

TEMPTRARY AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 02-152023

Employee: Brenda Otey
Employer: Verizon
Insurer: American Home Assurance c/o Sedgwick Claims Management
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: September 1, 2002

Place and County of Accident: Wentzville, St. Charles 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 (ALJ) 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 October 5, 2004. The award and decision of Administrative Law Judge Kevin Dinwiddie is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions as to disability and causation. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002), *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001), *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003).

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

This award is temporary or partial in nature, is subject to further order and shall be kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 R.S.Mo.

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

Given at Jefferson City, State of Missouri, this 21st day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Brenda Otey

Injury No. 02-152023

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Verizon

Additional Party: State Treasurer, as custodian of the Second Injury Fund (Open)

Insurer: American Home Assurance c/o Sedgwick Claims Management

Hearing Date: July 22, 2004; finally submitted 9/10/04 Checked by: KD/bb

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: 9/10/02
5. State location where accident occurred or occupational disease contracted: St. Charles County, 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
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Repetitive use of the upper extremities while working as a telephone operator.
12. Did accident or occupational disease cause death? No Date of death? ----
13. Parts of body injured by accident or occupational disease: right and left upper extremities
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? None
16. Value necessary medical aid not furnished by employer/insurer? N/A

Employee: Brenda Otey

Injury No. 02-152023

17. Employee's average weekly wages: \$427.84
18. Weekly compensation rate: \$285.23/\$285.23
19. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

20. Amount of compensation payable: Employer and insurer to provide medical care for compensable injury, as per Award.

TOTAL: SEE AWARD

Each of said payments to begin as of the date of this Award 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.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Brenda Otey

Injury No: 02-152023

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Verizon

Additional Party State Treasurer, as custodian of the Second Injury Fund (Open)

Insurer: American Home Assurance c/o Sedgwick Claims Management

Checked by: KD/bb

The claimant, Ms. Brenda Otey, and the employer, Verizon, appeared at hearing by and through their attorneys and entered into certain agreements and stipulations as to the issues and evidence to be presented in two respective claims for compensation. The parties agreed to hold a joint hearing in Injury Numbers 02-041682 and 02-152023. There is not a complete identity among the parties in these two injury numbers, inasmuch as different insurers were on the risk for the dates of injury plead in these two claims. Attorney Jay C. Lory appeared on behalf of the employer and its insurer, AIG Claim Services, Inc, in Injury Number 02-041682; Attorney Richard A. Day appeared on behalf of the employer and its insurer, American Home Assurance Company, in Injury Number 02-152023. In both of these claims for compensation, Ms. Otey is seeking a temporary or partial award, providing for medical care. The employer and insurer in Injury Number 02-041682 acknowledge that the claimant suffered an injury by occupational disease on or about April 23 of 2002, but argues that all necessary medical care has been previously provided. In Injury Number 02-152023, the employer and its insurer deny that the claimant suffered a compensable injury by occupational disease in September of 2002, and has provided no benefits for such claim of injury to date.

With respect to Injury Number 02-152023, the parties agree that the three issues to be resolved at hearing are injury by occupational disease, medical causation, and need for future medical care.

The parties further agreed and notice was taken that the claim for compensation in Injury Number 02-041682 was filed with the Division of Workers' Compensation and date stamped on 10/15/02; and that the claim for compensation in Injury Number 02-152023 was filed and date stamped on 6/09/03.

Ms. Otey appeared at hearing and testified on her own behalf. The claimant further submitted the deposition testimony of Bruce Schlafly, M.D. The employer and AIG Claim Services, Inc. submitted the deposition testimony of David M. Brown, M.D. The employer and American Home Assurance Company submitted the deposition testimony of Dr. Robert E. Tucker.

EXHIBITS

The following exhibits are in evidence:

Claimant's Exhibits

- A. Compilation of medical records, with index
- B. Deposition of Bruce Schlafly, M.D., taken on March 10, 2004
- C. Report of Injury

Employer and AIG Claim Services, Inc. Exhibit

- 1. Deposition of David M. Brown, M.D., taken on March 8, 2004

Employer and American Home Assurance Company Exhibit

- AA. Deposition of Robert E. Tucker, M.D., taken on 4/7/04

FINDINGS OF FACT AND RULINGS OF LAW

Ms. Otey is a 38-year-old mother of three children, and a high school graduate who has been employed by this employer as a telephone operator since April of 1988.

On 4/23/02 Ms. Otey was working at the employer's office located in Wentzville, Missouri, and her workstation consisted of a chair and armrest; a desk that could be lowered or raised; a computer and keyboard; and a headset that could be plugged into a board under the desk.

Ms. Otey relates that she was constantly using the keyboard to retrieve information per request received by telephone from the customers, noting that on or about 4/23/02 a call would come in and go out on a frequency of every 23 seconds. Claimant has witnessed a tremendous increase in call volume from when she first began in

1988 to the present, and attributes that increase to changes in technology, the advent of mobile phones, and the increase in services provided.

