

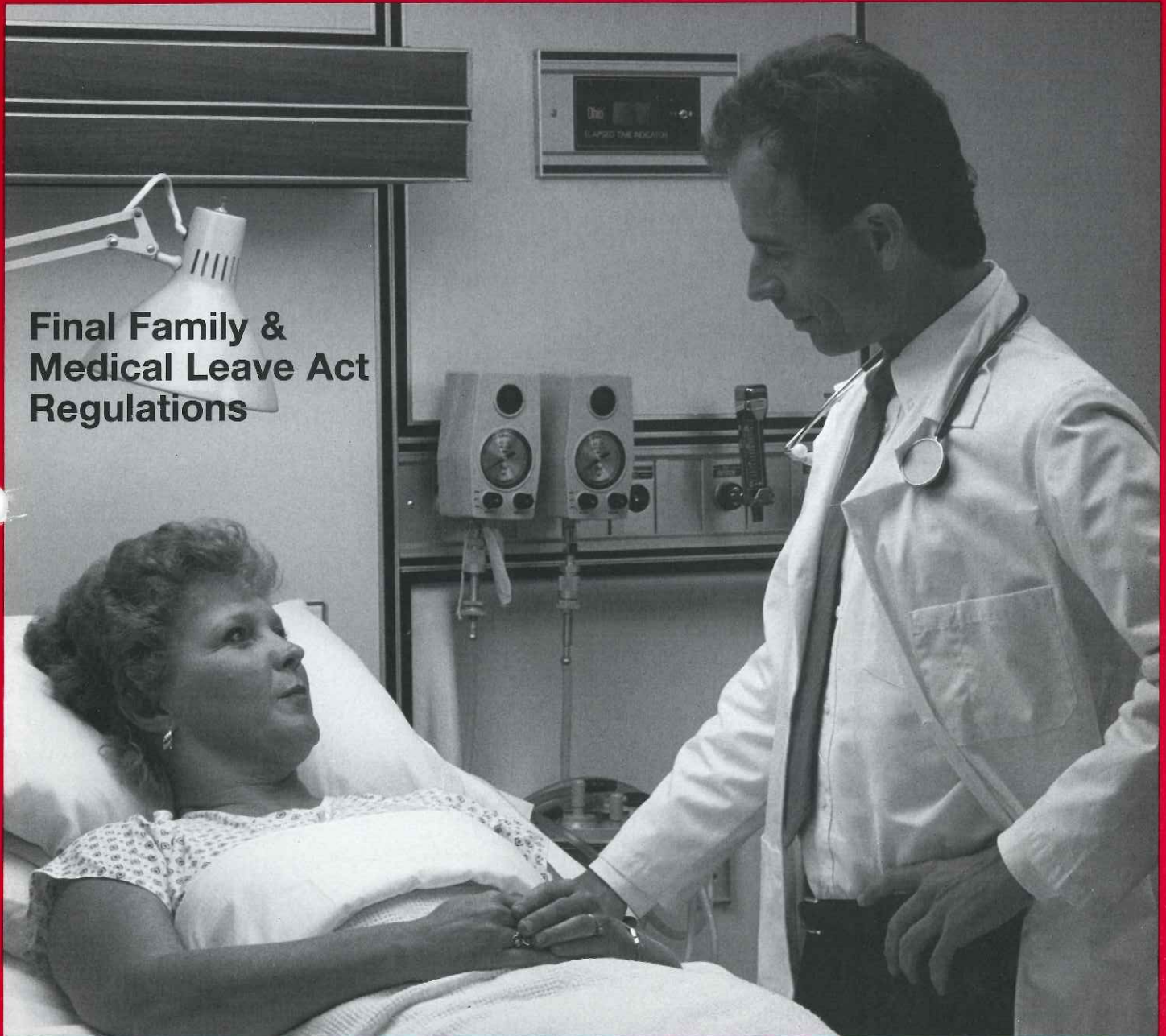
The Defense



Line

S.C. Defense Trial Attorneys' Association

Volume 23 Number 3



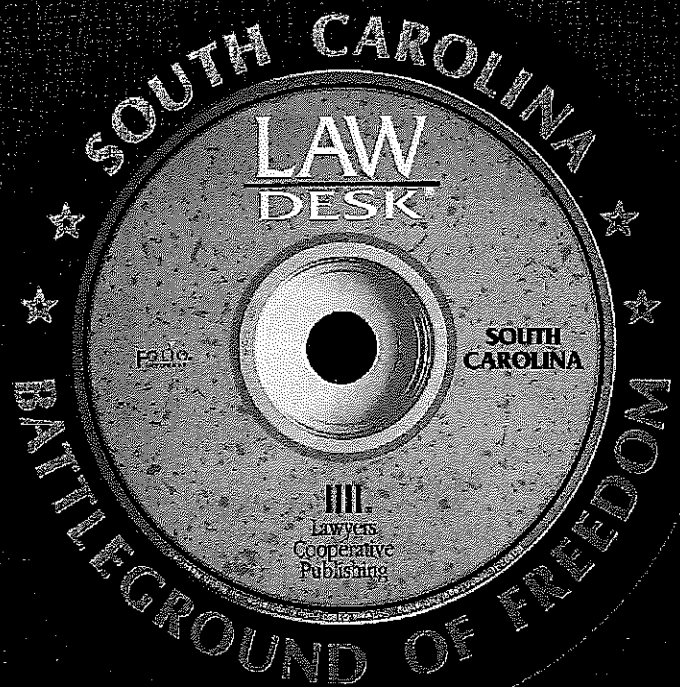
**Final Family &
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VOLUME 23, NO. 3 Summer, 1995

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Richard C. Kenistin, M.D., and
Kenneth D. Meadows, R.P.T.

TEN YEARS AGO

The Joint Meeting of the Defense Attorneys' and Claims Managers' Association was held for the eighteenth time at the Grove Park Inn in Asheville, North Carolina August 8-11, 1985. President **WADE H. LOGAN, III** of the Defense Attorneys and **JIM WATSON**, President of the Claims Management Association, presided the opening of the program Friday, August 9. A panel of attorneys and claims men addressed "Underinsured Motorist Coverage" Friday morning followed by a program of "Defending Claims where only one of Several Causes of Action is Covered. The third session August 9 was the **HONORABLE G. ROSS ANDERSON, JR.**, United States District Court Judge spoke on "Claims Handling and Defense of Law Suits as seen by a former Plaintiff's Attorney and Present Federal Judge."

Saturday morning Employment Related Claims were discussed by **KEN CHILDS** and **EMMA RUTH ST. PIERRE** followed by a presentation by the **HONORABLE JOHN G. RICHARDS**, Chief Insurance Commissioner. The last item on the agenda Saturday morning before Bloody Marys were "Recent Decisions on Comparative Negligence and Sovereign Immunity" addressed by **KAREN L. ANDERSON**, (now United States District Judge for the District of Columbia), **WILL DAVIDSON**, and **LARRY ORR**. Plans were underway for the Annual Meeting at Kiawah in October. The **CHIEF JUSTICE NESS** had accepted an invitation to speak on Procedural Development, **FRANK GIBBES** was Program Chairman.

TWENTY YEARS AGO

At the Eighth Meeting of the Defense Attorneys and Claims Managers at Myrtle Beach, Hilton, July 25 through July 27, our Treasurer reported a balance of \$3,013.04. President **JIM ALFORD** and his Executive Committee were planning the Eighth Annual Meeting on Hilton Head. Program Chairman **BRUCE SHAW** and Social Chairman **ERNIE NAUFUL**, (both future Presidents of the Association) were planning an outstanding program.

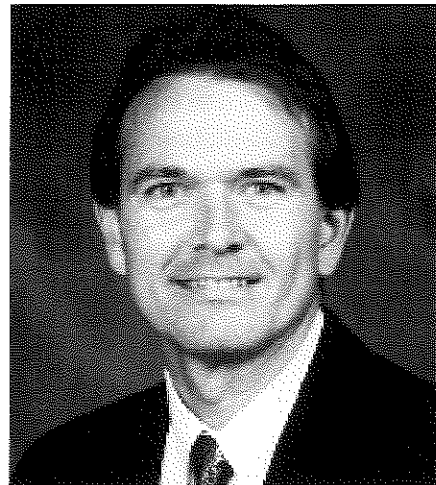
The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

THE PRESIDENT'S PAGE

"Is Jail a Problem?"

Let's hope not! This "catchy" question was posed on a free, sample advertising clock my law partner, Jim Hudgens, received by mail which had our firm name and telephone number on the face of it below the question. About once a week Jim shows me something funny or outrageous. However, on this occasion, I was on the telephone and steadfastly ignored Jim during his "show and tell." The problem was that I was talking to the Honorable Anthony M. Kennedy, Associate Justice, United States Supreme Court, about his presentation at our Annual Meeting, and I was intent on trying not to make a fool of myself (which sometimes is difficult). If you missed the Joint Meeting, you missed Jim at his most outrageous while he recounted the mythical adventures of our Joint Meeting Program co-Chairman, Frankie Marion, while Frankie was in a Winn-Dixie parking lot (Frankie will have to tell you about it). Using Frankie's "ER" chart, Jim explained how he was able to use various medical reference books to decipher the chart, making a rather dry topic interesting and funny.

Although I sometimes call Jim "Doc," a real medical doctor, Dayton Riddle, explained various tests performed to diagnose and treat back problems. Dr. Riddle's message was a breath of fresh air in a world with many built-up personal injury claims supported by some questionable providers of purported health care services. Dr. Riddle's view of back claims and the legal process bears republication and is set out in the chart below. Dr.



Michael B.T. Wilkes

Riddle's frankness is a lesson for us defense attorneys to never compromise our beliefs and to challenge those "experts" whose opinions are bought, not reasoned. A defense lawyer who has learned this lesson and who conveys this attitude to his clients will not need advertising clocks and will not need the services of the burgeoning law firm consultant industry to attract and keep clients.

TRIAL ACADEMY: Clarke McCants, Steve Darling and John Bell performed yeoman's duty in planning and executing our 1995 Trial Academy. This is one of the most important functions of our Association. Following is a list of our members who gave their time to this effort: **Hutson S. Davis, Jr.; Matthew H. Henrikson; Susan Batten Lipscomb;**

Trent M. Kernodle; Rebecca Laffitte; Joseph E. Major; Robert O. Meriwether; E. Warren Moise; Ernest J. Nauful, Jr.; Phillip E. Reeves; David T. Rhoney; Richard C. Thomas; and Stephen S. Wilson. The Honorable Jean H. Toal, Associate Justice, South Carolina Supreme Court, spoke to the students concerning preserving the record for appellate review. On the third and final day of the Trial Academy, the 24 students tried a case before the following who graciously served as our Mock Trial Judges; John E. Batten, III; William M. Catoe, Jr.; Owens T. Cobb, Jr.; Heyward E. McDonald; R. Bruce Shaw and Joseph M. Strickland. Special thanks go to Cris Malseed, Associate's Director, with the Nelson, Mullins Firm, who recruited and organized over 70 people to serve as witnesses and jurors. Judge Catoe implemented an interesting technique when he asked his jury to deliberate with the lawyers and him present. I would be afraid to hear what jurors say about me, but I'm sure it would be very important and beneficial, as this exercise undoubtedly was for the young lawyers before Judge Catoe.

ANNUAL MEETING: By the time you receive this issue, it will be about time to attend the Annual Meeting at The Cloister. Bill Coates, Mike Bowers and Mills Gallivan have set a high standard for future programs. There could not be a finer place to be November 9-12 than The Cloister, unless Georgia beats Auburn in Athens that Saturday (which is very unlikely - need 2 tickets?). See you at The Cloister!

SCDTAA ANNUAL MEETING

The South Carolina Defense Trial Attorneys' Association will hold its 28th Annual Meeting at The Cloister, Sea Island, Georgia on November 9 through 12.

On Friday evening there will be a reception honoring our keynote speaker, The Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States. This reception will be attended by State and Federal Court Judges from South Carolina, as well as certain Federal Court Judges from the Eleventh Circuit, to which Justice Kennedy is assigned.

On Friday, Dr. Rick R. Fuentes, Managing Director of Trial Consulting Services for Litigation Sciences, Inc. of Atlanta, Georgia will make a presentation on jury research and jury selection. Dr. Fuentes holds a Ph.D. and M.S. degree in Industrial Organizational Psychology from Texas A&M University and a second Masters degree in Counseling from the University of Georgia. He has studied group and jury dynamics for 10 years and specializes in the area of jury behavior with a particular emphasis on juror attitude assessment and deliberation group behavior. He has been consultant to in-house counsel and trial attorneys on over 100 high-risk and complex civil and criminal cases and assisted in settlement analysis, case strategy preparation, witness preparation, and juror profile development and jury selection. In addition to his extensive consulting background, he teaches undergraduate behavioral courses at Georgia State University. He has authored several articles in the area of jury research and behavior and psychology and the law. Dr. Fuentes has appeared on Court Television's instructional videotape series on jury selection, has delivered workshops and speeches to national and state legal organizations including the Federal Bar Association, the American College of Trial Lawyers, the National Bar Association, and the Alabama, North Carolina, and Florida Bars.

The group will also be addressed on Friday by The Honorable Ernest A. Finney, Chief Justice of the South Carolina Supreme Court, who will brief the session on the State of the Judiciary in South Carolina. In addition, there will be a State Judge Panel which will discuss such issues as jury deliberations, juror questions, post-verdict interviews, and the

handling of difficult jurors.

Also, there will be a combined Workers' Compensation, Labor and Employment Law Breakout Program. The orientation of this program will be toward recent cases addressing claims which might be brought by injured or disabled workers. This session will include such special employment litigation issues as tort claims, quasi-contract claims based on employee handbooks and policies, and statutory issues such as preemption and retaliatory discharge. This program will be moderated by Rusty Goudelock and Phillip Kilgore. Also, there will be a one-hour ethics seminar for LEPR credit.

On Saturday Griffin Bell, former United States Attorney General and partner at King & Spaulding of Atlanta, will address the session regarding Legislative Limits on Punitive Damages. Stephen G. Morrison, current President of the Defense Research Institute, partner at Nelson, Mullins, Riley & Scarborough and General Counsel and Corporate Secretary of Policy Management Systems, Inc. will address the session on National Tort Reform. In addition, there will be a Federal Judge Panel and a speaker addressing the issues faced by the Courts and attorneys in Daubert v. Merrill Dow Pharmaceuticals, concerning the admissibility of scientific evidence in Federal Court.

The Educational Program will conclude with The Honorable Anthony M. Kennedy, Justice of the Supreme Court of the United States addressing the session. Justice Kennedy attended Stanford University and the London School of Economics and received his B.A. degree from Stanford University in 1958 and received his L.L.B. from Harvard Law School in 1961. He was nominated by President Ford to the U.S. Court of Appeals for the Ninth Circuit and took his oath of office on May 30, 1975. He was nominated by President Reagan as Associate Justice of the United States Supreme Court and took his oath of office on February 18, 1988. Justice Kennedy has been in private practice and was a professor of constitutional law at McGeorge School of Law University from 1965 to 1988.

As usual, there will be entertainment activities at night and recreational activities during the free afternoons. The Program Committee looks forward to a large turnout at Sea Island.

Workers' Compensation Commission

Chairman Thomas M. Marchant III of the South Carolina Workers' Compensation Commission has recently appointed a representative committee of experienced workers' compensation practitioners for the purpose of reviewing the Commission's regulations. The committee's mission is to make recommendations which would improve the efficiency and effectiveness of claims administration and lead to greater judicial economy. This is the first comprehensive review of the regulations since they were adopted on September 2, 1990.

The committee is co-sponsored by C. Ben Bowen and Mills Gallivan. Written comments and suggestions for amendments to the regulations may be sent prior to October 10, 1995, to either Mr. Bowen, P.O. Box 2547, Greenville, SC 29602, or Mr. Gallivan, P.O. Box 10589, Greenville, SC 29603.

SC Defense Bar Group Honored

The South Carolina Defense Trial Attorneys' Association (SCDTAA) has been recognized as one of the outstanding defense bar groups in the United States by the 19,500-member Defense Research Institute (DRI), the nation's largest association of civil litigation defense lawyers.

DRI recently honored SCDTAA with its Exceptional Performance Award, citing "the association's dedicated efforts to advance the goals and objectives of the organized defense trial bar, including preservation of the civil jury and the promotion of fairness and balance in the civil justice system." Accepting the award was SCDTAA President Michael Wilkes, partner in The Ward Law Firm, Spartanburg, SC. SCDTAA has some 600 members throughout South Carolina.

Most of DRI's 19,500 members are attorneys in private practice who defend corporations, associations, insurance companies, government bodies and individuals in damage suits and other civil litigation. The organization also has some 400 corporate members, including insurance companies and manufacturers. Founded in 1960, DRI is headquartered in Chicago.

