarding Claimant's diagnosis of carpal tunnel syndrome ("CTS"), there is a dispute as to whether the CTS is work-related – the cornerstone issue for purposes of her workers' compensation claim. Claimant must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999)(citations omitted). Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Id.* However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. *Id.* A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. *Id.* Where the opinions of medical experts are in conflict, the fact finder determines whose opinion is the most credible. *Id.* Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Id.*

As between the two medical experts to opine as to causation, I find the opinion of Dr. Ollinger to be more credible, centered and consistent with the evidence than the opinions of Drs. Feinberg and Hanaway. Dr. Ollinger explained how he reached the conclusion Claimant's CTS was idiopathic, not work related, because the physical aspects of her work did not contain sufficient force, repetition, awkward posture, contact stress or vibrations to

cause CTS. His conclusion was supported by the detailed, relevant data in the Zuccarello report, as well as by Claimant's self-reported activities. He thought Claimant's size or post-menopausal state were not the primary causes, but they were simply alternate explanations or risk factors. On the other hand, Drs. Feinberg and Hanaway started with the notion Claimant's CTS was a consequence of her excessive keyboarding, and did not appear to consider factors such as force, repetition, rest periods, or other activities Claimant performed throughout the day. Furthermore, they offered no explanation to support their conclusions. On the issue of causation, I accept as true the testimony given by Dr. Ollinger and supported by the Zuccarello data, and I find Claimant's CTS is idiopathic and not substantially caused by work activities.

CONCLUSION

The weight of the credible evidence leads to the conclusion Claimant's CTS is idiopathic, and not substantially caused by her work activities. Claimant has not met her burden of establishing an occupational disease arising out of and in the course of her employment. Her claim is denied. All other issues are moot.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation