SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

SHIRLEY KITTERMAN,

Claimant, **HF No. 95, 2003/04**

vs. **DECISION**

GOLDEN WEST TELECOM,

Employer,

and

NATIONAL FARMERS UNION INSURANCE,

Insurer.

This matter comes before the Department on a petition for workers' compensation benefits pursuant to SDCL §62-7-12. A hearing was held on November 14, 2007; Claimant, Shirley Kitterman, was represented by Wm. Jason Groves, Groves Law Office, Rapid City; Employer, Golden West Telecom, and Insurer, National Union Fire Insurance, were represented by J. G. Shultz, Woods, Fuller, Shultz & Smith, Sioux Falls.

The claimant has the burden of proving the facts necessary to sustain an award of compensation. Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶35, 724 NW2d 586. 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. Orth, 2006 SD 99, ¶34, 724 NW2d 586.

Claimant worked as a customer service representative for Employer for twelve years, ending May 20, 2003. Seventy-five percent of her job was keyboarding; the rest of it involved talking on a telephone headset, and jotting down short, handwritten notes. On August 27, 2001, she reported pain in her right and left forearms, with greater pain on the right. She saw Dave Custis, a physician's assistant, in Wall, who referred her to Dr. Lew Papendick, a Rapid City orthopedist.

The Claimant told Dr. Papendick that she noticed tingling and pain in her right arm when she did computer work and when she sewed. Dr. Papendick sent the Claimant to Dr. Mark Simonson, a Rapid City neurologist, to be EMG-tested for carpal tunnel; the test was done on October 4, 2001, and did not confirm carpal tunnel. Dr. Simonson had the Claimant follow up with Dr. David Lang, a Rapid City orthopedic hand specialist; Dr. Lang ordered a cortisone injection, and diagnosed carpal tunnel and radial tunnel syndromes.

The Claimant returned to Dr. Simonson by referral on March 27, 2002, complaining of bilateral forearm, hand, back and neck pain. Her arm pain was greater on the right than the left. Dr. Simonson limited her to no repetitive upper extremity activities, including typing, and infrequent lifting of a maximum of ten pounds.

On April 10, 2002, the Claimant saw Dr. Dale Anderson, a Rapid City orthopedic surgeon, again reporting bilateral arm pain. Dr. Anderson recommended a conditioning program rather than surgery; in his view, surgery would not address her diffuse pain. He suggested Claimant continue her physical therapy and return to work four hours a day, gradually increasing to full duty.

On May 22, 2002, the Claimant again returned to Dr. Simonson. Her pain increased after trying to work two to four hours a day. He conducted additional tests, restricted her from keyboarding, and diagnosed overuse syndrome, his self-styled

"garbage can" diagnosis to describe diffuse myofascial pain in the Claimant's extremities. He shortly after recommended carpal tunnel surgery, which Dr. Lang performed on June 26, 2002.

After the surgery, the Claimant continued to complain of forearm pain. Dr. Lang was not sure why she was having pain in the antebrachial portion of her arm. He noted radial tunnel tenderness, and believed she had radial tunnel syndrome. He placed the Claimant's right arm in a cast, but this only made her worse. Attempts at keyboarding flared her symptoms. On October 17, 2002, Dr. Simonson restricted her to lifting five pounds infrequently and no repetitive upper extremity use, including keyboarding.

Dr. Thomas Brennan, a Spearfish physician with a background in family medicine, occupational medicine, and internal medicine, conducted an independent medical examination on Insurer's behalf on November 19, 2002. He described her condition as bilateral forearm myofascial pain of uncertain etiology, though he concluded that her symptoms were caused by her work, and that she would not be able at that time to resume her work. He recommended voice-activation software for her work station.

In 2007, Dr. Brennan gave a deposition in which he revised his earlier opinions somewhat. He testified that it was unlikely the Claimant's current pain problems stemmed from keyboarding, as she had not done any for several years but her pain had not improved. He also reviewed the information produced in Dr. Outlaw's 2006 examination.

Dr. Simonson gave the Claimant a twelve percent whole person impairment rating on January 15, 2003. He noted that she had been provided with voice-activation software at her workplace that should help her a great deal if it was effective. Like Dr. Lang, he was still puzzled about the exact diagnosis for her problems.

Dr. Peter Nathan, a Portland, Oregon orthopedic hand specialist, conducted a second independent medical examination on Insurer's behalf on March 4, 2003. He diagnosed right-sided carpal tunnel syndrome, but did not agree with the radial tunnel or overuse syndrome diagnoses. He questioned Dr. Brennan's diagnosis of myofascial pain based on a lack of objective findings. He opined that she had had left-sided carpal tunnel, but that had resolved. He concluded that her work was not a major contributing cause for her current condition, disability or treatment.