PERSON WITH LOW BACK PAIN

ON-MEDICAL PATHWAY

Part of Everyday Life
Advice From Friends
Non-Professional Remedies
Temporary Problem
Return to Normal

MEDICAL PATHWAY

Becomes a Patient
Examination, Evaluation
Lab Imaging
Pursuit of Diagnosis
Surgical - Non-Surgical
Return to Society with a Label

LEGAL PATHWAY

Becomes a Litigant
Passes Through Medical
Cannot Get Better Without Prejudicing Case
Settlements
Returns to Society with Disability

After Norton M. Hadler, MD with some liberties

SCDTAA ANNUAL MEETING PROGRAM

Friday, November 10, 1995

- | | | | | |
|-------|----|-------|------|---|
| 8:30 | to | 8:45 | a.m. | Welcome and announcements
SCDTAA President Michael B.T. Wilkes |
| 8:45 | to | 9:45 | a.m. | Jury Research and Jury Selection
Dr. Rick R. Fuentes, Managing Director of Litigation Sciences, Inc.,
Atlanta, Georgia |
| 8:45 | to | 9:45 | a.m. | Workers' Compensation/Employment Law Breakout
(Rusty Goudelock and Phillip Kilgore, Moderators) |
| 9:45 | to | 10:00 | a.m. | Coffee Break |
| 10:00 | to | 10:15 | a.m. | The State of the Judiciary
The Honorable Ernest A. Finney, Chief Justice of the South Carolina
Supreme Court |
| 10:15 | to | 11:00 | a.m. | State Judge Panel - The Honorable Henry F. Floyd,
The Honorable William L. Howard, Sr., and
The Honorable Costa M. Pleicones
(Wait Tollison, Moderator) Jury deliberations, juror questions,
post verdict juror interviews and handling of difficult jurors |
| 11:00 | to | 12:00 | noon | Ethics Topic
Mark Phillips, Moderator |

Saturday, November 11, 1995

- | | | | | |
|-------|----|-------|------|---|
| 8:30 | to | 8:50 | a.m. | SCDTAA Annual Business Meeting |
| 8:50 | to | 9:00 | a.m. | DRI Report |
| 9:00 | to | 9:30 | a.m. | Legislative Limits on Punitive Damages
The Honorable Griffin Bell |
| 9:30 | to | 9:30 | a.m. | National Tort Reform
Stephen G. Morrison, President DRI |
| 10:00 | to | 10:15 | a.m. | Coffee Break |
| 10:15 | to | 10:45 | a.m. | Daubert Hearing Issues
Speaker to be announced |
| 10:45 | to | 11:15 | a.m. | Federal Judge Panel
Conducting Daubert Hearings (John Massalon, Moderator) |
| 11:15 | to | 12:15 | p.m. | The Honorable Anthony M. Kennedy,
Associate Justice of the United States Supreme Court |

SOUTH CAROLINA WORKERS' COMPENSATION AND THE FINAL FAMILY AND MEDICAL LEAVE ACT REGULATIONS

BY ELIZABETH B. LUZURIAGA
YOUNG, CLEMENT, RIVERS & TISDALE, LLP



The Family and Medical Leave Act (FMLA) took effect on August 5, 1993. It is Federal legislation which applies to employers with 50 or more employees. Eligible employees are those who have been employed for at least 12 months and who have provided a minimum of 1250 hours of service during that 12 month period. The Act requires that workers be provided up to 12 weeks of unpaid leave a year for the birth of a child (or placement of a child for adoption or foster care), to care for a family member with a serious health condition, or because an employee's own health condition is so serious that it makes the employee unable to work. The Act has specific notification and medical certification requirements. There are also provisions requiring reinstatement to certain employees and maintaining group health care benefits during the leave period. This article focuses on the situations under the Family and Medical Leave Act which arise in a workers' compensation scenario. Oftentimes, when an employee takes leave for his own serious health condition, that condition will also be a work related injury. Below are some pointers on the interrelationship between the workers' compensation in South Carolina and FMLA leave requirements.

On January 6, 1995, the Department of Labor issued the Family and Medical Leave Act Final Regulations which became effective April 6, 1995. The new Final Regulations, which are consistent with the Interim Regulations issued on June 3, 1993, address some of the practical issues raised by the Family and Medical Leave Act (hereinafter "FMLA") since its adoption on February 5, 1993. Glaringly absent from the Interim Regulations, but present in the Final Regulations, are specific references to the interplay between a workers' compensation absence and FMLA leave. Discussed below are those portions of the Final FMLA Regulations which impact workers' compensation cases.

Workers' Compensation and FMLA Leave Run Concurrently: When addressing the interplay of workers' compensation and FMLA leave, it should first be kept in mind that once the twelve (12) weeks of leave under the FMLA have been exhausted, the protections or obligations under the FMLA to employees are no longer available. Regulation § 825.702(d)(2) specifically states that the workers' compensation absence and FMLA leave may run concurrently provided the employer gives proper notice and designation of the FMLA leave. The responsibility is on the employer to designate FMLA leave as such, § 825.700(a). Additionally, the Final Regulations require specific notice to the employee of the rights and obligations under the FMLA at the time FMLA leave is requested. § 825.301. This "specific notice" requirement is a new and additional requirement upon the employer. The Department of Labor has issued a Notice, Form WH-381, which should be given the employee when he requests the leave. The form outlines for the employee the terms regarding employee eligibility, the amount of leave the employee is entitled to, reinstatement, required medical certification, accrued paid leave, premium payments for health insurance, other

benefits, fitness for duty certificates, key employee status and periodic report requirements. Although many employers may already be providing such designation and notice to the employee when the employee loses time from work as a result of workers' compensation claim, these Final Regulations make such designation and notice a prerequisite to the workers' compensation absence and FMLA leave running concurrently.

Under the Final Regulations, an employer cannot require the employee, and the employee cannot elect, to exhaust accrued paid leave during any absence that is covered by workers' compensation disability payments. § 825.207(d)(2). This rule does not apply where the employee refuses offered light duty and the workers' compensation laws allow benefits to cease based upon the refusal of suitable employment. In that event, if the twelve (12) weeks have not passed, the employer could then begin substituting paid leave if its policies so allow.

Under South Carolina law, unless the employee agrees to the stop payment of workers' compensation benefits, the employer/carrier cannot cease the benefits without an order of the Workers' Compensation Commission. The employer's alternative is to request a stop payment hearing, which will not be scheduled before the twelve (12) weeks have run. Therefore, cessation of the workers' compensation benefits so as to allow substitution of the paid leave for the remainder of the twelve (12) weeks will likely be a provision which employers will use retroactively. Employers would be wise to put such provision in the specific notice so as not to run afoul of the Act.

Finally, one provision that employers may want to utilize is Regulation § 825.309 where an employer can require an employee to report periodically, while he is concurrently out on FMLA leave and

Continued on page 8

WORKERS' COMPENSATION

Continued from page 7

workers' compensation, as to the employee's intent to return to work. This provision will be advantageous where the employee is also out on workers' compensation but is not keeping the employer informed as to his status. Again, the employee should be given notice of such a requirement in the specific notice at the time the leave is requested.

LIGHT DUTY WORK: An employee is permitted but not required to accept an offer of light duty under the FMLA regulations. § 825.702(d)(2). Moreover, under the FMLA, an employee's refusal of light duty cannot result in detrimental action to the employee. Although an employee may be disallowed workers' compensation benefits for having refused light duty, the employee will be entitled to the balance of the twelve (12) weeks under the FMLA. At this juncture, § 827.207 allows the employer to begin substituting paid leave for unpaid leave. Therefore, under the FMLA, an employer cannot require that the employee take the light duty job or accept a reasonable accommodation until the twelve (12) weeks of FMLA leave have been exhausted. Of course, under the South Carolina Workers' Compensation laws, where an employee refuses light duty and the employer has offered suitable employment, the employer can file a Stop Payment Application to cease benefits pursuant to S.C. Code Ann. § 42-9-260 and Regulations 67-506 and 67-507.

The FMLA requires that an employee taking FMLA leave be reinstated to the same or equivalent job. § 825.214. Protecting an employee's job was one of the primary goals of the FMLA. Under § 825.200(d) when an employee is on light duty, job restoration will only be available until twelve (12) weeks have passed, which includes any period of light duty. Under the Final Regulations, if an employee is unable to perform the essen-

tial functions of the job, the employee has no right to another job in keeping with any work restrictions. The Final Regulations do, however, in turn refer to the Americans With Disabilities Act (hereinafter "ADA") which may require a reasonable accommodation in such a situation.

FITNESS FOR DUTY REPORTS: An employer is allowed to have a uniform policy of requiring fitness for duty certificates. § 825.310. Uniformity is defined as applying to similarly situated employees, for example, those in the same occupation or with the same serious health condition. Any fitness for duty reports must also be pursuant to the ADA, in that they must be job related and consistent with business necessity. § 825.310.

Given those employee protections, under § 825.311(c) an employee who does not provide the required fitness for duty report may be terminated. With respect to the impact on a workers' compensation claim, the wisdom in terminating an employee needs to be evaluated on a case by case basis in terms of whether the employee has been released for light duty or full duty work and whether suitable employment has been offered. Also, an employer must respect the ADA requirements.

EXPANDED DEFINITION OF SERIOUS HEALTH CONDITION: The Interim Regulations defined a serious health condition as 1) inpatient care; or 2) a condition involving incapacity of more than three days. The Final Regulations specifically and significantly expand that definition to include a "chronic serious health condition" which is defined as a condition requiring periodic visits to a health care provider and which continues over an extended period of time, but does not necessarily last more than three days. § 825.114. This definition is designed to cover conditions which are episodic, for example seizures or diabetes. However, this expanded definition may come into play in situations where an employee has

a work related back injury, has lost time from work, returns to work, but is missing periodic or sporadic time from work. In such cases, the employer may count this leave as FMLA leave.

MEDICAL CERTIFICATION: The FMLA medical certification form has been

redrafted by the Department of Labor. The Interim Regulations issued a medical certification form which sought information specifically about the employee's health condition. That form was criticized as requiring information possibly in violation of the ADA. The Final Regulations propound Form WH-380 as the suggested medical certification form. The most blatant change in the form and the largest criticism of the new form is that it is not as specific with respect to the diagnosis for which the employee needs FMLA leave. Although the current form requests the medical facts supporting the need for the leave, in a workers' compensation scenario it may not be clear from the form whether the employee is in need of the FMLA leave for a workers' compensation injury. An employer cannot seek information in addition to what is contained in the form. § 825.306.

However, if the injury for which the employee needs FMLA leave is a work related injury and if the workers' compensation laws of that state allow direct contact between the employer and the employee's health care provider, the employer can contact the health care provider directly for clarification or additional information. Otherwise, if the injury is not work related, the only way in which to obtain any clarification of the medical certification form is for the employer's health care provider, with permission from the employee, to contact the employee's health care provider. Under the South Carolina Workers' Compensation Act, there is no prohibition or limitation upon the employer/carrier contacting the employee's health care provider directly. It is recommended that employers maintain continued and open communication with the health care providers as medical management is a proven method for containing workers' compensation costs.

CONCLUSION: The Final Regulations of the FMLA have attempted to address the interplay between workers' compensation injuries and an employee's need for FMLA leave. This article has addressed those points of interplay. In handling workers' compensation claims it is important for employers and insurance carriers to keep in mind that the FMLA and its regulations give deference to state workers' compensation laws and these new regulations emphasize the importance of maintaining the integrity of those laws.

RECENT DECISIONS CASES

By Larry Orr and Bill Davies

Recent Decision Indiana Supreme Court Holds Plaintiff's Counsel Has a Right to Rely on the Truthfulness of Defense Counsel's Representation of Coverage

Fire Insurance Exchange v. Bell, 643 N.E.2d 310 (S.Ct. Indiana 1994).

Jason Bell was severely injured in a fire at the home of his grandfather, Joseph Moore. Moore was cited by the fire department for careless storage of gasoline. Moore's homeowner's insurer was Farmers Insurance Exchange. Bell's attorney, Robert Collins, entered into negotiations with Farmers' claim representative and defense counsel. Farmers informed defense counsel that Moore's policy limits were \$300,000.00. Subsequently defense counsel told Collins he did not know the policy limits. Collins claimed defense counsel and the claims representative told him on separate occasions that the policy limit was \$100,000.00. Eventually the claims representative and defense counsel told Collins they would settle the minor's claim for the \$100,000.00 policy limit, which was agreed to. After the settlement had been consummated Collins learned that the policy limit was actually \$300,000.00. Bell then filed an action against defense counsel, his firm and the insurer alleging, among other claims, the fraudulent misrepresentation of the insurance policy limits.

The trial court denied summary judgment in favor of the defendants, ruling that whether the injured party's lawyer had a right to rely on the alleged misrepresentations was a question of fact. This was affirmed by the Court of Appeals.

The Indiana Supreme Court affirmed in part and reversed in part. The Supreme Court affirmed the ruling that it was a question of fact whether the child's lawyer had a right to rely on the representations of the claims manager of the policy limits.

Defense counsel did not fair as well. The defendants argued that Plaintiff's counsel had no right to rely on representations of coverage because Plaintiff's counsel was educated and sophisticated, the parties were not in a dominant-subordinate relationship, and they were in an adversarial posture. Plaintiff's counsel could have obtained the policy limits information through the discovery process.

The Supreme Court rejected this argument stating:

We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.

We therefore reject the assertion of [defense counsel] that Bell's attorney was, as a matter of law, not entitled to rely upon their representations. However, rather than finding this to be an issue of fact for determination at trial, as did our Court of Appeals, we hold that Bell's attorney's right to rely upon any material misrepresentation that may have been made by opposing counsel is established as a matter of law. The resolution of the questions of what representations were actually made and the extent of reliance thereon, are, along with any other remaining elements of Plaintiff's case, issues of fact which must be determined at trial. (643 N.E.2d at 313.)

Jurisdictions and the Component Part Supplier

Judge John C. Hayes, III, recently addressed the issue of whether South Carolina courts could exercise jurisdiction over a supplier who sold raw materials to a manufacturer for incorporation into a product subsequently sold to the general public. The court held that the supplier was not susceptible to jurisdiction merely because the subsequent manufacturer advertised, sold, and distributed the completed product in this state.

This issue was raised in several cases in which the plaintiffs were claiming injury from asbestos-containing products. The defendant contesting jurisdiction was a seller of asbestos fiber to a manufacturer which allegedly included that fiber as a constituent part in some products that were advertised, sold, and used in this state. Judge Hayes, who was acting as Administrative Judge for all asbestos

cases in the state, dismissed the fiber supplier by Order dated April 13, 1995. The plaintiffs did not appeal. Judge Hayes' Order, in pertinent part, is as follows:¹

In these asbestos personal injury actions, defendant CSR, Ltd. ("CSR") seeks dismissal based upon its assertion that this Court lacks personal jurisdiction. In the special appearance and motion in each case, this defendant contends that this Court does not have jurisdiction over it because the requirements of South Carolina's Long Arm Statute are not met and because CSR does not have minimum contacts with South Carolina such that the exercise of personal jurisdiction over it would meet constitutional due process requirements. For the reasons that follow, CSR's motion is granted.

I. FACTS

It is uncontested that CSR is a corporation organized and existing under the laws of Australia, with its principal place of business in Sydney, Australia. For a limited period of time ending in 1966, CSR acted as a sales agent for the sale of raw asbestos fiber which was mined by a subsidiary of CSR, Australian Blue Asbestos Pty., Ltd. One of the purchasers of the asbestos fiber was the Johns-Manville Corporation ("JM").

Continued on page 10

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A. WILLIAM ROBERTS, JR. & ASSOCIATES COURT REPORTING

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Plaintiffs allege that JM used this fiber as an ingredient in the manufacturer (outside of South Carolina) of some of its asbestos cement pipe known as Transite Pressure Pipe. CSR, however, retained no control over, or monetary interest in, the fiber after its sale, and the ultimate destination and use of the fiber were determined by the unilateral decisions of the purchaser. Thus, for example, JM designated the port of entry into the United States. JM then directed further shipment of the asbestos fiber to its manufacturing plants and decided to incorporate the fiber as an ingredient in some of its Transite Pressure Pipe. JM then determined where its Transite Pressure Pipe would be sold.

Plaintiffs contend that JM sales of the Transite Pressure Pipe containing raw asbestos sold by CSR found their way to South Carolina through the JM distribution system and were used by Plaintiffs in South Carolina. CSR has denied this allegation.

A hearing was held on the motions in all cases on March 9, 1995. Prior to the hearing both sides submitted briefs and notebooks containing materials for the Court to consider. All matters submitted to the Court or referenced in argument were considered by the Court.

II. DISCUSSION

Parties seeking to invoke personal jurisdiction against a foreign corporation by utilization of the South Carolina Long Arm Statute have the burden of establishing jurisdiction. Southern Plastics Co. v. Southern Commerce Bank, — S.C. —, 423 S.E.2d 128 (1992). The determination of whether a court may exercise personal jurisdiction over a non-resident involves a two-step analysis. First, the trial judge must determine that the South Carolina Long Arm Statute applies. Second, the trial judge must determine that the non-resident's contacts in South Carolina are sufficient to satisfy due process requirements. The Supreme Court of South Carolina has adopted the due process analysis articulated by the United States Supreme Court. See Southern Plastics, 423 S.E.2d at 129.

A. LONG ARM STATUTE.

Our Long Arm Statute, S.C. Code Ann. §36-2-803(1) (1976), provides in relevant part:

A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(c) commission of a tortious act in whole or in part in this State; ... or

(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

In the present situation, there is no evidence that CSR acted in South Carolina either directly or through an agent as required by Section 36-2-803(1). Specifically, there is no evidence of the commission of any act in any degree in South Carolina by CSR as required by the provisions of Section 36-2-803(1)(c). Further, although there is at least prima facie evidence that CSR reasonably expected its product to be used or consumed in all of the continental United States including South Carolina, there is absolutely no evidence that any of CSR's product was so used or consumed in this State as required by the provisions of Section 36-2-803(1)(h).

For purposes of Section 36-2-803(1)(c), this Court does not find that the alleged tortious conduct of failure to warn the world of the potential risks of exposure to JM's asbestos-containing finished products creates tortious conduct by CSR towards the Plaintiffs in these cases. Even if there was such a duty to warn, it could not practically or legally extend to these plaintiffs as CSR's product lost its character through the conduct of others. If CSR's asbestos fiber was in fact used in the manufacture of some transite pipe by JM, JM turned the fiber into a product over which CSR had no control and had no ability to effectuate a warning. In addition, there is no showing by Plaintiffs of specific exposure to any of CSR's fiber or to any of the transite pipe which contained CSR fiber.

B. DUE PROCESS.

In order for a court to exercise personal jurisdiction over a non-resident, due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. In conducting this inquiry, the court must find that the defendant has the requisite minimum contacts with the forum. Without minimum contacts, the court does not have the "power" to adjudicate the action. The court must also find that

the exercise of jurisdiction is "reasonable" or "fair." If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process. See Southern Plastics Co., 423 S.E.2d at 131.

(1) POWER PRONG.

Absent the adoption of a pure stream of commerce theory, which the Court rejects, the Court finds that CSR has had no contacts with South Carolina. Defendant submitted an affidavit and depositions denying the contacts pertinent to asserting personal jurisdiction over a non-resident defendant. In response, Plaintiffs submitted a number of attachments referenced in their Statement of Facts. [The references to particular exhibits submitted by plaintiff are omitted. Judge Hayes specifically commented on each of the 35 exhibits.]

In the material submitted by CSR, including the affidavit of Edwin Smith, the deposition of Edwin Smith and the deposition of Richard Peacock, there is ample evidence indicating that CSR did not direct any activities to South Carolina, and has not purposely availed itself of the privileges of conducting activities in South Carolina. Southern Plastics Co., 423 S.E.2d at 131.

The pure stream of commerce theory has not been adopted by the United States Supreme Court. In fact, it appears that a plurality of the Court has rejected a pure stream of commerce doctrine. Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 120 (1987). See also Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (4th Cir. 1994), cert. denied, 115 S. Ct. 1103 (1995) (rejecting jurisdiction over supplier of asbestos filter material to a cigarette manufacturer even though supplier knew some of the cigarettes containing its asbestos filter would be sold in the forum); Watkins v. Turner and Newall, Ltd., Nos. 84-1742-17, 86-0087-17, 1988 U.S. Dist. LEXIS 8778, at *19 (D.S.C. April 29, 1988) (Anderson Jr., J.) (rejecting the assertion of personal jurisdiction over a foreign raw asbestos supplier in a finished product case, "the law is clear that where, as here, a supplier of raw materials supplies to out-of-state companies which in turn use the materials to manufacture, out-of-state, products which ultimately are sold or used within the state, the supplier may not constitutionally be held subject to personal jurisdiction within the state.")

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For all of the reasons stated above, Plaintiffs have submitted insufficient proof that CSR either directed any activities to South Carolina or that it has purposely availed itself of the privileges of conducting activities in South Carolina. This Court specifically finds that foreseeability of use is not proper criterion for determining the question of personal jurisdiction. See Asahi, Lesnick, and Watkins. If it were, CSR would be subject to jurisdiction in states with which it had absolutely no contacts simply because CSR could have foreseen possible use of its asbestos within all of JM's geographic market, apparently at least the contiguous 48 states.

As the "power prong" fails, the exercise of personal jurisdiction by this Court over CSR fails to comport with the requirements of due process. Southern Plastics.

(2) FAIRNESS PRONG.

In determining whether the exercise of jurisdiction over a foreign defendant is fair, this Court has considered a number of factors including the burden on the defendant; the state's interest in adjudicating the dispute, the interest of the Plaintiffs in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient solution to controversies; and the shared interest of the several states in furthering fundamental substantive social policies. Southern Plastics, 423 S.E.2d at 132 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)). The court finds that although the "Power Prong" has not been met, the "Fairness Prong" has been met. While it may be burdensome on CSR to litigate in South Carolina, when this burden is weighed against these Plaintiffs' and the State's interests as well as the burden on Plaintiffs to litigate in a foreign forum, fairness weighs in favor of South Carolina invoking personal jurisdiction. Additionally, it is this Court's understanding from the briefs and exhibits submitted that CSR is involved in litigation of the same or similar issues in a number of United States jurisdictions. Further, modern technology (telephone, fax, computer, video deposition, overnight mail, and world-wide air travel) lessen the burden on a defendant required to defend in a foreign jurisdiction.

CARPAL TUNNEL SYNDROME IN THE WORK PLACE

By Peter A. Nathan, M.D.,
Richard C. Keniston, M.D.,
and Kenneth D. Meadows, R.P.T.

Portland Hand Surgery and Rehabilitation Center

THE PORTLAND RESEARCH GROUP

Information about the Authors

The Portland Hand Surgery and Rehabilitation Center is a privately-operated surgical office which offers adjunctive rehabilitation services and includes a self-funded research department. Dr. Peter Nathan is a board certified orthopaedic surgeon with an additional certificate in hand surgery. Dr. Richard Keniston is board certified in Anatomic and Clinical Pathology. Kenneth Meadows is a licensed physical therapist with postgraduate training at the Mayo Clinic.

Dr. Nathan began to study the relationship between occupation and carpal tunnel syndrome in 1984. He was puzzled by the frequent lack of correlation between the severity of reported symptoms and the degree of median nerve slowing as well as the presence of median nerve latency in unaffected wrists. His studies⁽¹⁾ have been unique in that they have focused primarily upon nerve conduction abnormalities, have been longitudinal (adding the dimension of time), as well as cross-sectional in nature (similar physical activity in different occupations).

In the course of his continuing research into the causes of carpal tunnel syndrome, Nathan has studied nearly 2,000 subjects (over 4,600 median nerves), including 1,072 industrial workers from 7 industries. A number of separate studies have been

done ranging from industrial workers to high school students and workers' compensation claimants.^(2,3,4) In the last 10 years, Nathan has contributed to a test on carpal tunnel syndrome, published 12 articles outlining the results of various studies, and spoken on this topic before national and international medical conferences.

INTRODUCTION

For many decades, carpal tunnel syndrome (CTS) was seen primarily in middle-aged housewives.⁽⁵⁾ In recent years, this condition has become a common basis for workers' compensation claims, rivaling back pain for numbers of claims and financial cost.

Carpal tunnel syndrome is a condition in which the median nerve is compromised as it passes through a tunnel in the wrist known as the carpal tunnel. This tunnel is bounded by the carpal bones on three sides and by the transverse carpal ligament on the palm side of the wrist. In addition to the median nerve, flexor tendons, their synovial sheaths, and blood vessels pass through the carpal tunnel. Normally, the diameter of this tunnel allows enough space for adequate circulation of blood to the nerve and for smooth movement of the nerve and tendons in response to motion. The narrowness of the tunnel can result in a tightness or

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III. DECISION AND ORDER

For the foregoing reasons, defendant CSR's Motion to Dismiss for lack of personal jurisdiction in each of the above referenced cases is GRANTED. Accordingly, it is hereby ORDERED that the above-captioned cases are DISMISSED WITH PREJUDICE as to defendant CSR.

This Order is important because it clearly rules that a nonresident corporation merely introducing a component into the

stream of commerce is not, and should not be, sufficient to invoke jurisdiction. This decision by Judge Hayes is in line with prior state and Fourth Circuit decisions. Even though it was not appealed, the Order will provide strong support for future motions dealing with similar suppliers of component parts.

¹Because the Order is lengthy and contains many case-specific factual findings, it will not be printed in its entirety. Copies of the entire decision may be obtained from W.S. Davis, Jr. or D.D. Smalls, P.O. Box 11070, Columbia, S.C. 29211 (803-799-2000).

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compression which causes a decrease of blood supply to the median nerve. The impaired blood supply to the nerve can result in a specific set of symptoms which constitute the clinical condition of carpal tunnel syndrome.⁽⁶⁾

History and Presenting Symptoms

In a typical case of carpal tunnel syndrome, the patient complains of numbness and tingling in the distribution of the median nerve.⁽⁷⁾ The symptoms may radiate up the arm and may even be referred to the shoulder or neck. Patients frequently report being awakened at night by the symptoms, stating that shaking the arm brings relief. Other symptoms associated with carpal tunnel syndrome include pain, tightness, and clumsiness.

Extended History

We obtain a complete medical, occupational, and social history including a family history of CTS or other nerve entrapment syndromes and the avocational activities of the patient. We ask questions regarding the use of vitamins and other nutritional supplements, dieting, over-the-counter and prescribed drugs, smoking, and alcohol and caffeine consumption.⁽⁸⁾ We also ask about severe, recent trauma — such as a crushing injury to the wrist or Colles' fracture. Any of these factors can be relevant to the development of carpal tunnel syndrome.

Accuracy of History

Workers' compensation and damage suit patients may give a false history if they sense that full disclosure will endanger their claim. They may deny pre-employment or pre-accident symptoms or deny a prior diagnosis of CTS. Claimants may also deny a family history of CTS and significant recreational activities, particularly those involving repetitive or vigorous use of the hands and wrists (e.g., bowling, knitting, sewing, tennis). They may claim that a hand or wrist injury happened on the job when, in fact, it occurred elsewhere. Independent investigation by the defense, including surveillance, is sometimes necessary to validate the history and current physical activities.

EXAMINATION AND TESTING

We examine both upper extremities, even if only one extremity is symptomatic. The posture, range of motion, and strength of the various joints and muscle groups are assessed. The external dimensions of the wrist are measured with calipers. Diagrams are marked showing

the location of specific and nonspecific symptoms on the hand, wrist, or elbow. Phalen's test is performed; sensation at the tips of the fingers is measured by two-point discrimination using calipers. The thenar eminence is examined for atrophy, and we perform nerve conduction studies on both upper extremities.⁽⁹⁾

Nerve Conduction Studies

The gold standard^(10,11) for confirmation of the diagnosis of median nerve entrapment (the disease process in carpal tunnel syndrome) is the presence of median nerve conduction abnormalities in the area of the carpal tunnel. Nerve conduction studies are the only objective means for confirming that symptoms are due to CTS and not to some other condition.^(11,12)

A nerve conduction study measures any delay in the time it usually takes for a nerve impulse to travel from one point on a nerve to another. An abnormal latency (delay) in conduction of the nerve, in the presence of symptoms, confirms the diagnosis.

Acute Trauma and Carpal Tunnel Syndrome

The force required to crush, lacerate, or bruise the median nerve is much greater than can be produced by gripping an object such as a tool or steering wheel.⁽¹³⁾ If acute trauma, as in a motor vehicle accident, is suspected as the cause of CTS, the symptoms ought to occur immediately in conjunction with demonstrable swelling of the wrist. Nerve conduction findings should deteriorate rapidly. Symptoms occurring weeks, months, or years after an accident and following resolution of soft tissue swelling, suggest some other etiology, probably intrinsic factors.

Some individuals do complain of CTS symptoms and exhibit swelling of the wrist following a motor vehicle accident. In the typical palmar/steering wheel counterforce involvement, the median nerve within the carpal tunnel is unlikely to sustain any significant trauma. CTS signs and symptoms which appear immediately after an automobile accident (without a direct crush injury to the wrist) may be due to impingement of the median nerve at the neck-shoulder girdle region.

DIAGNOSIS

Requirements for the Diagnosis

The diagnosis of CTS is reliable if these criteria are met: 1.) An appropriate clinical history; 2.) Two or more specific symptoms (sensory loss, numbness, tingling, or nocturnal awakening). The diagnosis of CTS is also reliable if another set of criteria are met: 1.) One specific symptom and

two or more nonspecific symptoms (pain, tightness, or clumsiness) in the median nerve distribution;⁽¹⁴⁾ and 2.) Median nerve conduction abnormalities are present on NCS.⁽¹²⁾ Phalen's test is useful only for diagnostic confirmation.

Differential Diagnosis

Not all symptoms in the distribution of the median nerve mean that the patient has carpal tunnel syndrome. The most common cause of such symptoms is musculoskeletal discomfort (fatigue or mechanical irritation of soft tissue) which can be associated with any form of exercise, including work. We have found that 60 percent of women under 40 years of age who complain of CTS symptoms do not have median nerve conduction abnormalities and, hence, a diagnosis of carpal tunnel syndrome is probably wrong. The most common correct diagnosis in these individuals is muscular fatigue or irritation, followed by a variety of other medical conditions, including strains and sprains and tightness of muscles and fascia.

Misdiagnosis of CTS is particularly common in female keyboard users and female assembly line workers. Most of these women respond to temporary work modification and conservative treatment, including stretching of soft tissue structures of the upper extremity. Our analysis of 4,600 upper extremities suggests that a diagnosis of carpal tunnel syndrome based on symptoms alone is incorrect at least as often as it is correct. This is usually because the physician mistakes musculoskeletal discomfort for carpal tunnel syndrome.

There are other conditions associated with carpal tunnel syndrome (both symptoms of CTS and median nerve conduction abnormalities).^(6,15) These include morbid obesity, diabetes mellitus and rheumatoid arthritis, conditions associated with fluid retention and swelling of the contents of the carpal tunnel. Most carpal tunnel syndrome cases are not associated with inflammation.^(16,17) Therefore, use of terms such as "tendinitis" or "tenosynovitis" in relationship to CTS are inaccurate and suggest lack of current knowledge about CTS.

RELATIONSHIP TO WORK

We have found no consistent objective evidence that occupation is a major contribution factor for conduction abnormalities of the median nerve.^(18,19) Nevertheless, there is an inaccurate but growing public perception that many occupations involving repetitive or forceful

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use of the hands or wrists cause carpal tunnel syndrome.

Advertisements for keyboard devices claim to decrease this asserted danger. To the contrary, our studies have revealed that keyboard use (typing of any kind) affords protection against the development of carpal tunnel syndrome and is in no sense a cause of this disease.⁽²⁰⁾

Compensability plays a major role in the incidence of workers' claims for carpal tunnel syndrome. The incidence of claims for CTS is higher in states such as Washington or Illinois,^(21,22) which have looser criteria for CTS claims, or states with more generous compensation rates than in states with a more specific definition of CTS (Oregon)⁽²³⁾ or less generous compensation (Iowa).⁽²¹⁾ Based on the number of claims made, one would conclude that CTS occurs 74 percent more often in the State of Washington than in the State of Oregon. This is true even of comparable groups of workers. Oregon state government employees file claims for carpal tunnel syndrome only one-third as frequently as do Washington state government employees. In Oregon, workers appear to have the same incidence of CTS (one case per 1000 each year) as the general population and the patients in the Rochester, Minnesota study.^(22,24)

Studies Finding Work Relatedness

Most studies of occupation as a cause of CTS have lacked a good case definition.^(25,26,27) The primary criterion for causation has been that the workers reported symptoms while employed. Nerve conduction studies, the most objective test for confirming median nerve conduction abnormalities, have been conspicuously absent or abbreviated in most of those studies. Studies which omit or minimize the significance of nerve conduction studies are of little or no value.

Secondly, study design has been flawed. Most studies have been cross-sectional (like a snapshot, isolated in time and space), with few cases of CTS, and control groups with an unreasonably low prevalence of CTS.^(25,26,27) Also, they have focused upon a single occupation or a few closely-related occupations or have focused on a single industry (e.g., casting workers, meat packers, postal workers, newspaper workers).^(21,25,26,27) Some studies have even excluded novice workers from consideration,^(25,26,27) a group with a particularly high prevalence of specific and nonspecific complaints.⁽²⁸⁾

Even more significant, most of these studies have ignored all or most individual factors described below.⁽²⁹⁾ The exclusion of individual factors from consideration has led, by default, to a perceived increase in the importance of occupation as a cause of CTS.

STUDIES BY PORTLAND RESEARCH GROUP

Regardless of the groups we have studied, the most important individual factors for predicting the development of carpal tunnel syndrome are body mass index (kg/m²), age, wrist depth/width ratio, and avocational activities. Body mass index (BMI) is a measure of obesity, which is associated with diseases of all kinds.^(29,30) Peripheral nerves, like the rest of the body, deteriorate slowly over time; therefore, older workers are more likely to have diseased nerves than younger ones. Wrist dimensions are inherited in large part, as is body type. Individuals with squarer wrists (wrist depth/width ratio greater than 0.7) are more likely to develop

TABLE 1 — NIOSH Surveillance Case Definition of Work-Related Carpal Tunnel Syndrome.^(22,24)

Criteria A, B, and C must be met:

- A. Symptoms suggestive of carpal tunnel syndrome: paresthesia, hypesthesia, pain or numbness affecting at least part of the median nerve distribution of the hand.
- B. Objective findings consistent with carpal tunnel syndrome.
Either, (1) One or more of the following physical findings: Tinel's sign, Phalen's sign, or decreased or absent sensation to pin prick in the median nerve distribution of the hand.
or, (2) Electrodiagnostic findings of median nerve dysfunction across the carpal tunnel.
- C. Evidence of work relatedness: One or more of the following: Frequent, repetitive or forceful hand work on affected side; sustained awkward hand position; use of vibrating tools; prolonged pressure over wrist or base of palm; temporal relationship of symptoms to work or association with carpal tunnel syndrome noted in co-workers.

CTS than are individuals with more rectangular wrists.^(30,31,32)

Frequent vigorous aerobic exercise renders development of CTS much less likely. Alternatively, obesity and the absence of exercise increase the risk for CTS by a factor of 10.

The individual factors (BMI, age/gender, wrist dimensions, avocational activities, and legal drug use) combined are approximately 10 times as important as job-related factors for predicting who has CTS. Two of three job-related factors selected (keyboarding time and duration of employment) actually predict less CTS. If we include nerve conduction studies in the analysis, job-related factors contribute nothing to our ability to predict who has CTS.^(28,30,31,32)

PROPOSED OSHA STANDARDS

The National Institute for Occupational Safety and Health (NIOSH) has already issued a working case definition for occupational CTS (OCTS), pursuant to an OSHA report (Table 1).⁽³³⁾ Note that this case definition permits the diagnosis of OCTS when that diagnosis would not be reached by any competent physician familiar with CTS.⁽¹²⁾ The most important objective evidence of CTS, an abnormal nerve conduction study, is not even required by the NIOSH definition. The need for an abnormal nerve conduction study to confirm the diagnosis of carpal tunnel syndrome is generally, but not universally^(22,25,26,27) accepted in the medical community.

A study to establish the validity of the NIOSH standards^(22,33) was undertaken by Dr. J.N. Katz.⁽¹²⁾ These patients were evaluated and compared to actual diagnoses confirmed by nerve conduction tests. The results of the testing indicated that 50 percent of the workers who satisfied the NIOSH definition of OCTS did not have carpal tunnel syndrome. Moreover, 25 percent of the subjects who failed to meet the NIOSH standards had carpal tunnel syndrome. Katz and his co-workers reached the obvious conclusion that the proposed NIOSH case definition was of limited value in the diagnosis of CTS because of its failure to require an abnormal nerve conduction study.

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Note that the NIOSH definition warrants the diagnosis of carpal tunnel syndrome even if only one of these findings is present: Tinel's sign, Phalen's test, or decreased or absent sensation in the median nerve distribution. Hence, if a worker has the right job, and complains of any symptoms, then even a positive Tinel's sign suffices to warrant the diagnosis of OCTS. Paradoxically, a review of medical literature confirms beyond doubt that Tinel's sign is useless in the diagnosis of CTS.⁽³⁴⁾

The paucity of evidence required by NIOSH to find a relationship between occupational duties and carpal tunnel syndrome is similarly flawed. It requires only one of a number of occupational situations. Ten years of research by our group suggests that there is a significant protective effect of work.^(20,28,30,31,32) After correction for age, the longer the duration of employment, the less likely the worker is to have CTS.^(31,32)

The temporal relationship of nerve conduction abnormalities to work may often be evidence against an occupational cause of a patient's carpal tunnel syndrome. In many cases, the severity of median nerve slowing revealed by nerve conduction studies could not have developed within the period of time the worker was employed at the job where the symptoms were first reported.

The presence of carpal tunnel syndrome in co-workers is frequently a reflection of the "herd effect." If one worker files a claim and is perceived by co-workers as benefiting from this action, more claims can be expected. Whenever so-called "repetition strain injuries" or "cumulative trauma disorders" become compensable, the number of claims for these conditions tends to explode in what has been termed "an epidemic of mass hysteria."^(23,35) Thus, one factory may have multiple claims for carpal tunnel syndrome while a comparable factory in the same industry with workers doing the same task with the same equipment will have few or no cases.^(21,36,37)

CARPAL TUNNEL RELEASE SURGERY AND REHABILITATION

We have found surgery to be an effective and curative treatment for CTS symptoms which do not respond to conservative care. In our experience, with surgery⁽¹⁾ and early active postoperative physical therapy, a patient can return to his or her old job in two or three weeks.

In our practice, the first physical therapy session is on the day after surgery. We never use wrist splints, as these interfere with rehabilitation, and can cause adhesions and additional scarring. Any delay in returning to work greater than 40 days suggests poor medical management and/or lack of motivation by the patient.

SUMMARY OF OUR FINDINGS

CTS is a common condition in the general population and in industrial workers. CTS, if managed correctly, is usually neither serious nor debilitating. A high percentage of patients filing claims for OCTS do not have CTS or, if they do, it is usually not job-related, but is the result of intrinsic (personal) factors. The NIOSH case definition for OCTS is so loose as to invite a diagnosis of OCTS in the majority of blue-collar workers and keyboard data entry personnel. Nerve conduction testing is the gold standard upon which a diagnosis of CTS is confirmed. The major factors predicting median nerve conduction abnormalities at the carpal tunnel are increased age, elevated body mass index (obesity), and a wrist depth/width ratio greater than 0.7. The major factors predicting CTS symptoms and a CTS diagnosis are nerve conduction abnormality and lack of vigorous aerobic exercise. The job-related factors contribute less than 10 percent to the ability to predict CTS; two-thirds of the contribution of the job-related factor is protective. If physical therapy is begun immediately following surgery, nearly all carpal tunnel release patients can return to work in two to three weeks.

DEFENSE TIPS

Stephen C. McAliley, Esq.

1. A physician who is willing to make the diagnosis of carpal tunnel syndrome without a nerve conduction velocity test, should admit that a majority of physicians familiar with this disease do an NCV.

2. Frequently you will see the treating physician order an NCV test which turns out normal. Nonetheless, the physician recommends surgery. Why did he order the test if its outcome was not going to alter treatment? Was he just curious? Would he agree that this was an unnecessary diagnostic test inasmuch as he obviously would operate regardless of the outcome of this test?

3. Is the doctor aware of any outcome studies of CTS surgery when done in the face of a normal NCV? Has this physician ever ordered an NCV study when carpal tunnel syndrome was suspected? If so, why was the test ordered in those cases but not in this case?

¹Nathan PA, Meadows KD, Keniston RC: Rehabilitation of Carpal Tunnel Surgery Patients Using a Short Surgical Incision and an Early Program of Hand Therapy. *J Hand Surg* 1993; 18A: (in press).

²Nathan PA, Doyle LS, Meadows KD: Comparison of Sensory Latencies of the Median Nerve at the Carpal Tunnel Among Juveniles and Adults. *Bull Hosp Dis Orthop Inst* 1989; 49:85-93

³Steel mill, meat/food packing, electronics, and plastics.

⁴Aluminum reduction, cable, furniture, and creamery.

⁵Phalen GS: The Carpal Tunnel Syndrome: Clinical Evaluation of 598 Hands. *Clin Ortho* 1972;83:29-40.

⁶Szabo RM, Madison M: Carpal Tunnel Syndrome. *Ortho Clin NA* 1992;23:103-109. This article is an excellent overview of both the diagnosis and treatment of CTS.

⁷The median nerve innervates the thenar muscle at the base of the thumb and furnishes sensation to the thumb, index finger, middle finger, and thumb side of the ring finger.

⁸Nathan PA, Keniston RC, Meadows KD, Lockwood RS: Legal Drugs (Tobacco, Caffeine, and Alcohol) and Slowing of Sensory Conduction of the Median Nerve at the Carpal Tunnel. Presented at 1st Congress of the Federation of European Societies for Surgery of the Hand, Brussels, Belgium, May 26-29, 1993.

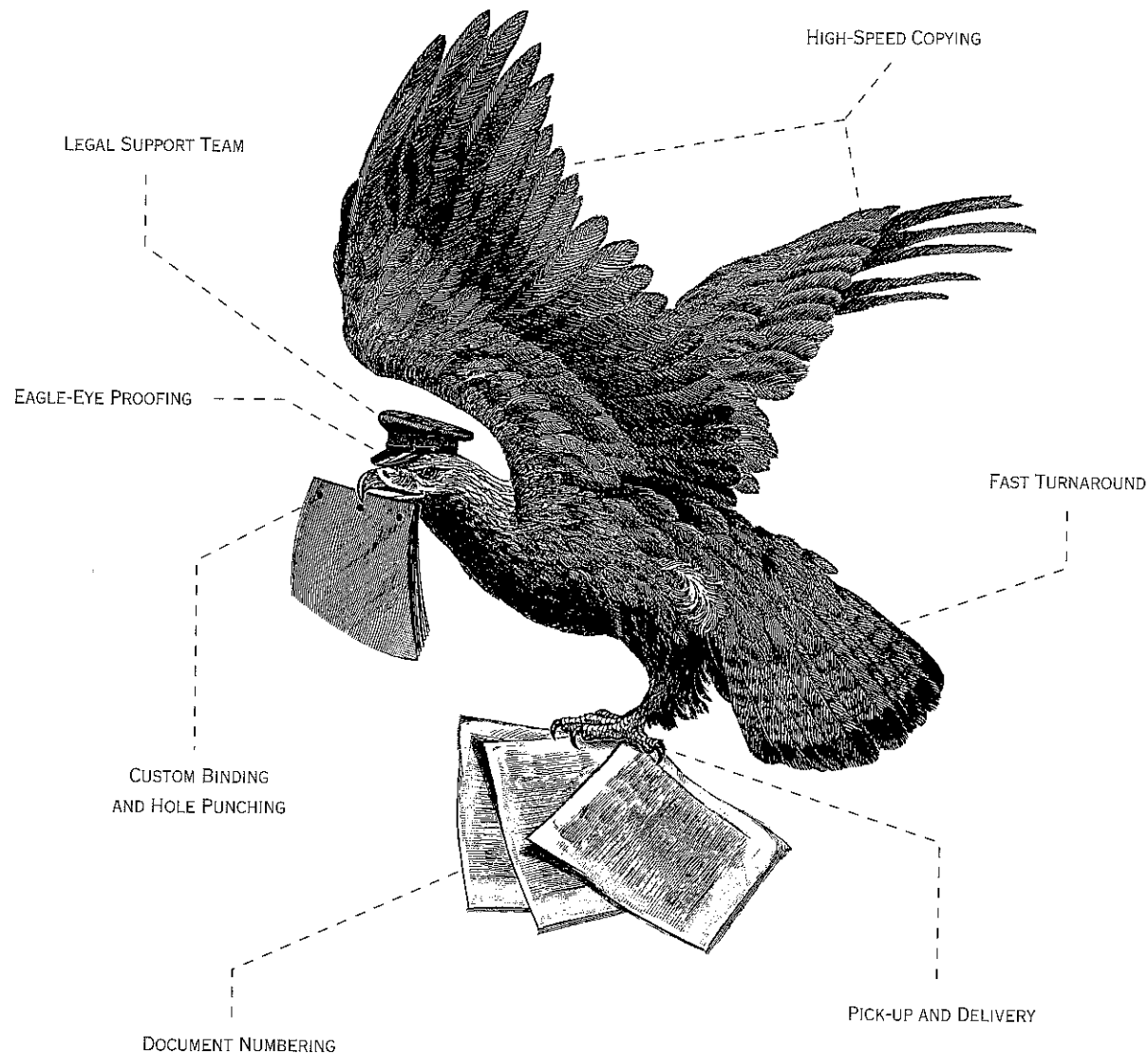
⁹The thenar muscle forms the thenar eminence at the base of the thumb.

