SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MARILYN REIMER, **HF No. 123, 2003/04**

Claimant, **DECISION**

vs.

CITY OF MOBRIDGE,
a municipal corporation,

Employer,

and

EMC INSURANCE COMPANIES,

Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management on January 10, 2005, in Aberdeen, South Dakota. Marilyn Reimer (Claimant) appeared personally and through her attorney of record, H. I. King. Greg L. Peterson and Melissa E. Neville represented Employer and Insurer (Employer).

ISSUES

1. Whether Claimant provided timely notice pursuant to SDCL 62-7-10;
2. Whether the left cubital tunnel syndrome arose out of and in the course of Claimant's employment; and
3. Whether Claimant's employment activities were a major contributing cause of her left cubital tunnel syndrome.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

1. At the time of the hearing, Claimant was fifty years old and lived in Mobridge, South Dakota.
2. Claimant is approximately 5'1" tall and weighs 220 to 230 pounds. Claimant is a Type II diabetic and has a hyperthyroid condition. In addition, Claimant smokes on average one pack of cigarettes per day.
3. Claimant worked for Employer for sixteen years as a dispatcher with the Mobridge Police Department.

4. Claimant's duties included answering telephone calls, relaying information to various law enforcement agencies, taking hand-written notes during the telephone calls, typing on the computer and typewriter and performing some data entry.
5. For the majority of her career, Claimant worked the evening shift from 3:30 to 11:30 p.m., but she also worked some day shifts from 7:30 to 3:30 p.m.
6. The dispatcher working the evening shift typically received more services calls, which required more data entry. The dispatcher on the day shift typically received more administrative calls, which did not require as much data entry.
7. When Claimant began working as a dispatcher, her work station was approximately four feet long and two and a half feet wide. Her work station was made out of a kitchen countertop set on two filing cabinets. In this space, Claimant used a telephone, two computers with keyboards, a dispatch radio and a typewriter.
8. In 2001, the Police Department moved to a new location and Claimant received a new work station with a longer countertop. Claimant continued to use the same equipment and sat on an adjustable chair.
9. Several pictures depicting Claimant's current workstation were received into evidence. The medical providers had the opportunity to examine these pictures.
10. Claimant did not use a headset when she answered telephone calls.
11. Claimant held the telephone receiver in her left hand, leaned on her left elbow and took notes with her right hand. Claimant stated, "I would reach over the entire desk, grab the phone with my left hand, pick it up and I would put my elbow on the counter and I would take the phone call."
12. Sometimes Claimant cradled the telephone receiver between her neck and left cheek while she took notes or typed on the computer.
13. Claimant's position would vary depending upon the telephone call, but her elbow "was on the table in some form."
14. The length of each call varied depending upon the type of emergency and type of telephone call. Claimant handled at least a third of all the calls received by the dispatcher center.
15. Donovan Glerup, a dispatcher with the Mobridge Police Department for five years, also testified at the hearing. Glerup primarily worked during the day shifts.
16. Glerup provided a report that documented the number of 911 calls received by the dispatch center during July and August 2004. For example, in July 2004, the number of 911 calls totaled 607 or approximately twenty calls per day. However, the report did not document every call that was received by the dispatch center.
17. As with Claimant, Glerup did not use a headset when he answered telephone calls. Glerup, who is 6'2" tall, held the telephone receiver with one hand and took notes with the other hand. He also occasionally leaned on the counter as he took notes.
18. This claim involves Claimant's request for workers' compensation benefits relating to her diagnosis of left cubital tunnel syndrome. Prior to her injury in 2003, Claimant received medical treatment for pain complaints in her upper extremities and neck and for right carpal tunnel syndrome.
19. On October 12, 1995, Claimant sought medical treatment from Dr. J.D. Collins for "pain in the left upper medial arm and just above the medial epicondyle of her

left elbow, localized. There is no referred pain or numbness in the arm." Dr. Collins prescribed Relafen.

20. On October 26, 1995, Claimant returned to see Dr. Collins and he noted "[t]he inflammation of her left elbow and arm, which was probably a sprained arm or some early arthritis, responded to Relafen and is completely asymptomatic now" and no further treatment was necessary.
21. At that time, Claimant was never diagnosed with cubital tunnel syndrome and her condition completely resolved.
22. In 2000, Claimant treated with Dr. Donald Frisco, physiatrist, and Nate Bauer, physical therapist, for right neck and shoulder problems that Claimant attributed to holding the telephone between her cheek and shoulder. Claimant also treated successfully for right carpal tunnel syndrome, which was work-related.
23. On Friday, June 6, 2003, Claimant sought medical attention for pain in her left hand. Claimant saw Gail Bonn, PA-C.
24. During the week before she sought medical treatment, Claimant experienced discomfort in her left hand. Claimant's hand did not hurt, but it felt numb. Claimant described her symptoms as "[i]t's kind of like - - like if you slept on your hand and it tingled, numb type feelings."
25. Claimant did not immediately report her injury to Employer when she noticed the numbness because she did not think it was serious. Claimant thought it was just a "numb feeling."
26. On June 6th, Claimant experienced "an extreme pain from [her] elbow all the way to [her] fourth and fifth finger and inside [her] hand and wrist."
27. Claimant decided to seek immediate medical treatment as soon as she experienced this new symptom.
28. In the medical record from June 6th, PA Bonn noted:

> Marilyn is a 49-year old in with complaints of a tingling numb sensation in her left 4th and 5th fingers. It has been going on for about a week. She does work as a dispatcher at the Police and she does a lot of typing and repetitive motions with that hand. She did have a problem with carpal tunnel on the right in September of [2001], that was pretty much alleviated with conservative measures.

PA Bonn thought Claimant had carpal tunnel of the left wrist and prescribed a cock-up splint and ibuprofen.

29. On Monday, June 9, 2003, Claimant notified Employer of her condition and completed a South Dakota Employer's First Report of Injury (FROI).
30. On the FROI, Claimant wrote "progressive 6-6-03" for the date of injury. Claimant described her injury as "fingers on left hand are numb, pain at wrist and inside hand pain extends up arm."
31. At that time, Claimant thought she had left carpal tunnel syndrome. This assumption was based on Claimant's previous experience with right carpal tunnel syndrome and on the appointment with PA Bonn. Claimant incorrectly attributed her symptoms to continuous typing and use of the computer.
32. Employer mailed the FROI to Insurer on June 10th. Thereafter, Insurer sent Claimant an Employee's Report to complete. Claimant was asked to provide in

her "own words," what caused her injury. Claimant responded that her injury was caused by "constant use of computer & teletype, typewriter."

33. On the same form, Claimant described her pain complaints as "numbness in small finger & ring finger, left side of palm left hand w/ pain radiating from hand to neck."
34. On June 23, 2003, Claimant saw Dr. John Gluscic, an orthopedic surgeon, for complaints of left hand numbness and tingling. Specifically, Claimant reported problems "with left hand numbness and tingling along her ulnar digits for sometime now. It has progressively gotten worse to the point where it is numb all the time. She has no feeling over the 4th and 5th fingers and it has been like that for at least a month. She had no injury or trauma. She does a lot of keyboarding at work."
35. Dr. Gluscic did not think Claimant had left carpal tunnel syndrome; instead, Dr. Gluscic thought Claimant had left cubital tunnel syndrome.
36. Dr. Gluscic recommended nerve conduction studies on Claimant's left arm to confirm his diagnosis.
37. In addition, Dr. Gluscic stated, "[i]t is very probable that her work related activities [have] aggravated this."
38. On July 21, 2003, Dr. Frisco conducted the electrodiagnostic evaluation. Claimant had an abnormal study with "evidence of left ulnar nerve entrapment at the elbow of moderate severity" and these findings were consistent with left cubital tunnel syndrome.
39. Claimant provided a history to Dr. Frisco that she had been typing repetitively. Dr. Frisco informed Claimant during the appointment that repetitive or continuous typing was not the cause of cubital tunnel syndrome.
40. On July 23, 2003, Insurer's medical case manager, Dawn Wipf, wrote a letter to Dr. Frisco and asked if Claimant's work duties as a 911 dispatcher were a major contributing cause of the left ulnar nerve entrapment.
41. Claimant saw Dr. Gluscic again on August 4, 2003. Dr. Gluscic noted:

> Followup patient who had nerve conduction studies of her left upper extremity. It showed cubital tunnel syndrome that is already moderately severe with some loss of nerve function. Based on this, I do think that she needs to have this addressed surgically and I would recommend an ulnar nerve transposition. Again, she reiterated that her work related activity is what brought on her symptoms as she does a lot of keyboarding and talk[ing] on the phone. It is using her arm in these functions that her symptoms have been exacerbated more.

42. On August 13, 2003, Dr. Frisco responded to Wipf's letter. Dr. Frisco wrote, "I cannot state with a reasonable degree of medical certainty that work is a major contributing cause to the ulnar nerve entrapment at the elbow/cubital tunnel syndrome. She has no history of trauma to her elbow and therefore I cannot state with a reasonable degree of medical certainty that work is a major contributing factor to the nerve entrapment."
43. Claimant did not agree with Dr. Frisco's opinion that her condition was not work-related and decided to obtain a second opinion.

44. On August 13, 2003, Claimant saw Dr. John Vidoloff, another physiatrist in Aberdeen. Dr. Vidoloff verified that Claimant had left cubital tunnel syndrome. Dr. Vidoloff stated, "[i]t is my opinion that this is a Work Comp related injury from being on the job" and referred Claimant to Dr. Charles Miller, a neurosurgeon in Aberdeen.
45. Claimant saw Dr. Miller on August 26, 2003. Dr. Miller noted, "[t]his is a 49-year-old female who has been complaining of numbness in her 4th and 5th fingers for the last two months. She said the numbness just started gradually and she has noticed that in that time, it has, also, become very sensitive."
46. Dr. Miller also noted that Claimant had "severe dysesthetic pain in the ulnar distribution of her hand with skin changes, of redness, shiny skin, extraordinary hypersensitivity of the skin, itself. This has progressed particularly in the last several months. She has had EMGs which show ulnar nerve entrapment."
47. Dr. Miller informed Claimant that she had causalgia, a secondary pain syndrome resulting from the left cubital tunnel syndrome.
48. Dr. Miller recommended immediate surgery. On September 3, 2003, Dr. Miller performed ulnar release surgery on Claimant's left elbow.
49. Claimant returned for a follow-up visit with Dr. Miller on September 11, 2003, but Claimant had no change in her symptoms.
50. On September 25, 2003, Claimant returned to see Dr. Miller and again reported no change in her symptoms. Dr. Miller stated, "I discussed the situation with her. Apparently she is a 911 dispatcher. We talked about issues related to work and, also, the difficulty and amount of time that she does rest on the elbow. Apparently, this is making things much more difficult for her."
51. Dr. Miller recommended that Claimant participate in a pain management program and prescribed physical therapy and occupational therapy.
52. Despite various treatments, Claimant continued to experience persistent pain and progressive skin changes consistent with causalgia.
53. Claim was not employed at the time of the hearing and described her current condition as "painful."
54. Claimant was a credible witness. This is based on the opportunity to review all of her testimony and observe her demeanor at the hearing.
55. Other facts will be developed as necessary.

ISSUE I

WHETHER CLAIMANT PROVIDED TIMELY NOTICE PURSUANT TO SDCL 62-7-10?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). Claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). The notice requirement is governed by SDCL 62-7-10. This statute provides:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury.

> Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
>
> (1) The employer or the employer's representative had actual knowledge of the injury; or
>
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

"In order to collect the benefits authorized by the South Dakota Legislature, a worker must meet the requirements of state statute." Aadland v. St. Luke's Midland Regional Medical Ctr., 537 N.W.2d 666, 669 (S.D. 1995). "Notice to the employer of an injury is a condition precedent to compensation." Loewen v. Hyman Freightways, Inc., 557 N.W.2d 764, 766 (S.D. 1997). The purpose of the notice requirement is to provide Employer the opportunity to investigate the cause and nature of Claimant's injury while the facts are readily accessible. Schuck v. John Morrell & Co., 529 N.W.2d 894, 897 (S.D. 1990). "The notice requirement protects the employer by assuring he is alerted to the possibility of a claim so that a prompt investigation can be performed." Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 24 (citation omitted).

The statute is clear that written notice must be provided within three business days after the occurrence of the injury. "The time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of [the] injury or disease." Miller v. Lake Area Hosp., 551 N.W.2d 817, 820 (S.D. 1996). The "reasonableness of a claimant's conduct 'should be judged in the light of his own education and intelligence, not in the light of the standard of some hypothetical reasonable person of the kind familiar to tort law.'" Loewen, 557 N.W.2d at 768.

The South Dakota Supreme Court has previously held "that the duty to notify [an] employer did not arise until the date when the compensable injury was known to [claimant]." Vu v. John Morrell & Co., 2000 SD 105, ¶ 23 (citing Pirrung v. American News Co., 67 N.W.2d 748 (S.D. 1954)). The court also stated:

> [T]he fact that [claimant] suffered from pain and other symptoms is not the determinative factor and will not support a determination that respondent had knowledge of the existence or extent of [her] injury. A claimant cannot be expected to be a diagnostician and, while he or she may be aware of a problem, until he or she is aware that the problem is a compensable injury, the statute of limitations does not begin to run.

Id. at ¶ 24 (citing Bearshield v. City of Gregory, 278 N.W.2d 164, 166 (S.D. 1979)).

Claimant provided written notice of her injury to Employer on June 9, 2003. Employer argued that Claimant should have reported her injury one week prior, at the onset of her symptoms, because she knew her symptoms were work-related. It is true

that Claimant thought her symptoms were work-related. However, prior to June 6, 2003, Claimant did not recognize the nature, seriousness and probable compensable character of her condition. Claimant experienced some discomfort, numbness and tingling in her left hand. But, the mere fact that Claimant had these symptoms does not support a determination that Claimant was aware of the compensable nature of her symptoms.

Claimant did not immediately report her injury to Employer when she noticed the numbness because she thought it was just a "numb feeling." Claimant's left arm did not hurt or ache. At that time, Claimant did not think her condition was serious. Then, on Friday, June 6th, Claimant experienced "an extreme pain from [her] elbow all the way to [her] fourth and fifth finger and inside [her] hand and wrist." This was a new symptom. As of June 6th, Claimant thought her condition was serious enough to warrant medical attention.

Claimant finally sought medical treatment on June 6th because that was the first day she experienced pain in her left arm and hand. Claimant did not know the existence of an injury until she sought medical treatment on June 6, 2003. Even then, PA Bonn thought Claimant had carpal tunnel syndrome. Claimant was not diagnosed with cubital tunnel syndrome until Dr. Frisco conducted the electrodiagnostic studies on July 21, 2003. By that time, Claimant already had filed the FROI with Employer.

It is true that Claimant had experience filing a workers' compensation claim due to her work-related right carpal tunnel syndrome. Even with this prior experience, Claimant did not think the numbness and tingling in her left arm was serious until she felt a severe pain in her left elbow that ran down into her fourth and fifth fingers. On that very same day, June 6th, Claimant sought medical treatment. Claimant's action in not seeking medical attention until Friday, June 6th, when her left arm actually started to hurt, was reasonable. On Monday, June 9th, Claimant completed and provided to Employer the FROI. On June 9, 2003, Employer received timely notice and was promptly alerted to the possibility of a claim.

In summary, the time period for notice did not begin to run until June 6, 2003, when Claimant recognized the nature, seriousness and probable compensable character of her injury. Claimant completed and provided to Employer the FROI on June 9, 2003, within three business days of when the notice period began to run. Claimant provided timely written notice to Employer on June 9, 2003.

ISSUE II AND ISSUE III

WHETHER THE LEFT CUBITAL TUNNEL SYNDROME AROSE OUT OF AND IN THE COURSE OF CLAIMANT'S EMPLOYMENT?

WHETHER CLAIMANT'S EMPLOYMENT ACTIVITIES WERE A MAJOR CONTRIBUTING CAUSE OF HER LEFT CUBITAL TUNNEL SYNDROME?

SDCL 62-1-1(7)(a) and (b) define what constitutes a compensable injury:

[O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is

compensable only if it is established by medical evidence, subject to the following conditions:

(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
(b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.

Employer incorrectly argued that SDCL 62-1-1(7)(b) is the appropriate standard to apply to the facts of this case. Subsection (b) deals "preexisting injuries" and controls "if the preexisting condition developed outside of the occupational setting[.]" *See* Byrum v. Dakota Wellness Foundation, 2002 SD 141, ¶ 15. There is no dispute that Claimant has preexisting conditions concerning her weight, diabetes, hyperthyroidism and smoking. However, there was no medical evidence that any of these conditions combined to cause Claimant's current condition or need for treatment. More importantly, Claimant did not have a preexisting condition of left cubital tunnel syndrome. SDCL 62-1-1(7)(b) does not apply and SDCL 62-1-1(7)(a) is the appropriate standard to use in this matter. Therefore, Claimant must establish both that her injury arose out of and in the course of employment and that her employment related activities were a major contributing cause of the left cubital syndrome.

Claimant must show that her "injury arose out of [her] employment by showing a causal connection between [her] employment and the injury sustained." Horn v. Dakota Pork, 2006 SD 5, ¶ 13 (citations omitted). "The employment need not be the direct nor proximate cause of the injury in order to establish this causal connection, but rather must be shown to be a contributing factor to the injury." Id. "[T]o show that an injury 'arose out of' employment, it is sufficient if the employment 1) contributes to causing the injury; or 2) the activity is one in which the employee might reasonably be expected to engage or 3) the activity brings about the disability upon which compensation is based." Norton v. Deuel Sch. Dist., 2004 SD 6, ¶ 8 (citations omitted).

"The phrase, 'in the course of' employment 'refers to time, place and circumstances under which the accident took place.'" Id. ¶ 9 (citations omitted). "An employee is considered within the course of employment if '[s]he is doing something that is either naturally or incidentally related to employment.'" Id. "[A]n activity that was expressly or impliedly authorized by the contract or nature of employment falls within the course of employment." Id. (citation omitted).

Claimant must also prove by a preponderance of medical evidence that her employment related activities were a major contributing cause of the left cubital tunnel syndrome. SDCL 62-1-1(7)(a) "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "The evidence necessary to support an award must not be speculative, but rather must 'be precise and well supported.'" Horn, 2006 SD 5, ¶ 14 (citation omitted). When medical evidence is not conclusive, Claimant has not met the burden of showing

causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

Before either issue can be addressed, it is necessary to examine all the medical evidence in this matter. Four medical providers testified live at the hearing including Dr. Gluscic, Dr. Frisco, Dr. Vidoloff and Dr. Miller.