The Claimant tried returning to work with the Employer on March 21, 2003, using Dragon Naturally Speaking (DNS) voice-recognition software to keep her keyboarding to a minimum. Kathy Swan, the Employer's human resource director, trained herself in DNS to become familiar with it; Amy Wolford was trained in using DNS for the customer service work the Claimant would be doing, and was successful in performing those duties. The Claimant, however, had problems with it; her speech would not be correctly recognized, forcing her to repeat things frequently; she would then get frustrated, changing the intonation of her voice and causing further inaccuracies. The Employer terminated her on May 20, 2003, for being insufficiently productive.

The Claimant requested Dr. Myung Cho, a Sioux Falls physiatrist, to conduct an independent medical examination on August 17, 2005. Dr. Cho opined that the Claimant has chronic bilateral forearm and hand pain consistent with chronic myofascial pain syndrome secondary to repetitive use of both upper extremities and hands. She concluded that the Claimant's work is a major contributing cause of her current disability and impairment, and assigned a six percent whole person impairment rating.

Dr. Edward Outlaw, a Las Vegas, Nevada pain management physician, conducted a third independent medical examination for Employer/Insurer on March 10, 2006. As part of that examination, Dr. MaryRose Cusimano-Reaston (Reaston), a Ph.D

in psychology from Las Vegas, conducted an “electrodiagnostic functional assessment” (EFA); Dr. John Coyle, a Rollins, Wyoming osteopath, interpreted the EFA results and prepared a report. The conclusion from this testing and examination was that the Claimant’s pain problems stemmed from her trapezius and upper shoulders, that such problems were of acute origin, and as a result her problems were not work-related.

A preponderance of the evidence establishes that the Claimant suffered a work injury, and that her present medical condition is a product of that injury. Drs. Simonson, Lang and Cho reached the conclusion that her current pain problems resulted from her work, specifically her keyboarding, and those opinions appear to be well-founded. It is argued that they do not agree on a diagnosis, something which played a part in Dr. Coyle’s report; but they do agree, based on their experience, expertise, contact with the Claimant, and familiarity with the general nature of her work, that she suffers bilateral forearm pain because of the repetitive nature of her work. The Claimant testified credibly about the nature and sources of her pain complaints, and her testimony is consistent with the opinions of her physicians.

Drs. Brennan, Coyle and Nathan do not agree with this conclusion. The Claimant’s physicians, however, are more qualified to render such opinions on this subject than Drs. Brennan or Coyle, as they are specialists in conditions of this type, and have had more direct contact with the Claimant over the course of her treatment. Dr. Nathan had similar qualifications, but unfortunately suffered from health conditions that prevented his deposition from taking place; his opinions were therefore not subjected to the same level of scrutiny as the Claimant’s physicians. The issues of causation in this case were fairly debatable, but ultimately the greater weight of evidence supports the Claimant’s position.

The Claimant's workers' compensation benefits were stopped on March 21, 2003. When she was terminated, she began receiving long-term disability benefits that will continue until she is 62. She claims that she is permanently and totally disabled as a result of her injury, and that claim will now be addressed.

The legal standards for a permanent total disability claim are well-established:

> The claimant has two avenues to make the required prima facie showing for inclusion in the odd-lot category. First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations. Obvious unemployability may be shown by: (1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or (2) persuading the trier of fact that he is in fact in the kind of continuous, severe and debilitating pain which he claims. Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.

Fair v. Nash Finch Co., 2007 SD 16, ¶19, 728 NW2d 623 (additional citations omitted.)

Here, Rick Ostrander testified on the Claimant's behalf as a vocational expert. He opined that the Claimant was obviously unemployable within her community of Wall. Commuting to the larger labor market in Rapid City would be out of the question given her arm problems. Given her physical restrictions, Ostrander also concluded that retraining would be futile. It is concluded that the Claimant has met her prima facie burden of establishing her permanent and total disability.

The burden then shifts to the Employer/Insurer to establish that some form of suitable employment is regularly and continuously available within her community. Fair,

2007 SD 16, ¶23, 728 NW2d 623 (citation omitted). There was no vocational expert testimony presented on that issue. Employer/Insurer offered a demonstration of the use of voice-recognition technology at the Claimant's former workstation, and the testimony of Kathy Swan and Amy Wolford, who were able to successfully use the technology to perform the tasks involved in the Claimant's former position without repetitive hand use. Dr. Brennan opined that the Claimant should try performing her duties using such technology.

The Employer is to be commended for attempting this accommodation; indeed, the Claimant attempted to work using DNG for several weeks, and reasonable efforts were made to make that attempt a success. Nonetheless, the Claimant did not succeed in meeting the Employer's performance goals using the technology; it was noted in testimony that DNG is most effective when the user's voice is consistently evenly modulated and paced, and the Claimant's results with it show that did not work effectively for someone with her speaking patterns. The Employer failed to meet its burden of establishing that suitable employment exists for the Claimant. The Claimant has established by a preponderance of the evidence that she is entitled to permanent total disability benefits.

The Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections to them and/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 12th day of May, 2008.

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James E. Marsh
Director