

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

Injury No.: 03-060302

Employee: Geneva Sellers
Employer: A. G. Edwards & Sons, Inc.
Insurer: Sentry Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: May 19, 2003
Place and County of Accident: St. Louis City, 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 July 16, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued July 16, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 6th day of March 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Geneva Sellers

Injury No.: 03-060302

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: A. G. Edwards & Sons, Inc.

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

Additional Party: Second Injury Fund (open)

Insurer: Sentry Insurance Company

Hearing Date: May 23, 2007

Checked by: LJW:tr

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: May 19, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City, MO
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 occurred or occupational disease contracted: While performing her job duties, Employee developed left cubital and carpal tunnel syndrome, and right carpal tunnel syndrome.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left elbow and wrist, and right wrist.
14. Nature and extent of any permanent disability: 15% PPD referable to the right wrist, 27.5% PPD at the elbow referable to the left wrist and elbow, 15% multiplicity, and 7 weeks disfigurement.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Geneva Sellers

Injury No.: 03-060302

- 17. Value necessary medical aid not furnished by employer/insurer? \$18,150.80
- 18. Employee's average weekly wages: \$337.41
- 19. Weekly compensation rate: \$224.94 / \$224.94
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$18,150.80
21 weeks of temporary total disability (or temporary partial disability)	\$4,723.74
96.6 weeks of permanent partial disability from Employer	\$21,729.20
7 weeks of disfigurement from Employer	\$1,574.58

22. Second Injury Fund liability: Open

Total:	\$46,178.32
--------	-------------

23. Future requirements awarded: None

Said payments to begin immediately 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 25% of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Mark Moreland

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Geneva Sellers

Injury No.: 03-060302

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: A. G. Edwards & Sons, Inc.

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

Additional Party: Second Injury Fund (open)

Insurer: Sentry Insurance Company

Checked by: LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on May 23, 2007. Post-trial memorandums were received, and the case was submitted on the June 30, 2007. Attorney Mark Moreland represented Geneva Sellers (Claimant). A.G. Edwards & Sons, Inc., (Employer) was insured by

Sentry Insurance Company, and represented by Attorney Ben Shelledy. Pursuant to agreement by the parties Second Injury Fund (SIF) will remain open.

Prior to the start of the hearing the remaining parties identified the issues for disposition in this case: arising out of and in the course/scope of employment; occupational disease; medical causation; medical expenses in the amount of \$18,150.80; temporary total disability (TTD), future medical care; and the liability of Employer for permanent partial disability (PPD) benefits and disfigurement. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits A-E, and Employer offered Exhibits 1-2. All exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be reviewed and summarized.

1. Claimant is forty-two years old, began working for Employer as a wire operator in December 1999, and left Employer's employment in September 2003. Claimant's job duties included data entry, typing, and filing. 90% of Claimant's work day was spent in data entry. Claimant utilized a keyboard that was located an arms length from her body, rested her arms on her desk, used her left arm to flip the tickets she was entering, and used her right hand to enter the data.
2. Claimant has a medical history of undergoing a breast reduction during 2002 due to pain in her upper back, shoulders, and neck, took thyroid medication for approximately two years during 2003-2005, and is a smoker. Claimant is 5'3" and weighs 187 pounds.
3. During April or May 2003, Claimant developed numbness in her left ring and small fingers, and pain in her left forearm and right hand. Claimant told her supervisor about the numbness, but no medical care was offered. During June 2003, Claimant sought medical care with her private physician, and a nerve conduction velocity (NCV) was ordered that was reported as within normal limits. Claimant next sought care with Dr. Glogovac, a hand surgeon. Dr. Glogovac diagnosed left cubital and carpal tunnel syndrome. Dr. Glogovac took Claimant off work from June 24, 2003 until July 8, 2003.
4. Claimant again approached Employer about her condition, and Claimant was sent for a medical evaluation with Dr. Crandall, a hand surgeon. Dr. Crandall examined Claimant on June 30, 2003. Upon examination, Dr. Crandall noted an equivocal left brachial plexus provocative test, an equivocal left ulnar and median Tinel's sign, numbness of her left ring and small fingers during Phalen's testing, numbness in all left fingers during left arm raise testing, and pain in her left ring and small fingers with provocative testing. Dr. Crandall suggested a keystroke analysis be performed, and a possible repeat NVC. Dr. Crandall did not find a relationship between cubital tunnel syndrome and her typing. On October 20, 2003, Dr. Crandall further opined it is not uncommon for patients who have undergone breast reduction to experience pain in the ulnar nerve distribution. Additionally, Dr. Crandall opined "women who have large breasts wear very tight bras and it cuts across their shoulders and pinches the nerves before they enter the clavicle and then they have pains all the way down their arm." Dr. Crandall also found Claimant typed between 44,000 – 47,000 keystrokes per day, and OSHA does not relate development of carpal tunnel syndrome to typing unless the worker types four hours of continuous typing a day or 60,000 keystrokes.
5. Claimant left her employment with Employer at the end of September 2003. Claimant went to work for Wal-Mart as a cashier on October 7, 2003. On January 14, 2004, Dr. Glogovac performed a left cubital tunnel decompression, and provided off-work slips for Claimant from January 12, 2004 until February 17, 2004. On August 4, 2004, Dr. Glogovac performed a right carpal tunnel decompression, and provided off-work slips for Claimant from July 30, 2004 until November 1, 2004. On December 21, 2005, Dr. Glogovac performed a left carpal tunnel decompression. The total cost for Claimant's medical care was \$18,150.80.