Dr. John Gluscic is an orthopedic surgeon who began treating Claimant on June 23, 2003, for complaints of left hand numbness and tingling. Claimant informed Dr. Gluscic that she thought her injury was caused by "continuous use of computer, teletype, [and] typewriter." Dr. Gluscic initially thought Claimant's "work related activities [have] aggravated" her condition. However, at the hearing, Dr. Gluscic could not opine as to the cause of Claimant's cubital tunnel syndrome:

> Q: [D]o you have an opinion based upon a reasonable degree of medical probability as to what caused Mrs. Reimer's cubital tunnel syndrome that you diagnosed incident to your treatment in August of 2003?
> A: A direct cause, no, I do not.
> Q: And if I ask more specifically then, are you able to state with a reasonable degree of medical certainty that Mrs. Reimer's cubital tunnel syndrome or her ulnar nerve entrapment of the elbow was caused by her work environment as a dispatcher for the City of Mobridge, do you have such an opinion?
> A: With a degree of medical certainty, no, I don't.
> Q: What's the basis of your opinion?
> A: First off, when I saw her, I really didn't know what her job entailed specifically. Second off, since the deposition I gave in May, I have had a chance before this deposition to actually look at some of the other information that's available. Looking at the initial intake from the worker's comp slip that Mrs. Reimer submitted, the type of activities that she described on that initial intake would not necessarily be consistent with the type of activity that would directly cause the cubital tunnel type symptoms or the syndrome. In later notes when I subsequently saw her in follow-up, she described an activity that might cause increased pressure at the cubital tunnel, but in and of itself wouldn't necessarily cause the subsequent underlying problem. And also, I didn't perform her surgery, so I have no idea what was found at the time of the exploration of the nerve and oftentimes you get a better sense when you actually do the surgery and if it is a localized area that's been repetitively injured or irritated as opposed to a chronic ongoing problem that's developed over time.

Dr. Gluscic confirmed that the activities initially described by Claimant are not the type of activities that typically cause cubital tunnel syndrome. Dr. Gluscic stated that continuous use of the computer and typing "would be more consistent with what you get in carpal tunnel syndrome as opposed to cubital tunnel because of the position of the wrist. In all of those activities the elbow is held at a relatively straight or extended position and it's not going to increase the pressure in that cubital tunnel area."

Even though Dr. Gluscic could not opine that Claimant's work activities were a major contributing cause of her left cubital tunnel syndrome, he agreed that cubital tunnel syndrome can be caused by a job "where you were sitting your elbow on a hard object for hours and hours each day[.]" In addition, Dr. Gluscic testified:

> Q: Is resting one's elbow on the table, holding a phone to her ear, is that the type of physical activity that causes cubital tunnel syndrome?
> A: When it comes to resting the elbow, it depends on what position the elbow is resting. If you rest it on the very tip of it where the bone is, it's not going to put any pressure on the cubital tunnel. If your elbow is resting in a position where it's off to the side and the nerve is directly being compressed against a hard surface, then it would do that. Likewise on the phone, if you talked with your - - or if you held anything, you held your hand in a flexed position for an extended period of time, it would increase the pressure in the cubital tunnel by probably three-fold over normal position.

Dr. Gluscic also agreed that repetitive trauma to the elbow can cause cubital tunnel syndrome:

> Q: And that can be caused by for a period of time putting your elbow on a desk a certain way day in and day out for a long period of time?
> A: Yes, sir.
> Q: So when we talk about small traumas, we're talking as little as putting your elbow on a desk and leaning on it and doing it again and again throughout a period of time?
> A: Yes, sir.

Finally, Dr. Gluscic opined that Claimant's medical conditions including the thyroid disease and diabetes were not "serious and significant enough or long-standing enough to actually [make] a significant contributing factor in her developing [the left cubital tunnel] condition."

Dr. Frisco is a physiatrist board certified in physical medicine and rehabilitation. Dr. Frisco treated Claimant previously for right carpal tunnel syndrome. Dr. Frisco saw Claimant again on July 21, 2003 to perform EMG nerve conduction testing. The findings were consistent with left cubital tunnel syndrome. Claimant provided a history to Dr. Frisco that she had been typing repetitively. Dr. Frisco testified:

> Q: Did she give you any kind of an indication in an eight-hour work shift how much of that eight hours was devoted to typing repetitively?
> A: Well, I heard the - - well, no, but when I heard the word continuous, continuous is continuous to me, so I didn't pursue it any further, but the purpose of my examination was not to do a thorough evaluation and get history and address causation for her, but after the examination, I told - - after the examination, I told her that repetitive typing or continuous typing is not the cause of cubital tunnel syndrome unless of course you're resting your elbow on the table or - - well, actually unless you're resting your

elbow across the cubital tunnel and she seemed fine with that and that's where we left it.

