

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

Injury No.: 02-047405

Employee: Traci Townser
Employer: First Data Corporation
Insurer: Pacific Employers Insurance Company
Date of Accident: Alleged May 20, 2002
Place and County of Accident: Alleged 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 May 6, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 6, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of January 2006.

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 (ALJ) should be reversed.

The majority of the Commission concludes that the evidence presented by employer is more credible, believable,

and trustworthy than the evidence presented by employee. I disagree.

The employee is claiming injury to her right hand as the result of cumulative trauma sustained in her 7 years as a customer service representative. Dr. Phillips, Dr. Crandall, and Dr. Cohen all diagnosed employee with carpal tunnel syndrome. The question before us is whether there is a causal link between employment and the condition of ill being.

The ALJ and the majority were of the opinion that employee did not establish the work-relatedness of her condition. However, I find the opinion of the ALJ deeply flawed and based upon factors other than the statutory requirements of proof.

In the preamble to his rulings of law, the ALJ provides a unique reading of the statutory provisions governing occupational disease. I quote the entire flawed paragraph:

The Missouri Workers' Compensation law permits recovery for chronic hand symptoms that result from the workplace under the category of occupational disease if the symptoms are the result of "repetitive motion." Section 287.067.7 RSMo (2000). Thus, the legislature limits employer liability for hand symptoms which do not result from a single accident to those cases only in which the symptoms result from "repetitive motion." Id. The exposure to repetitive motion must be proven like any other element of Claimant's case.

Award Page 5

Section 287.067.7 RSMo does not state that recovery can be had for chronic hand symptoms only if the symptoms are the result of "repetitive motion." Section 287.067.7 is the "three-month" rule describing how to determine which of two or more exposing employers is liable if an occupational disease was caused by repetitive motion, and the most recent exposure was for less than three months. That rule has no bearing on this case because the hazardous exposure with this employer was for much longer than three months. In addition, the subsection applies to any occupational disease caused by repetitive motion, not just diseases of the hand. The ALJ's interpretation that this section is a legislative expression limiting employer liability for hand injuries is inexplicable.

The ALJ enlightens us with a definition of ergonomics. It is one thing to interject material which is not in the case but quite another to interject material which is incorrect. Mr. Webster's dictionary advises that ergonomics is the "applied science of equipment design intended to reduce operator fatigue and discomfort." The ALJ, however, seems to equate exposure with ergonomics. This is a conclusion without foundation.

The ALJ discounts the conclusion of job relatedness advanced by Dr. Cohen because the doctor did not have an ergonomic study. I know of no requirement for such a study before a medical expert may offer an opinion. Of course, that is because no such requirement exists. In any event, the ergonomic studies offered in this matter were conducted on different customer service jobs than the job performed by employee. Dr. Crandall's causation opinion, based entirely on an analysis of job duties that are not performed by this employee, is devoid of value and is entirely unreliable.

The ALJ goes on to attack the conclusion of Dr. Cohen because the doctor did not premise the "statutory requirement of a precipitating repetitive motion." What is the basis for this conclusion? The report of Dr. Cohen was admitted into evidence without objection. Dr. Cohen diagnosed an "overuse disorder," suggesting repetitive motion. How then, can the ALJ conclude that this factor was not considered by the doctor in formulating his opinion?

The following paragraph from the award is also troubling:

More important is the question of why, after five or more years, Claimant begins to have symptoms. It is axiomatic that a cause and effect relationship be identified. This cannot be done after many years of exposure with no symptoms. The onset of symptoms is too remote from the commencement of exposure to the alleged repetitive motion.

Award Page 7

The errors in this paragraph are numerous. Dr. Crandall's records reflect that employee reported having problems with her right hand off and on since 1998 -- three years after the exposure began. I think it is a stretch to characterize five years as "many years." Certainly, three years does not qualify as "many years."