On 4/23/02, while working at her workstation, Ms. Otey began to suffer unbearable pain in her wrists to her mid arm, tingling in her fingertips, and swelling in her hands. Ms. Otey immediately reported her complaints to her supervisor, Ms. Debbie Williford. Claimant had experienced similar but less intense pain complaints beginning in May of 2001, and the pain complaints continued to worsen from 5/01 up to 4/23/02. Claimant is right hand dominant, and her complaints were worse as to numbness in her right upper extremity as opposed to the left.

Claimant had her wrist complaints evaluated at Unity Health Care Center on 4/24/02. Nerve conduction study was scheduled to determine a diagnosis and course of treatment (See Index 1 to Claimant's Exhibit A). Claimant was prescribed pain medication and was advised to work light duty. Dr. Peeples performed electrodiagnostic testing, and his report dated 5/6/02 indicates that the testing provided no evidence of a right or left median or ulnar neuropathy (Index 3 to Claimant's Exhibit A). Dr. Peeples also performed a physical examination as to the wrists, and noted no positive or otherwise remarkable findings. Claimant also met with Dr. Doumit on 5/6/02. Dr. Doumit took a history from the claimant; performed an examination; prescribed the use of wrist splints; and suggested a referral to a hand specialist, Dr. Brown

The employer had no light duty available for Ms. Otey, who received temporary total disability benefits from the employer from 4/28/02 through 5/17/02.

Ms. Otey then met with Dr. David M. Brown at Missouri Bone & Joint Center on 5/17/02. Dr. Brown took a history, took x-rays, and performed an examination of the hands. Dr. Brown noted that there was no visible swelling in the hands; clinical testing was all noted to be negative as to the cubital and carpal tunnels; no intrinsic muscle atrophy was noted in either hand; and the x-rays were noted to be negative for significant bone or joint abnormality. Dr. Brown further noted the nerve conduction study to be unremarkable, and concluded that claimant should remain under observation after his examination revealed that claimant was "negative for peripheral compression neuropathy or specific tendinitis" (See Index 2 to Claimant's Exhibit A). Dr. Brown released Ms. Otey to return to work without restrictions.

Ms. Otey returned to her employment, but continued to suffer the same pain complaints as to her hands. Ms. Otey performed the same duties from 4/23/02 until her termination from employment with Verizon on 9/10/02. Ms. Otey relates that in September of 2002 she had pain and swelling in her wrists; numbness in her fingertips; and was having difficulty with such activities as driving, using small items, and maintaining her grip on things.

On 3/12/03 Ms. Otey met with Dr. Bruce Schlafly for an evaluation of her hand complaints. Dr. Schlafly took a history, performed an examination, and noted that his findings were positive as to Tinel's sign over the median nerve of each wrist; positive Phalen's test bilaterally for carpal tunnel syndrome; and decreased sensation to the pinwheel in the right index finger. Claimant was noted to have some trouble with two-point discrimination, and to have pressure at the median nerve producing tingling radiating into her fingers. Dr. Schlafly concludes that Ms. Otey suffers from a bilateral carpal tunnel syndrome, and recommends surgery on the right wrist, holding in abeyance a left carpal tunnel surgery until after the right has been performed.

On November 21, 2003, the claimant participated in an independent medical examination performed by Dr. Robert E. Tucker. Dr. Tucker took a history from Ms. Otey, reviewed certain records, elicited complaints, and performed a physical examination. Dr. Tucker found all manner of inconsistencies in his findings with respect to grip strength testing, pinwheel testing of sensation, and as to Phalen's and Tinel's testing for a neuropathy, and ultimately concluded that the claimant did not have the kind of objective findings that would support a diagnosis of carpal tunnel syndrome. Dr. Tucker concluded that the complaints made by Ms. Otey were more typical of a myofascial disorder. (Employer and American Home Assurance Exhibit AA, at page 25).

Ms Otey remained unemployed from her last day of employment with Verizon in September of 2002, until beginning her current employment as an office manager with Crossroads Church in April or May of 2004. Ms. Otey notes that her current duties require that she sit in on meetings among the pastors; receive telephone calls and e-mails; and prepare a weekly church bulletin. Claimant relates that her current complaints are the same as she suffered back in April of 2002, and notes that her hand complaints will wake her up as many as three times a night.

Ms. Otey acknowledges that she has also treated for a coronary condition; that she has had a quadruple coronary bypass surgery; and believes that her termination from employment with Verizon was due to poor attendance related to her heart condition over the years. Claimant acknowledges that she receives social security disability for a number of health issues, having initially made application in June of 2002 while still in the employment of Verizon. Ms. Otey further acknowledges that her hobbies include crochet, cross-stitching, baking, and putting together photo albums.

MEDICAL CAUSATION/INJURY BY OCCUPATIONAL DISEASE

The employer and its insurer, AIG Claim Services, Inc., admit that the claimant suffered an injury by occupational disease on or about 4/23/02, but argues 1) that the condition suffered by the claimant is not carpal tunnel syndrome and 2) that if claimant is indeed suffering from carpal tunnel syndrome, a medical causal relationship has not been established between that diagnosis and an exposure at work on or about 4/23/02. Lastly, this employer and AIG Claims Services, Inc. argues that if the claimant developed a carpal tunnel syndrome on a later date, then under the last exposure rule, the employer and insurer liable for such occupational disease is the last employer to expose the employee to the occupational hazard prior to the filing of the claim. Inasmuch as American Home Assurance was the insurer of the employer on the date of last exposure, 9/10/02, and inasmuch as the claims for compensation were filed on 10/15/02 and on 6/09/03, the argument is that American Home Insurance would be the liable insurer for a work related carpal tunnel syndrome.

Dr. Brown does not put a face to the condition suffered by Ms. Otey as of 5/17/02, the date he released her to return to work without restriction, but can not say that it is a carpal tunnel syndrome in the absence of confirming diagnostic or clinical findings. Dr. Schlafly did not perform his evaluation until March 12, 2003. At that point, the claimant continued to work and to perform the same duties from 4/23/02 until 9/10/02, save for the 2 and 6/7 weeks (4/28/02 through 5/17/02) during which she was receiving temporary total disability benefits. Dr. Schlafly agrees that he would not be able to arrive at a diagnosis of carpal tunnel syndrome based purely on the medical records that existed prior to having evaluated Ms. Otey in March of 2003.

“Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause”. Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

Medical causation as to an overuse condition of the upper extremities cannot be considered uncomplicated. The commission may not substitute an administrative law judge’s personal opinion on the question of medical causation for the uncontradicted testimony of a qualified medical expert. Wright v Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo banc 1994), citing Merriman v. Ben Gutman Truck Service, Inc., 392 S.W.2d 292, 297 (Mo. 1965).

The claimant had no positive findings to support a diagnosis of carpal tunnel syndrome until after her last date of exposure to a hazard at work on 9/10/02. There is no disputing that the claimant was exposed to the hazard of suffering a repetitive use disorder while engaged in her occupation at Verizon as a telephone operator. Dr. Brown acknowledged that he was familiar with the functions performed by Verizon operators, and would not hesitate to find a carpal tunnel syndrome to be work related, supposing he believed such a condition actually existed. (Employer and AIG Claim Services, Inc. Exhibit No. 1, at page 21).

The negative findings by Dr. Peeples per his nerve conduction study notwithstanding, Ms. Otey has all the classic complaints for a carpal tunnel syndrome. The claimant is found to be suffering from numbness in her fingers, weakness in her grip that compromises her ability to grasp objects, and pain in her upper extremities at the wrist that causes her to awaken at night. Dr. Schlafly found the claimant to have positive findings of carpal tunnel syndrome per his clinical evaluation, and believes the condition to be related to the work activity of Ms. Otey as an operator for Verizon.

Subsection 2 of Section 287.063 RSMo provides as follows:

The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.

The testimony of Dr. Schlafly, coupled with the credible complaints of Ms. Otey as to her upper extremities, persuades that as a result of an exposure to a hazard at work through 9/10/02, Ms. Otey suffered an injury by repetitive motion known as bilateral carpal tunnel syndrome. American Home Assurance Company insured the liability of the employer for such injury as of the last date of exposure, and as of the date both claims were filed in Injury Numbers 02-041682 and 02-152023. Claimant is found to have suffered a compensable injury by occupational disease, known as a bilateral carpal tunnel syndrome, and per sections 287.067 and 287.020 RSMo, Verizon is the liable employer, and American Home Assurance is the insurer covering the liability for the compensable work injury. Johnson v. Denton, 911 S.W.2d 286,288 (Mo. banc 1995); Oswald v. National Fabco

Mfg. Inc., 77 S.W.3d 611,612 (Mo. banc 2002).

FUTURE MEDICAL CARE

Section 287.140.1 RSMo, provides, in part, as follows: "In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

The claimant is not obliged to present evidence of specific medical treatment or procedures that would be necessary in the future in order to receive an award for medical care. Bradshaw v. Brown Shoe Co., 660 S.W.2d 390 (Mo.App.1983). It is sufficient to show "by reasonable probability" the need for additional medical treatment as a result of the work injury. Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823,828 (Mo.App. S.D. 1995).

The testimony of Dr. Schlafly persuades that the claimant has yet to reach maximum medical improvement, and that there is further medical treatment available to cure or relieve of the effects of a bilateral carpal tunnel syndrome. The employer and its insurer, American Home Assurance Company, are to provide the necessary treatment, consistent with the opinion of Dr. Schlafly.

This award as to Injury Number 02-152023 is temporary or partial in nature, and the matter to remain open pending an acknowledgment of the parties that issues are ripe for further adjudication.

Date: October 5, 2004

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ GARY ESTENSON
GARY ESTENSON
Director
Division of Workers' Compensation