. . . .

Q: When you use the word continuously, where did you extract that word from?

A: That's what she told me and then later on in our - - later on as I - - when I found out that she was having some problems with RSD and she was upset with me because I didn't agree that it was work related and she had gone to either Dr. Vidoloff and Dr. Miller, I pulled this sheet and I looked through the chart and I wanted to make sure that I didn't miss something and again, continuous use of computer, teletype and typewriter was written by her in the notes, so that's basically what I went by.

Dr. Frisco opined, "[w]ith the information that has been provided to me by [Claimant] and from my medical records, I would not be able to state with a reasonable degree of medical certainty that work is a major contributing cause." Dr. Frisco did not ask Claimant any specific questions about her workstation or her duties. Dr. Frisco explained his opinion:

> Number one, the history that she gave me regarding continuous typing, that's number one. Number two, the information on page 91 of the medical records that you just showed me, that's number two; her related continuous typing as the source. I don't see in her - - and the information that she shared with me wasn't that she is forced into an awkward position to hold her elbows on a table or to hold her elbows in a bent position. I don't call carpal tunnel work related - -
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> Q: Carpal tunnel?
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> A: I'm sorry, cubital tunnel work related unless there's direct trauma to the elbow or somebody can demonstrate to me that the workstation they're involved in forces them to hold their elbows in a flexed position greater than 90 degrees or forces them to rest their hand, their elbows on the table . . .
>
> . . . .
>
> The other thing is repetitive flexion and extension of the elbow, I would agree with Dr. Miller. There's nothing documented that shows that that increases the pressure within the elbow; however, in a flexed position greater than 90 degrees, in this position here, you are - - you've increased the pressure within the cubital tunnel by three times.

Dr. Frisco also stated:

> This position right here like you're on the telephone, continuous positions like that are bad for that. So if somebody can demonstrate for me that they in fact are forced into that position, I can agree that work could be a major contributing cause, that's not what was shared with me. What was shared with me, continuous typing was the source of the symptoms, so therefore with the information provided to me, I have to state with a reasonable degree of medical

certainty that work is not a major contributing cause of the cubital tunnel syndrome.

Dr. Frisco opined that cubital tunnel syndrome would be caused by sustained flexion and not light repetitive flexion. After reviewing the photographs, Dr. Frisco agreed that Claimant's workstation put her in an awkward positions and acknowledged that Claimant's workstation was "really abnormal." He testified, "I don't like it. I mean if she was being forced to work in a position like this, I would have a problem with it." Dr. Frisco agreed that the workstation was not conducive to helping someone with cubital tunnel syndrome. Dr. Frisco also opined that is was possible for someone to develop ulnar nerve entrapment with this workstation.

Dr. Vidoloff, a physiatrist, first saw Claimant on August 13, 2003. Dr. Vidoloff noted that Claimant had pain and "[s]he also had numbness and tingling of the left little and ring fingers. She had swelling of the fingers and hands on both sides, right and left." Dr. Vidoloff reviewed the electrodiagnostic testing and agreed that Claimant had cubital tunnel syndrome.

Dr. Vidoloff opined that Claimant's left cubital tunnel syndrome caused the causalgia, a secondary pain syndrome. Dr. Vidoloff explained. "I maintain she had trauma to the elbow in her job over a period of time because [of] resting her left elbow on the table holding a telephone in the left hand. My opinion is that repeated trauma of what she did, she worked on this job on a regular basis full-time for 15 to 16 years pushing that elbow down caused repetitive trauma which led to the trauma, the causalgia." He also stated, "[y]ou can have repetitive, chronic repetitive micro trauma, small amounts of trauma over the elbow over a long period of time like in employment and this repetitive, chronic repetitive trauma can cause and in her case I believe did cause the ulnar nerve entrapments and - - . . . And then onto causalgia."

Dr. Vidoloff opined that Claimant's employment activities of leaning on her left elbow were a major contributing cause of the development of left cubital tunnel syndrome. Dr. Vidoloff stated:

Q: And it's your testimony here today to a reasonable medical degree that her employment as was explained to you - - you also saw pictures of her workstation did you not?
A: Yes, I did.
Q: Was a significant contributing factor to her injury being the ulnar nerve entrapment or however it's termed?
A: Yeah.
Q: And then on the causalgia, is that caused by injury or trauma to a nerve?
A: Yes.

According to Dr. Vidoloff, Claimant's work activities were consistent with someone who received micro traumas to the ulnar nerve and "when you put your elbow on the table and you do that again and again, that is an injury that - - or that is a trauma that can lead to cubital tunnel syndrome[.]" Dr. Vidoloff did state that "[o]besity increases the risk of ulnar nerve entrapment at the elbow." However, neither Dr. Vidoloff nor any other medical provider opined that Claimant's weight was a major contributing cause of her left cubital tunnel syndrome.