Most troubling with the final sentence of the above paragraph is that no medical expert offered an opinion that the onset of employee's symptoms was too remote from the commencement of exposure. The ALJ supplies his lay opinion as medical fact to defeat causation. "[A]ny administrative decisionmaker who has made an unalterable prejudgment of operative adjudicative facts is considered biased." *Fitzgerald v. Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990).

The ALJ advises us that it is "axiomatic" that a cause and effect relationship be identified. This statement is a drastic oversimplification of a complex legal concept. Proof of causation is not a matter of common sense, it is a statutory requirement. See §§287.067 and 287.020 RSMo. The legislature would not have described the causal relationship several different ways, if it's meaning was self-evident. Nor would courts have published countless decisions telling us what causation means. This type of empty rhetoric serves no purpose in a workers' compensation decision.

The ALJ concludes that a cause and effect relationship cannot be shown "after many years of exposure without symptoms." Nowhere in the expert medical evidence, consisting of the reports of Dr. Cohen and Dr. Crandall, does either physician offer an opinion remotely similar to the ALJ's blanket assertion.

The ALJ's causation criteria are not set forth in the Workers' Compensation Law. The ALJ's causation criteria are not supported by expert medical evidence in the record. This is an improper interjection of the ALJ's own opinions into the case before him without evidentiary support. It is axiomatic that the ALJ should decide the case before him as it is presented without providing the help or hindrance of his own views and opinions.

The ALJ would have employee's expert, Dr. Cohen predicate causation "to the exclusion of other possible causes." This is a new and groundbreaking requirement found nowhere in the Workers' Compensation Law. The statute requires that the employment be a substantial factor in causing the injury. Missouri case law establishes that causation be proven within a reasonable degree of medical certainty. There is no legal standard such as that espoused by the ALJ. The ALJ's imposition of this evidentiary requirement is a clear indication of the impossible, unreasonable and improper burden of proof this ALJ would have employee establish. The standard of proof employed by this ALJ is unique to him and at odds with the statutory requirements.

I find that employee has established that her work exposed her to the hazards of repetitive motion, specifically keyboarding and mouse use, hazards to which she was not exposed outside the workplace. I find the opinion of Dr. Cohen to be the most persuasive and credible evidence regarding causation. Dr. Cohen believes that employee's workplace exposure caused her upper right extremity condition.

I would reverse the award of the administrative law judge denying compensation. I would award compensation including past medical expenses, temporary total disability benefits, and permanent partial disability benefits. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Claimant: Traci Townser

Injury No.: 02-047405

Dependents: N/A

Before the
Division of Workers'
Compensation

Employer: First Data Corporation

Additional Party:

Department of Labor and Industrial
N/A Relations of Missouri
Jefferson City, Missouri

Insurer: Pacific Employers Insurance Company

Hearing Date: February 8, 2005

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 Claimant in employ of above employer at time of alleged accident or occupational disease? N/A
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 Claimant 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: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Claimant: Traci Townser

Injury No.:

02-047405

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Claimant's average weekly wages: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable:

None

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: N/A

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 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 Claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Claimant: Traci Townser

Injury No.: 02-047405

Dependents: N/A

Before the
Division of Workers'

Employer: First Data Corporation

Compensation

Additional Party: N/A

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

Insurer: Pacific Employers Insurance Company

Checked by: JED

This case involves a disputed repetitive motion claim alleged by Claimant with a filing date of May 21, 2002 and an exposure date of May 20, 2002. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is not a party to this claim. All parties are represented by counsel.

Issues for Trial

1. Incidence of occupational disease (exposure and medical causation);
2. Unpaid medical expenses;
3. Unpaid temporary total disability benefits; and
4. Nature and extent of permanent disability.