¹⁰Nathan PA, Keniston RC, Meadows KD, Lockwood RS: Predictive Value of Nerve Conduction Measurements at the Carpal Tunnel. *Muscle & Nerve* 1993; 16:(in press).

¹¹A gold standard is the primary criterion upon which a particular diagnosis is based.

¹²Katz JN, Larson MG, Fosse AH, et al.: Validation of Surveillance Case Definition of Carpal Tunnel Syndrome. *Am J Publ Health* 1991; 81:189-193. "Surveillance" here means "screening" for undiagnosed cases of CTS and also implies checking up on the NIOSH case definition to see if it is accurate.

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¹³Frost HM: Skeletal Structural Adaptations to Mechanical Usage (SATMU): 4. Mechanical Influences on Intact Fibrous Tissues. *Anat Record* 1990; 433-439. Connective tissues can resist forces at least ten times the maximum we can voluntarily place on them without failure. The median nerve is supported internally and externally by connective tissue.

¹⁴For a more complete definition of symptoms, see Peacock K: Carpal Tunnel Syndrome. *Hippocrates' Lantern* Vol. 1, No. 3:4-6. Proximal radiation of CTS symptoms is very common in our experience.

¹⁵Other medical conditions associated with CTS are oral thyroid disease, pregnancy, menopause, use of oral contraceptives, gynecological surgery, and amyloidosis.

¹⁶Fuchs PC, Nathan PA, Myers LD: Synovial Histology in Carpal Tunnel Syndrome. *J Hand Surg* 1991; 1 6A:753-758.

¹⁷Kerr CD, Sybert DR, Albarracin NS: An Analysis of the Flexor Synovium in Idiopathic Carpal Tunnel Syndrome: A Report of 625 Cases. *J Hand Surg* 1992; 17A:1028-1030.

¹⁸Nathan PA, Meadows KD, Doyle LS: Occupation as a Risk Factor for Impaired Sensory Conduction of the Median Nerve at the Carpal Tunnel. *J Hand Surg* 1988; 13B:167-171.

¹⁹Nathan PA: Letter to the Editor. Cumulative Trauma Disorders of the Upper Extremities. *JAMA* Aug. 12, 1992; Vol. 268, No. 6:787.

²⁰Nathan PA, Keniston RC, Meadows KD, Lockwood RS: Keyboarding as a Risk Factor for Slowing of Sensory Conduction of the Median Nerve, Symptoms, and Carpal Tunnel Syndrome in Managers and Clerical Workers from Eight Industries. Presented at 1st Congress of the Federation of European Societies for Surgery of the Hand, Brussels, Belgium, May 26-29, 1993.

²¹Mesear VR, Hayes JM, Hyde AG: An Industrial Cause of Carpal Tunnel Syndrome. *J Hand Surg* 1986; 11A:222-227.

²²Franklin GM, Haug J, Heyer N, et al.: Occupational Carpal Tunnel Syndrome in Washington State, 1984-1988. *Am J Publ Health* 1991;81:741-746.

²³Oregon Department Of Insurance and Finance, Research and Analysis Section. Carpal Tunnel Syndrome in Oregon, 1987-1991.

²⁴Stevens JC, Sun S, Beard CM, O'Fallon WM, Kurland LT: Carpal Tunnel Syndrome in Rochester, Minnesota, 1961 to 1980. *Neuro* 1988;38:134-138.

²⁵Stock SR: Workplace Ergonomic Factors and the Development of Musculoskeletal Disorders of the Neck and Upper Limbs: A Meta-Analysis. *Am J Ind Med* 1991; 19:87-107. Dr. Stock reviewed 49 studies and found only three (including our own) "that merited careful consideration on the basis of criteria emphasizing adequate definitions, populations, exposures, and outcomes." The rest were flawed by one or more of these criteria.

²⁶Silverstein BA, Fine LJ, Armstrong TJ: Occupational Factors and Carpal Tunnel Syndrome. *Am J Indust Med* 1987; 11:343-358. Dr. Stock found the Silverstein study to be worthy of special consideration. This study did not include nerve conduction studies in its case definition of CTS and was based on an unrepresentative sample.

²⁷Gerr F, Letz R, Landrigan PJ: Upper-Extremity Musculoskeletal Disorders of Occupational Origin. *Annu Rev Publ Health* 1991; 12: 543-566. Another review study which also ignores the issue of causality by assuming a prior work-relatedness and also relies primarily on reported symptoms rather than objective findings.

²⁸Nathan PA, Keniston RC, Myers LD, Meadows KD: Longitudinal Study of Median Nerve Sensory Conduction in Industry: Relationship to Age, Gender, Hand Dominance, Occupational Hand Use, and Clinical Diagnosis. *J Hand Surg* 1992; 17A:850-857.

²⁹Dekrom MCTFM, Kester ADM, Knipschild PG: Risk Factors for Carpal Tunnel Syndrome. *Am J Epidemiol* 1990; 1 32: 1102-1110. Dieck GS, Kelsey JL: An Epidemiological Study of Carpal Tunnel Syndrome in an Adult Female Population. *Prev Med* 1985; 14:63-69. Vessey MP, Villard-MacIntosh L, Yeates D: Epidemiology of Carpal Tunnel Syndrome in Women of Childbearing Age. Findings in a Large Cohort Study. *Int J Epidemiol* 1990; 19:655-659. Kalman AC, Thomas JE, Lambert EH,

Love JG, Lipscomb PR: Long-Term Results of Operation for Carpal Tunnel Syndrome. *Mayo Clin Proc* 1966;41:232-241. Stevens JC, Beard CM, O'Fallon WM, Kurland LT: Conditions Associated with Carpal Tunnel Syndrome. *Mayo Clin Proc* 1992;67:541-548.

³⁰Nathan PA, Keniston RC, Myers LD, Meadows KD: Obesity as a Risk Factor for Slowing of Sensory Conduction of the Median Nerve in Industry: A Cross-Sectional and Longitudinal Study Involving 429 Workers. *J Occup Med* 34:379-383.

³¹Nathan PA, Keniston RC: Response to Letter to Editor. *J Occup Med* 1992;34:1118-1119.

³²Nathan PA, Keniston RC: Carpal Tunnel Syndrome and Its Relation to General Physical Condition. *Hand Clinics* 1993;9:253261.

³³Ergonomic Safety and Health Management: Proposed Rule. Department of Labor, Occupational Safety, and Health Administration. *Federal Register*. Aug. 3, 1992:34190-34200. Table 1 is based upon this report.

³⁴Kuschner SH, Ebramzadeh E, Johnson D, et al.: Tinel's Sign and Phalen's Test in Carpal Tunnel Syndrome. *Orthop* 1992;15:1297-1302.

³⁵Ireland DCR: The Australian Experience with Cumulative Trauma Disorders. In: *Occupational Disorders of the Upper Extremity*. Millender LH, Louis DS, and Simmons BP, eds. New York: Churchill Livingstone, 1992:79-88.

³⁶Hadler NM: Arm Pain in the Workplace: A Small Area Analysis. *J Occup Med* 1992;34:113-119.

³⁷Schottland JR, Kirschberg GJ, Fillingim R, Davis VP, Hogg F: Median Nerve Latencies in Poultry Processing Workers: An Approach to Resolving the Role of Industrial "Cumulative Trauma" in the Development of Carpal Tunnel Syndrome. *J Occup Med* 1991;33:627-631.

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