Dr. Miller is a board certified neurosurgeon who performed the ulnar release surgery. Dr. Miller recognized that Claimant had a history of diabetes, but it did not make any difference in the diagnosis of ulnar nerve entrapment. Dr. Miller reviewed the photographs of Claimant's workstation. Dr. Miller opined that Claimant had cubital tunnel syndrome and causalgia. Dr. Miller explained causalgia is a reflex sympathetic dystrophy that causes extraordinary hypersensitivity and causes the skin to look red and shiny. Dr. Miller opined that Claimant's causalgia was caused by the left ulnar nerve entrapment.

Dr. Miller opined that Claimant's work for Employer as a dispatcher was a major contributing cause of the left ulnar nerve entrapment and causalgia. Dr. Miller explained:

> It is a major contributing cause because of several factors. The first is and foremost being the findings at surgery. <u>At surgery there was a thick pad or thick band, excuse me, of compressive tissue that was distal to the epicondyle and that means that it is on the surface of the lower portion of the elbow where one would rest or press on that. Secondly, that that tissue was extraordinary in its appearance.</u> It was more than I had seen in other individuals and it was in somewhat of a little bit of an unusual location. Oftentimes we find the band is approximal; in other words, on the other side of the elbow. However, the important thing is the finding of that tissue associated then with her dispatch activities and - -
> Q: Can I stop you there?
> A: Sure.
> Q: What did she tell you her dispatch activities were?
> A: That she was - - we talked a little bit and part of it is working computers, but part of it also is leaning on the elbows and also, leaning to reach or - - but predominantly leaning.
> Q: Leaning on her elbows?
> A: That's correct.

(emphasis added). During surgery, Dr. Miller found that the compressive area was "distal to the elbow, that means in this lower half and so that it's centered right in this particular area here just beyond the elbow in an area where - - you know, again where it fits to her activities."

Dr. Miller's opinion was also based on his familiarity with the dispatcher position and the fact that he reviewed the photographs of Claimant's workstation. Dr. Miller testified:

> Q: In fact, have you ever thought cubital tunnel syndrome was work related?
> A: No.
> Q: In this case you did?
> A: That's correct.
> Q: And so it's even - - it's an unusual conclusion for you to reach that this type of compression is unusual?
> A: That's correct.

Q: Why do you then come here before us and testify that you believe it to be work related, other than what you've testified to as what you observed surgically?
A: Sure, but I think it's the synthesis of all that information, looking at the workstation, seeing the reaching that she has to do, the fact that she's done it for 15 years, you know, it's not going to be something that's related to a single incident. It is going to be something that is going to be - - have to be done over and over and over again to develop that reactive tissue that we saw, the compressive tissue on the nerve.

Dr. Miller opined that Claimant's activities outside of work would not have caused her to develop cubital tunnel syndrome because those activities would not have been carried on for an eight-hour shift. Dr. Miller explained there has been repetitive trauma caused by a repetitive activity done over a period of time. Dr. Miller also testified:

Q: And you subsequently interviewed her and she told you that she was on her elbows most of the time?
A: That's correct.
Q: And your surgery proved or disproved that?
A: I'm not sure the surgery can prove or disprove it, but certainly if you put those two pieces of information together, they make sense.

Dr. Miller opined the tissue build up that he saw during surgery was consistent with Claimant "leaning on the elbows. It's consistent with rubbing or even harder sharp edges." Dr. Miller agreed that Claimant answering the telephone and resting her left elbow on her workstation caused light trauma and this repetitive activity caused her left cubital tunnel syndrome. Dr. Miller further testified:

> In some ways though, the leaning on the elbow is going to be away from the area. You know, this is more up on the elbow in this fashion forward, because again where we saw that compression was somewhat away from - - and I think if again, if you watch Marilyn and her body habitus, she tends to get forward on her elbows in this fashion rather than me as a taller person who is - - you know, because I've got the height, torso height advantage where I'll put - - lean my elbows on it.
> . . . .
> Again, it is the repetitive - - you know, and I guess to expand on the whole idea of repetitive, you know, and that's why these are called repetitive stress disorders or repetitive trauma, it is the constant of micro trauma; in other words, that you are constantly doing the same type of damage to the nerve that any single action does not induct the fundamental change; however, that it is repeated time after time after time, day after day, year after year and that that repetitive micro trauma, that repetitive stress, that continued injury to the elbow is what's necessary or in this case to the elbow is necessary to induce this type of finding. I don't believe, and this is why I have not testified in the past, I mean to talk from a negative standpoint, you know, I don't believe that a single blow to the elbow is going to cause ulnar nerve [entrapment]. Now if you fall on the elbow and you

injury the elbow to where you cause a fracture or a bony callous, you know, fine, then that shows a single traumatic blow or injury to the nerve. That's going to show up at surgery.