6. Dr. Schlafly examined Claimant on two occasions, October 21, 2005 and December 1, 2006. Upon Dr. Schlafly's last examination, Dr. Schlafly noted a positive Tinel's and Phalen's sign over Claimant's median nerve at her left wrist, and indicated Claimant had difficulty with two point discrimination testing involving her left ring and small fingertips. Dr. Schlafly diagnosed Claimant with bilateral carpal tunnel syndrome, and left cubital tunnel syndrome, and found her work to be a substantial factor in her development of the syndromes. Dr. Schlafly rated Claimant's disability as 25% PPD of her right wrist, 27.5% PPD of her left wrist, 35% PPD of her left elbow, and opined Claimant should receive extra compensation due to multiplicity. Dr. Schlafly testified OSHA has never established a minimum number of keystrokes needed to produce carpal tunnel syndrome, and cubital tunnel syndrome starts with repetitive motion of the fingers in association with muscle movement along with flexed elbow position. Further, Dr. Schlafly testified nothing in his review of Claimant's medical records indicated she underwent breast reduction surgery for median or ulnar nerve problems.

7. Dr. Ollinger examined Claimant on January 16, 2006. Dr. Ollinger indicated the abnormal finding upon physical examination included numbness and tingling of Claimant's left ring and small fingers. Dr. Ollinger did not find any positive responses to Claimant's cervical brachial area or findings of radiculopathy. Dr. Ollinger did not believe Claimant's work duties were a substantial factor in causing Claimant's upper extremity disorder. Dr. Ollinger opined there was a "possibility" of a connection between mammary hyperplasia and Claimant's upper extremity disorder, Claimant's obesity is a risk to development of carpal tunnel syndrome, and Claimant's thyroid condition was also an additional risk. Dr. Ollinger noted Claimant still has symptoms despite receiving treatment. Dr. Ollinger rated Claimant's disability at 2% PPD to her left elbow, and 2% PPD to her right wrist.

8. As of hearing, Claimant continues to experience aching and decreased strength. Her hands go numb if she raises her hands over her head, and her left ring and small fingers remain numb. Regarding her right wrist, Claimant complains of pain and decreased strength.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to arising out of, occupational disease and medical causation

Claimant alleges an occupational disease of left cubital and bilateral carpal tunnel syndromes that arose from her work duties. Section 287.067 RSMo., defines occupational disease as:

... an identifiable disease arising with or without human fault out of and in the course of the employment.[1] 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 to 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."

In cases of alleged occupational disease, the disease must be occupationally induced, rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App.1991) (overruled on other grounds). An occupational disease is not compensable if work is merely "a triggering or precipitating factor." §287.067.2 RSMo. The exposure to the disease must be greater or different from disease exposure to the general public, and there must be a disease/work link common to the specific job or profession. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63 (Mo.App. 1995). The work must be a substantial factor in the cause of the resulting medical condition or disability. §287.020.2 RSMo. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining "substantial factor." *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds).

Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by 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 (Mo.App. 1991) (overruled on other grounds). Drs. Crandall and Ollinger do not find Claimant's work to be a substantial factor in her development of bilateral carpal tunnel syndrome and left cubital tunnel syndrome. Dr. Schlafly reaches the opposite conclusion. All three physicians are highly qualified hand surgeons. However, Drs. Crandall and Ollinger rely heavily on the theory Claimant's typing at work did not meet the threshold standard set by either OSHA (Dr. Crandall) or the Kilbom study (Dr. Ollinger) to place a worker at risk for repetitive motion injuries.

As demonstrated upon cross-examination, OSHA has only indicated a worker needs to engage in four hours of typing in a steady manner to be placed at risk. OSHA has never stated an individual must type 60,000 keystrokes a day before the risk occurs. Dr. Crandall has extrapolated this figure, and used this figure to reach the conclusion Claimant does not type enough during the day to have developed her injuries.[2] Further, the keystroke analysis conducted of Claimant's "work duties" never involved Claimant. The keystroke analysis was conducted by monitoring the keystrokes performed by co-workers doing similar work. It is unknown if Claimant would have actually typed more or less than the individuals studied. Likewise, no evidence was produced to establish the validity of the Kilbom study, which was used as the threshold standard by Dr. Ollinger.

There is no doubt Claimant had factors other than her work duties that placed her at risk for nerve entrapment injuries. However, as stated in *Cahall*, a causative factor may be substantial even if it is not the primary or most significant factor. Claimant credibly testified she spent 90% of her eight hour day entering data for Employer. I find Claimant established by competent and substantial evidence she developed an occupational disease involving her right wrist and left arm that arose out of and in the course of her employment with Employer due to the repetitive motion required of her job. I find Dr. Schlafly's opinion to be persuasive, and Claimant has met her burden to establish her injuries were occupational diseases that were medically causally related, and that arose out of and in the course and scope of her employment.

Issues relating to past medical expenses and temporary total disability

Claimant requests total reimbursement of medical expenses in the amount of \$18,150.80. Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Itemized bills were supported by the appropriate medical records, and Claimant's testimony. Dr. Schlafly testified the medical treatment received was necessary. The reasonableness of the bills was not challenged. Accordingly, I find Employer liable for \$18,150.80 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of her work related injury.

Claimant seeks TTD benefits for the periods Dr. Glogovac authorized her off work. TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). I find Claimant is entitled to twenty-one weeks of TTD benefits not provided by Employer. Dr. Glogovac authorized Claimant to be off work from 6/24/03-7/8/03, 1/12/04-2/17/04, and 7/30/04-11/1/04. Accordingly, I find Employer liable for \$4,723.74 in TTD benefits.

Issues related to future medical care

Claimant seeks future medical care. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled in part). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury.

Id. When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986). Dr. Schlafly indicated in his last report Claimant could benefit from an ulnar nerve transposition performed at her left elbow, however, Claimant does not wish to undergo this procedure. Dr. Schlafly makes no additional recommendations for other treatment. Based on the evidence presented, I do not find Employer liable for future medical benefits.

Issues relating to permanent partial disability & disfigurement

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds). Section 287.190.4 RSMo., allows additional compensation, not to exceed forty weeks, to be awarded for disfigurement when an injury produces scarring to the head, neck and arms. Dr. Ollinger rated Claimant's disability as 2% PPD referable to Claimant's right wrist, and 2% PPD at the level of the left elbow. Dr. Schlafly rated Claimant's right wrist at 25% PPD, her left wrist at 27.5% PPD, and 35% PPD referable to her left elbow. Due to the multiple injuries involved, Dr. Schlafly recommended additional compensation due to multiplicity be awarded. Dr. Crandall did not rate the injuries, and no physician provide an opinion regarding scarring.

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Based on the evidence presented, I find Claimant has sustained 15% PPD referable to her right wrist, regarding her left wrist and elbow I award 27.5% PPD referable to her left elbow, and an additional 15% multiplicity for which Employer is liable. Additionally, I find Employer liable for 7 weeks disfigurement. In total, Employer is liable for \$23,303.78 in PPD and disfigurement.

CONCLUSION

In summary, Claimant sustained an occupational disease on May 19, 2003 that arose out of and in the course of her employment with Employer. Claimant is awarded \$18,150.80 in past medical expenses, \$4,723.74 in past TTD benefits, and \$23,303.78 in permanent partial disability and disfigurement benefits. Claimant's attorney is entitled to a 25% lien of any payments made to Claimant.

Date: _____

Made by: _____

LINDA J. WENMAN

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker

Acting Director

Division of Workers' Compensation

[1] Section 287.020.3(1) defines injury as that which has arisen out of and in the course of employment. Section 287.020.3(2) instructs that to arise out of and in the course of employment an injury must meet four requirements; (a) the employment is a substantial factor causing the injury, (b) the injury is a natural incident of the work/employment, (c) the employment was a proximate cause of the injury, and (d) the injury is not from risk unrelated to the employment to which other workers would be equally exposed outside of employment in normal life.

[\[2\]](#) Although Dr. Crandall heartily invokes the OSHA guidelines, Dr. Crandall testified the OSHA standards were never put in place for workers' safety, rather, the guidelines (and brief period of sanctions) were designed to "allow for class action lawsuits."