Findings of Fact

1. The average weekly wage was stipulated at \$809.28 resulting in applicable TTD/PPD rates of \$539.52/\$329.42. Employer paid medical expenses in the amount of \$2,342.65. Employer has paid no compensation. Employer disputes that Claimant sustained an occupational disease as a result of alleged repetitive trauma.
2. Claimant began working for employer in July of 1995 as a customer service representative. Claimant continued working for the employer through July of 2003.
3. Claimant testified that her job duties as a customer service representative included the intake of telephone calls and the input of information into a computer with regard to money transfers. The employer was also known as Western Union Financial Services.
4. Claimant testified that after doing the work for five years in July of 2000, she experienced right upper extremity complaints. Claimant was sent to Dr. David Brown. A nerve conduction study was performed on July 21, 2000 and the study was negative with regard to the right upper extremity.
5. In his report of August 2, 2000 Dr. David Brown, an orthopedic surgeon specializing in hand cases, indicated to Claimant that the "cause of her symptoms in regard to her right upper extremity were not clear." Claimant was released from treatment and no further treatment was recommended. Claimant kept working full time/full duties.
6. Claimant indicated that in 2001 there were some minor changes made to her desk area which included some changes to the edge of her desk. Claimant claims that her computer input and the work position of her wrists caused the right upper extremity complaints.
7. Claimant continued to work full time/full duties. In May of 2002 Claimant again complained to the employer of problems with her right upper extremity and felt that her right hand was hurting from typing.
8. The company provided evaluation through Concentra (Dr. Zahid) who determined that the condition was not work-related in a report of July 22, 2002. Claimant was also evaluated by Dr. Phillips, a neurologist, and Dr. Crandall, a hand specialist, who performed nerve conduction studies in 2002 and 2003.
9. Dr. Crandall opined that the right hand condition was not at a surgical level and no surgery was recommended. Claimant was released from Dr. Crandall's care on July 8, 2003. Dr. Crandall opined the condition was not work-related and that Claimant's computer input duties were not intense enough to cause symptoms in the right upper extremity.
10. The employer presented the evidence of Jennifer Christy, an industrial engineer and ergonomic expert, who performed a full keystroke analysis with regard to some of Claimant's job duties that she performed through the years for First Data Corporation. Jennifer Christy concluded that the levels of typing were safe and posed no industrial hazard. Ms. Christy provided testimony by deposition and a full ergonomic report which concluded that the levels of typing were well within generally accepted safe industrial engineering standards.
11. Dr. Crandall was then provided with a copy of the ergonomic study, which supported his prior opinion that Claimant's typing was always at a safe and non-hazardous level from an industrial engineering/ergonomic and medical point of view.
12. Claimant was also evaluated on her own by Dr. Raymond Cohen, a neurologist, who provided an opinion that Claimant's right hand and right elbow conditions were work-related.
13. Claimant came under the care on her own with Dr. Glogovac who, on December 9, 2003 performed surgery to the right wrist and right elbow.

14. The parties agreed that Claimant was temporary totally disabled from December 9, 2003 through January 31, 2004.

15. Claimant returned to work full time/full duties on February 1, 2004. Dr. Glogovac did not provide an opinion on causation. Furthermore, Dr. Crandall's final opinion was that Claimant suffered from very mild carpal tunnel syndrome and there was no indication that Claimant suffered from any type of right elbow syndrome. Dr. Crandall did not recommend surgery and specifically indicated that the risk of surgery would outweigh any potential benefits of surgical intervention.

16. Claimant voiced no complaints with regard to her right elbow condition.

17. The discovery deposition of Eileen Gibson, Human Resources Manager, offered by Claimant is essentially irrelevant to the medical issues at hand and any relevancy objections posed by employer in her deposition are sustained.

RULINGS OF LAW

Occupational Disease: Exposure and Medical Causation

The Missouri Workers' Compensation law permits recovery for chronic hand symptoms that result from the workplace under the category of occupational disease if the symptoms are the result of "repetitive motion." Section 287.067.7 RSMo (2000). Thus, the legislature limits employer liability for hand symptoms which do not result from a single accident to those cases only in which the symptoms result from "repetitive motion." Id. The exposure to repetitive motion must be proven like any other element of Claimant's case.