Dr. Miller agreed that Claimant's condition was not caused by a traumatic blow or injury. Dr. Miller opined that what he objectively found during surgery was indicative of a repetitive type of trauma.

On cross examination, Dr. Miller confirmed that this was the first and only time he testified that cubital tunnel is a work-related illness. Dr. Miller explained:

Q: And that again is based on your assumption of how she rested her elbows on the edge of the table based on the band of fibers that you detected operatively?

A: I think that it's based predominantly on the fact of what we saw in surgery indicating that there had to be some chronic repetitive trauma. It is my assumption, and it is exactly that, that it is because of her elbows leaning in the particular way that she did. Not being there, I can't say that that's what caused it, but if you look at the circumstances, again it's a synthesis of the data. It's not just one individual piece. The findings at surgery though were the most important.

Dr. Miller opined that Claimant's work activities were a major contributing cause of her left cubital tunnel syndrome because "[i]t is predominantly the leaning and the specific type that we talked about; in other words, leaning on the edge of the table, leaning on the edge of the desk as well as the specific location of the telephone and the specific location of the dispatch console."

Dr. Miller's opinions are persuasive and are entitled to more weight than any other expert. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988). Dr. Miller's testimony was based on objective findings at surgery. Dr. Miller found compressive tissue in the lower portion of the elbow consistent with Claimant's credible testimony that she leaned or rested her left elbow on the countertop while she performed her work duties. Claimant established by a preponderance of the medical evidence that her work activities were a major contributing cause of the left cubital tunnel syndrome.

Employer argued that Claimant's injury did not arise out of her activities at work, but were caused by her own body habitus and manner of posture. This argument is without merit and is contrary to the medical evidence and Claimant's credible testimony. Claimant's employment contributed to causing her injury. Claimant was provided with a poor workstation and she leaned on her elbow throughout her work shift to take notes during various telephone calls. Claimant performed this type of activity during her entire tenure with the Mobridge Police Department. All the medical providers agreed that resting an elbow on a desk thereby compressing the ulnar nerve can cause cubital tunnel syndrome. This was exactly what Claimant did as a part of her work activities.

In addition, the activity is one in which Claimant might reasonably be expected to engage. Again, due to her poor workstation, Claimant leaned on her elbow during her

work shift in order to perform her duties. Even Claimant's co-worker admitted that he leaned on his elbow while performing his duties as a dispatcher. This activity was naturally related to Claimant's employment. Finally, Claimant's activity of leaning on her elbow to perform her work duties brought about the disability upon which compensation is based. This is well-supported by the testimony of Dr. Miller, as he found during surgery a thick band of compressive tissue on the surface of the lower portion of Claimant's elbow where she rested or pressed. Claimant's credible testimony as to how she performed her work duties also supports the finding that her left cubital tunnel syndrome arose out and in the course of her employment.

Employer also criticized Claimant because during her initial appointments, she did not mention to her medical providers "using the phone constantly." The physicians knew that Claimant worked as a dispatcher. Claimant, based upon her previous experience with right carpal tunnel syndrome, initially thought she had left carpal tunnel syndrome. Even PA Bonn initially diagnosed Claimant with left carpal tunnel syndrome. Claimant is not a diagnostician. During her early treatments, Claimant incorrectly assumed her symptoms were caused by using the computer and typewriter. After Claimant was diagnosed with left cubital tunnel syndrome, she attributed her symptoms to the fact that she leaned on her elbow as she handled various telephone calls. During her August 4, 2003, appointment with Dr. Gluscic, Claimant discussed the fact that she leaned on her elbow while conducting her dispatcher duties. Thereafter, Claimant discussed her work duties with Dr. Vidoloff and Dr. Miller. Both physicians concluded her work activities were a major contributing cause of her left cubital tunnel syndrome and support that her injury arose out of and in the course of her employment.

There is no dispute that Claimant leaned on her left elbow as she performed her work duties. Claimant's testimony as to how she leaned on her elbow and the duration was credible. Claimant established by a preponderance of the evidence there was a causal connection between her employment activities and the development of left cubital tunnel syndrome. Claimant's left cubital tunnel syndrome arose out of and in the course of her employment. The medical evidence, especially those opinions expressed by Dr. Miller, established that Claimant's work activities were a major contributing cause of her left cubital tunnel syndrome. Therefore, Claimant is entitled to workers' compensation benefits. The Department shall retain jurisdiction over the issue of extent and degree of Claimant's disability.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's proposed Findings and Conclusions to submit objections or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 22nd day of February, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge