

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

Injury No.: 95-104341

Employee: Mary Lucas
Employer: St. Louis Children's Hospital
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: February 16, 1995
Place and County of Accident: St. Louis 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 August 18, 2004, as supplemented herein, and awards no compensation in the above-captioned case.

In the instant case, the employee seeks workers' compensation benefits for her bi-lateral upper extremity complaints, alleging her medical condition is attributable to an occupational disease arising out of and in the course of her employment. The applicable statutes are section 287.063 RSMo 1994 and section 287.067 RSMo 1994.

An informative legal analysis of occupational diseases pursuant to these Missouri statutes is found in *Kelley v. Banta and Stude Const. Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), from which the following legal principles are cited:

[1,2] 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. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo. App. 1991). 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. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo. App. E.D.1995); *Dawson v. Associated Electric*, 885 S.W.2d 712, 716 (Mo. App. W.D. 1994); *Hayes*, 818 S.W.2d at 300; *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo. App. 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo. App. 1987).

[3-6] Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson* 885 S.W.2d at 716; *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 223 (Mo. App. W.D.1992); *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Sellers*, 752 S.W.2d at 416; *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo. App. 1978). 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. *Hayes*, 818 S.W.2d at 299; *Sheehan v. Springfield Seed & Floral*, 733 S.W.2d 795, 797-8 (Mo. App. 1987). A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. *Dawson*, 885 S.W.2d at 716; *Sellers*, 776 S.W.2d at 504; *Sheehan*, 733 S.W.2d at 797. The opinion may be based on a doctor's written report alone. *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo. App. 1988). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. 1984). 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. *George v. Shop 'N Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D.1993); *Webber*, 826 S.W.2d at 54; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

Also, as particularly applicable to the instant case, and as stated in *Maxon v. Leggett and Platt*, 9 S.W.3d 725 (Mo. App. S.D.2000), "[M]ere exposure is not enough to shift liability to a subsequent employer. Instead, the subsequent employer must expose the employee to repetitive motion capable of producing [claimant's ailment]."

In the instant claim claimant failed to establish through expert testimony the probability that her claimed occupational disease was caused by conditions in her work place. The employer did not expose the employee to repetitive motion capable of producing claimant's alleged medical condition.

Both the Commission and the Administrative Law Judge who heard the case are of the opinion that the more credible medical expert opinion concerning this issue was the opinion rendered by Dr. Ollinger. Dr. Ollinger was of the opinion that claimant's occupation with this employer did not contain significant forces, repetition, awkward postures, contact stresses, vibrations, or duration factors to be a substantial factor and certainly not the proximate cause of her alleged medical condition. Dr. Ollinger clearly explained that claimant's other risk factors, i.e., diabetes as well as rheumatoid arthritis, were the clear risk factors for her contraction of her alleged medical condition, bilateral upper extremity complaints/carpal tunnel syndrome. In his opinion the contraction of her alleged disease was not consequent to any exposure to her work activities. Rather, it was consistent with her known prior medical conditions.

Accordingly, claimant did not sustain an injury due to an occupational disease arising out of and in the course of her employment.

The award and decision of Administrative Law Judge Joseph Denigan, issued August 18, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

DISSENTING OPINION

I must respectfully disagree with the majority of the Commission. I would reverse the decision of the administrative law judge (ALJ) and award compensation.

The decision of the ALJ is replete with contradictions. The ALJ correctly sets out that the proof of a medical condition and its relationship to employment requires expert medical opinion. The ALJ then declares as “dispositive evidence” employee’s own impression that her problems with her hands came from poor circulation. The ALJ also lists employee’s preexisting conditions of diabetes and arthritis as “dispositive evidence.” But in what way is this “dispositive”? Does the mere existence of these conditions mandate a conclusion not reached by the medical experts? The medical experts are split on the significance of these preexisting conditions. The ALJ, however, finds the conditions of such importance that he is disposed to reach his conclusions in spite of expert opinion to the contrary.

To hold that employee’s irrelevant impression of her condition and/or her irrelevant prior problems are conclusive of the legal fact of causation in this case is error.

More troubling, to me, is the interjection into the case, by the ALJ, of his own, unsupported, standard of causation.

The ALJ interjects his own measure of exposure for repetitive trauma cases. The ALJ would require an exposure to be compatible with his own “axiomatic” understanding. This is contrary to the law and is error.

The law clearly states: “An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists . . .” Section 287.063 RSMo.

Nowhere in the law, and nowhere in the record of the testimony in this case, do the factors concerning the qualities of the stimuli appear. For the ALJ to interject such “axiomatic” criteria is improper, contrary to the law and error.

The ALJ has established his own standard of compensability, which is contrary to statutory and case law.

The ALJ was in error in excluding employee’s offered exhibits B, C, H and J. Admittedly, the statute states that such offered material cannot be used against the Second Injury Fund. However, the material should have been admitted as part of employee’s claim against the employer.

The ALJ states that employee’s expert failed to take into account, in formulating his opinion concerning causation, certain “long standing, undisputed and commonly known alternative causes . . .” The basis for that conclusion is not stated and certainly not readily apparent from the record.

Employee’s expert testified, at length, concerning the preexisting conditions of rheumatoid arthritis and diabetes and ruled out their significance in this case. Whatever other “commonly known” alternative causes the ALJ speaks about are nowhere in the record. This statement of the ALJ is indicative of his erroneous reasoning in this case.

Employer’s expert, a plastic surgeon, did not have the benefit of a job description covering this employee’s work. He stated that he did not need one because he “knew what her work involved.” Does anyone believe that the surgeon understands the daily tasks and chores of the housekeeping staff and/or the cafeteria worker?

Employer’s expert further admitted that the EMG study, which was accepted as diagnostic of bilateral carpal tunnel, did not show diabetic neuropathy in the hands.

There being no involvement of the disease in the hands, how then can diabetes be considered as causative? Employer’s expert’s opinion is fatally flawed.

I would find that employee's work was sufficiently repetitive in nature to have aggravated the underlying, preexisting, condition of carpal tunnel syndrome and is responsible for the current need for medical treatment.

John J. Hickey, Member

AWARD

Employee:	Mary Lucas	Injury No.:	95-104341
Dependents:	N/A	Before the	
Employer:	St. Louis Children's Hospital	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Self-Insured	Department of Labor and Industrial	
Hearing Date:	May 11, 2004	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED: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: N/A
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? No
7. Did employer receive proper notice? N/A
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 Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee:	Mary Lucas	Injury No.:	95-104341
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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$247.20
- 19. Weekly compensation rate: \$164.80
- 20. Method wages computation:

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None

- 22. Second Injury Fund liability: No

- TOTAL: -0-

- 23. Future requirements awarded: None

Said payments to begin N/A 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:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mary Lucas	Injury No.: 95-104341
Dependents:	N/A	Before the
Employer:	St. Louis Children's Hospital	Division of Workers'
		Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-Insured	Checked by: JED

This case involves a disputed repetitive trauma injury alleged by Claimant with the reported onset date of February 16, 1995. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund ("SIF") is a party to this claim. All parties are represented by counsel.

Objections by the SIF to Exhibits B, C, H and J, while an anomaly in the legislation, must be sustained.

Issues for Trial

1. Notice;
2. incidence of occupational disease;
3. unpaid Medical expenses;
4. nature and extent of temporary total disability;
5. liability for future medical expenses;
6. nature and extent of permanent partial disability;
7. liability of the SIF.

FINDINGS OF FACT

Stipulations

1. The applicable compensation rates are \$164.80 for both temporary total disability and for permanent partial disability.
2. The parties stipulated that Employer paid no interim benefits.
3. Claimant was employed for the period July 11, 1994 through February 16, 1995 (seven months).

Dispositive Evidence

4. Claimant performed custodial duties in patient rooms and offices for Employer. She subsequently transferred to the cafeteria and performed mopping and dishwashing duties.
5. Prior to her work for Employer, Claimant drove a school bus.
6. Prior to her work for Employer, Claimant had bilateral hand pain and believed it was poor circulation.
7. Prior to her work for Employer, Claimant was diagnosed and treated for insulin dependent diabetes.
8. Prior to her work for Employer, Claimant was diagnosed and treated for rheumatoid arthritis.
9. Claimant's symptoms worsened after she left Employer.
10. On cross-examination, Claimant admitted having hand pain symptoms while driving a bus for Mayflower.
11. Claimant's expert, Dr. Hanaway, a neurologist, found Claimant's condition work related based in part upon an assumption of a two-year work history (i.e. exposure) with Employer.
12. Dr. Hanaway admitted diagnoses of diabetes and rheumatoid arthritis since 1990 but did not find either as pre-employment (i.e. pre-1995) causes of Claimant's condition.
13. Dr. Ollinger, a hand surgeon, testified that Claimant's bilateral CTS symptoms were genuine and caused by her pre-existing conditions of diabetes and rheumatoid arthritis.
14. Dr. Ollinger did not believe any of her duties with Employer over seven months either caused or aggravated her condition.

RULINGS OF LAW

Compensability

As with all proofs in complex medical evidence, a medical expert’s opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). Silman, 891 S.W.2d at 175.

Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). Extent of qualification pertains to the weight to be given opinion evidence (rather than admissibility). See Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31 (Mo.App. 1992).

It is axiomatic that an employee’s exposure to a repetitive trauma consists of the qualities of the traumatic stimuli plus the length of time or duration of the exposure. Dr. Hanaway was not properly informed about Claimant’s alleged exposure. He repeated NCS studies which has nothing to do with pre-employment causation analysis; Claimant’s *condition* is not disputed. Dr. Hanaway deferred to another hand surgeon who did not testify, Dr. Hau Eisen. Dr. Hanaway is not a hand surgeon and lacks similar qualification when compared to the testifying hand surgeon, Dr. Ollinger.

Dr. Ollinger’s testimony is more persuasive for three reasons. His experience far exceeds that of Dr. Hanaway and he was better informed about the exposure. His conclusions are reconcilable with the balance of the record. He also identified causally related pre-existing pathologies that, additionally, gave rise to pre-employment symptoms. Claimant failed to establish by a preponderance of credible evidence that any permanent disability was the result of the subject accident and not that of a non-compensable, or prior, or subsequent event. Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991). Here, Dr. Hanaway failed to integrate long standing, undisputed and commonly known alternative causes of CTS symptoms into his analysis. In addition, he was materially misinformed, or mistook, Claimant’s exposure. A decision in this case depends on expert testimony because a complex medical issue is presented. Dr. Ollinger’s analysis is entitled to more deference.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain her burden of proof. Claim denied. The other issues are moot.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Reneé T. Slusher
Director
Division of Workers' Compensation