The science of work place exposure is called ergonomics. Ordinary disease of life, not traceable to the workplace, are not compensable under the workers' compensation law. Section 287.067.1 RSMo (2000). Thus, in order to recover for repetitive motion, Claimant must prove an exposure (to repetitive motion) in the work place that caused her hand symptoms. Pain and inability to work is not an evidentiary proof of medical causation. Aggravation of symptoms is not proof that the alleged repetitive activity is a substantial cause. Common sense dictates that many types of activity imposed on sore tissue will aggravate symptoms but this does not also mean that the imposed activity is the *cause* of the pathology.

Claimant's testimony was not probative of medical causation. 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 Sprinklers Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). Here, Claimant's exposure to typing is undisputed. The exposure, as a full time customer service representative, was essentially unchanged since 1995. However, despite constant exposure to the alleged repetitive motion, Claimant's symptoms first manifest after more than 5-7 years on the job. Although Claimant presented an expert on causation, Claimant's position is untenable for several reasons.

Claimant must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200 (Mo. App. 1991). Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 416 (Mo. App. 1988); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Estes v. Noranda Aluminum, Inc., 574 S.W.2d 34, 38 (Mo. App. 1978).

Here, Dr. Cohen made a statement of causation without explaining why he came to his conclusion, or to the exclusion of other causes. Dr. Cohen had no ergonomic study before, or after, he made his assertion of work-relatedness. Claimant's complaints at first were diffuse and a nerve conduction study in 2000 revealed that her

exam was normal and, per Dr. Brown, the "cause of her symptoms in her right upper extremity were not clear." The subsequent changes in complaints and diagnosis of work-related disease by Dr. Cohen are curious in the record. Even in May of 2002 and thereafter, the nerve conduction studies only revealed very mild carpal tunnel syndrome and no discernible diagnosis of the right elbow and the left upper extremity was completely normal. Despite these results underwent surgeries with Dr. Glogovac who did not testify.

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. Sillman v. Montgomery & Associates, 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). An expert must identify that which is relied on by those in the respective areas of science McDonagh, supra. An ergonomic study seems to be that which must be relied on in order to form a probative opinion. Dr. Cohen's assertion has little utility since he did not consider the ergonomics study or explain how Claimant's work causes the condition.

In contrast, Dr. Crandall's opinion was supported by the expert keystroke analysis of Jennifer Christy, Industrial Engineer. Dr. Crandall reviewed an ergonomic job analysis and concluded that work was not a substantial factor in causation. Dr. Crandall's opinion adheres to establish norms of expert proof. The opinion evidence, together with the illogic that Claimant endured the same exposure for numerous years and suddenly manifests a work-related repetitive trauma compels a finding that her condition is not work-related.

Dr. Cohen's statement is insufficient without first premising the precipitating "repetitive motion." More weight might be given his opinion if hand surgery was his specialty and could explain the ergonomics of Claimant's alleged exposure. Employer's expert ergonomic evidence was un rebutted. Missouri courts recognize that medical personnel, other than medical doctors, may be qualified to testify to matters "within the limited and precise range of their medical specialties." Sigrist By and Through Sigrist v. Clarke, 935 S.W.2d 350, 357 (Mo. App. 1996). More important is the question of why, after five or more years, Claimant begins to have symptoms. It is axiomatic that a cause and effect relationship be identified. This cannot be done after many years of exposure with no symptoms. The onset of symptoms is too remote from the commencement of exposure to the alleged repetitive motion.

There was no medical evidence or testimony from Claimant to suggest that she had any problem with regard to the right elbow before the surgery. Claimant admitted that she presently had no problems with her right elbow. However, Claimant did testify that she still has some discomfort in her right hand, which may suggest the carpal tunnel surgery was not appropriate treatment based upon the very mild findings of the 2003 nerve conduction study.

-
-

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:

Patricia "Pat" Secret
Director
Division of Workers' Compensation