IN THE SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SANDERSON FARMS, INC. — APPELLANT

VERSUS — CAUSE NO. 2009-WC-00840-COA

DEBRA F. JOHNSON — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court evaluate possible disqualification or recusal.

1. Judge Mark Henry,
   Administrative Law Judge for the Mississippi Workers' Compensation Commission

2. Honorable Douglas S. Boone and his law firm,
   Gilchrist Sumrall Yoder & Boone, PLLC,
   Attorney of record for Sanderson Farms, Inc.

3. Honorable John T. Ball
   Attorney for Claimant/Appellee

4. Mississippi Workers' Compensation Commission

5. Sanderson Farms, Inc.

6. Debra Johnson

7. Liberty Mutual Insurance Company/Helmsman Management Services, Inc.

Douglas S. Boone,
Attorney for the Appellant

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STATEMENT OF ISSUE

Is the decision of the Mississippi Workers' Compensation Commission that Claimant's alleged carpal tunnel syndrome is work related, arbitrary and capricious when that decision is based on medical opinions which were not supported by any scientific evidence when contra evidence was presented based upon scientific evidence that carpal tunnel syndrome is not caused or contributed to by work?

STATEMENT OF THE CASE

1. On October 19, 2001, the Appellee, hereinafter referred to as the Claimant, filed a Petition to Controvert alleging that on the ____ day of August, 2000, she suffered a compensable injury to both hands, wrists and arms by using scissors on the line. (Record Excerpts pg. 2)

2. The Appellant, hereinafter referred to as the Employer, filed a timely Answer denying the Claimant suffered a compensable injury. (Record Excerpts pg. 3)

3. An evidentiary hearing was held on June 27, 2006, and Administrative Judge Mark Henry issued his Order on November 29, 2006, finding that the Claimant suffered a compensable injury and awarding the following: (1) temporary total disability benefits in the amount of $173.43 each week beginning August 16, 2000, and continuing through November 22, 2003; (2) penalties and interest on any due and unpaid compensation benefits from the due date of each installment of such benefits; (3) reasonable and necessary medical supplies in accordance with the fee schedule. Judge Henry reserved determination of permanent benefits pending an examination by Dr. Vohra. (Record Excerpts pg. 25)

4. Judge Henry in a separate Order of November 29, 2006, appointed Dr. Vohra to perform an independent medical evaluation for permanent disability purposes. (Record Excerpts pg. 23)

5. On December 12, 2006, Employer filed a Petition for Review Before the Full Commission and on January 19, 2007, the Full Commission held that the Petition for Review was interlocutory in nature and, therefore, dismissed same without prejudice. (Record Excerpts pg. 52)

6. On August 22, 2007, Judge Henry issued his Final Order awarding forty weeks of permanent partial disability benefits (10% to each upper extremity) and ordering a credit of $500.00 for funds expended by the Employer in payment to Dr. Vohra. (Record

Excerpts pg. 63)

7. On or about August 24, 2007, Employer filed its Petition for Review Before the Full Commission and requested oral argument. Oral argument was granted. (Record Excerpts pg. 68)

8. Claimant did not file a cross-appeal.

9. On April 3, 2008, the MWCC reversed the Order of the Administrative Judge as to the permanent disability award reducing it from 10% for each upper extremity to 5% for each upper extremity (20 weeks) but affirmed the opinions of the Administrative Judge in all other respects. (Record Excerpts pg. 71)

10. Employer filed a Notice of Appeal with the MWCC on April 18, 2008. (Record Excerpts pg. 74)

11. Appeal Bond to the Circuit Court, Pike County, with Supersedeas was approved by the Pike County Circuit Court on April 23, 2008. (Record Excerpts pg. 77)

12. On May 12, 2009, the Circuit Court affirmed the Order of the Commission. (Record Excerpts pg. 82)

13. On May 26, 2009, Sanderson Farms, Inc., the Appellant filed a Notice of Appeal. (Record Excerpts pg. 88)

STATEMENT OF THE FACTS

Carpal tunnel syndrome is an abnormality of the median nerve at the wrist. The median nerve serves the thumb, index, middle and one-half of the ring finger. The median nerve runs through the carpal tunnel which is a narrow space inside the wrist. If one has carpal tunnel syndrome one may feel tingling and numbness in the thumb, index, middle and half of the ring finger. A carpal tunnel release is a rather simple operation which simply cuts the transverse carpal ligament at the wrist which takes the compression off the median nerve. Carpal tunnel syndrome is diagnosed by its clinical symptoms as described and by nerve conduction studies which measure the impulses in the median nerve to determine whether those velocities have slowed. If the median nerve does not slow down, you are not developing carpal tunnel syndrome. (Exhibit Vol. II, Exhibit 15, Pages 66 and 72)

Thirty-five years ago few people had ever heard of carpal tunnel syndrome and fewer still had ever alleged that it was a work related phenomena. Over the years, it has become the illness and work injury du jour. Everyone in this country including physicians have assumed that carpal tunnel syndrome is a direct result of repetitive motion at work or that such contributed to the condition. Scientific studies now establish that the notion of carpal tunnel syndrome as a cumulative trauma disorder is no longer tenable. (Exhibit Vol. II, Exhibit 15)

Employer asked Dr. Nortin M. Hadler to review this case for purposes of trial. We would invite the Justices to review Dr. Hadler's *curriculum vitae* appearing as an exhibit to Dr. Hadler's deposition. (Exhibit Vol. II, Exhibit 15) The CV is eighteen pages long and it reflects an extraordinary body of work by Dr. Hadler. He graduated from Yale College *magnum cum laude* with highest honors in biology in 1964. He went to Harvard Medical School and graduated *cum laude* in 1968. He interned at Massachusetts General Hospital and was a clinical investigator at the National Institute of Health. He has been a Professor of Medicine at the University of North Carolina since 1973. He has served many adjunct academic appointments including

Georgetown, Harvard, Harrow England, Paris V University and Maizuri Municipal Hospital in Kyoto, Japan. His academic and professional trainings include Phi Beta Kappa and AOA which is the equivalent of Phi Beta Kappa for medical students. He has been inducted as a Fellow in the American College of Rheumatology, the American College of Physicians and the American Occupational Environmental Medicine Association. He has been board certified by the National Board of Medical Examiners and the American Board of Internal Medicine. He has served as an investigator for the NIH, World Health Institute and the Robert Wood Johnson Foundation. He serves on a host of committees and foundations. He has also served as an editor and advisor on the editorial boards and advisory boards of a host of peer review publications including *The Journal of Occupational Environmental Medicine.* He has lectured all over the world and he has published over ninety peer reviewed articles, many of which are on the subject of this litigation. He has authored ninety-eight book chapters, review articles and editorial and other invited articles. He has also testified before Congress and with OSHA on proposed ergonomic standards. He has published eleven books, ten of which concern occupational and muscoskeletal disorders.

Dr. Hadler is an extraordinary man with an extraordinary body of work. What he is first and foremost is a scientist. Regrettably, the Mississippi Workers' Compensation Commission ignored his testimony as to the scientific data now available which establishes that carpal tunnel syndrome is not a work related phenomena.

Dr. Hadler discussed several studies on carpal tunnel syndrome during his testimony that show that the belief that carpal tunnel syndrome is caused by repetitive movement is no longer a tenable hypothesis. (Exhibit Vol. II, Exhibit 15)

Claimant began working at Sanderson Farms on or about August 12, 2000. She worked approximately fourteen weeks and averaged approximately thirty hours per week during her tenure. After an orientation period, her job was to back up a machine that cut the skin and windpipe at the neck of the chickens. Essentially, her job was to cut the skin and windpipes if

the machine failed to accomplish that task. She would use scissors in her right hand. It was not necessary to use her left hand in the performance of her job, but could, and the left hand would be used only to steady the product and such did not require any flexion of her wrist. She was required to cut the flesh and windpipes no more than one to four times a minute and only if the machine failed to do its task. (T. 115-120, and E6 Pages 8-11) Claimant complains that she acquired bilateral carpal tunnel syndrome within two weeks of her limited exposure at Sanderson Farms. Lisa Cain, Claimant's supervisor, testified that in her thirteen years of work at Sanderson Farms no one had suffered any wrist injury doing her job. (T.121) Notwithstanding the fact it was not necessary for Claimant to even use her left hand in the performance of her job, Dr. Haimson performed a surgical release of the carpal tunnel of Claimant's left wrist and Claimant considers herself totally disabled. She used scissors in her right hand and did little work with her left. We note she has considered herself totally disabled for at least six years prior to her employment at Sanderson Farms and had been on a "quest" to be declared disabled for some twelve years. (T. 58)

The Claimant since 1994 (six years prior to her employment at Sanderson) has considered herself totally disabled. Prior to her work at Sanderson Farms, she applied for Social Security Disability in 1994, 1996 and in 1999. She applied once again in the year 2000 after leaving her 13-week employment at Sanderson Farms.

In applying for Social Security Disability, Claimant alleged the following, to-wit:

> I suffer with a severe and disabling lower back condition and severe headaches. I had a motor vehicle accident in 1994 in which I hurt my right leg and knee. My left shoulder goes numb. My right hand had bilateral carpal tunnel syndrome. My right hand stays in constant pain. I am not able to bend due to severe pain in my back. I also have severe pain in my left hand. (Exhibit 9)

Claimant testified that since 1994 she had been on a 12-year quest to be a Social Security Disability beneficiary. (T. 58) Again, her quest started six years prior to her 13-week employment with Sanderson Farms.

SUMMARY OF THE ARGUMENT

Claimant began working at Sanderson Farms on or about August 12, 2000. She worked approximately fourteen weeks and averaged approximately thirty hours per week during her tenure. After an orientation period, her job was to back up a machine that automatically cut the skin and windpipes of chickens. Essentially, her job was to cut the skin and windpipe if the machine failed to accomplish the task. She would use scissors in her right hand and she could use her left hand to steady the product although it was not necessary to use her left hand at all in the performance of this job. She was not required to place any tension with her left hand other than to steady the product and such did not require any flexion of her wrist. Her job at Sanderson was very light and redundant to a machine. Inasmuch as her job was redundant to a machine, she was not required to cut the skin and windpipes of more than one to four chickens a minute. (T. 115-120; E-6 pages 8-11) Claimant complains that she acquired bilateral carpal tunnel syndrome within two weeks of her tenure at Sanderson Farms. Claimant had a carpal tunnel release on her left wrist. We note she used scissors in her right hand and did almost nothing with the left. (T. 115-120; E-6 pages 8-11)

Dr. Nortin M. Hadler is the leading expert in the country on workplace muscoskeletal disorders. He is a professor of medicine. He served as a National Institutes of Health investigator and the same at World Health Organization. He has lectured extensively all over the world. He has authored over two hundred publications, half of which are peer reviewed, and he has authored ten books on muscoskeletal disorders. We invite the Court to review his *curriculum vitae* which is attached as an exhibit to his deposition. (Exhibit Vol. II, Exhibit 15) He has produced an extraordinary body of work.

Dr. Hadler's deposition was taken and the first sixty-five pages of the deposition relate to his qualifications to testify as to the etiology of carpal tunnel syndrome. There is no man more qualified in the world regarding this matter than Dr. Hadler. Attached to his deposition is his report. (Exhibit Vol. II, Exhibit 15) Dr. Hadler set forth the science regarding carpal tunnel

syndrome which is composed of both cross sectional studies and powerful epidemiological longitudinal studies which establishes conclusively that an association of hand usage and carpal tunnel syndrome is scientifically untenable.

The Mississippi Workers' Compensation Commission relied on the testimony of Dr. Haimson and Dr. Passman, orthopedic surgeons from Natchez. Both Dr. Haimson and Dr. Passman were cross-examined extensively regarding their qualifications to give testimony on the etiology of carpal tunnel syndrome. Neither could point to a single scientific study suggesting that carpal tunnel syndrome is a work-related phenomenon. Their opinions were nothing more than speculation. Dr. Passman and Dr. Haimson's testimony should have been excluded under the principles of *Daubert* and if not excluded, given no weight. We respectfully submit that MWCC erred in admitting their testimony and accepting their testimony as to causation. The Employer presented un-refuted scientific evidence through the testimony of Dr. Hadler that Claimant's alleged condition at Sanderson Farms had absolutely nothing to do with the physical requirements of her job. The science consisted of powerful and compelling epidemiological studies which establish that carpal tunnel syndrome is not caused or contributed by work. The Commission's reliance on opinions from physicians which are not supported by science when those opinions are contra to compelling cross-sectional and longitudinal epidemiological studies is arbitrary and capricious and the decision of the Commission should be reversed.

STANDARD OF REVIEW

The Standard of Review is noted in *Fresenius Medical Care and Continental Cas. Co. v. Woolfolk,* 920 So. 2d 1024 (Miss. Ct. of Appeals 2005), to-wit:

> The Mississippi Supreme Court has stated that it is not within the authority of a reviewing court to re-weigh the evidence in order to determine whether the preponderance of the evidence "might favor a result that is contrary to the Commission's determination." *Hollingsworth v. I.C. Isaacs and Co.,* 725 So.2d 251, 254 (¶ 11) (Miss. Ct. App. 1998). "So long as there is substantial evidence in the record to support the Commission's findings, this Court is obligated to affirm the Commission." *Id.* at 254-55 (¶¶ 11-12). "Although it is true that the Workers' Compensation Commission is the trier of facts and its orders will be affirmed where there is substantial evidence to sustain its findings, nevertheless, the substantial evidence rule is sufficiently flexible to permit the Court to examine the record as a whole to check for errors." *Universal Mfg. Co. v. Barlow,* 260 So.2d 827, 831 (Miss. 1972). "Courts have often reversed the Workers' Compensation Commission when the Commission acted against the great weight of the testimony." *Id.* (citing *M.T. Reed Const. Co. v. Garrett,* 249 Miss. 892, 164 So.2d 476, 477-78 (Miss. 1964)). *Fresenius Medical Care and Continental Cas. Co. v. Woolfolk, ex rel.,* 920 So. 2d 1024, 1031 (Miss. App. 2005).
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> . . . .
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> Reversal is proper only when a Commission's order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. *Id.* (citing *Smith v. Jackson Const. Co., 607 So. 2d 1119, 1124 (Miss. 1992)). Fresenius Medical Care and Continental Cas. Co. v. Woolfolk, ex rel.,* 920 So. 2d 1024, 1029 (Miss. App. 2005).

ARGUMENT

Is the decision of the Mississippi Workers' Compensation Commission that Claimant's alleged carpal tunnel syndrome is work related, arbitrary and capricious when that decision is based on medical opinions which were not supported by any scientific evidence when contra evidence is presented based upon scientific data that carpal tunnel syndrome is not caused or contributed to by work?

What is carpal tunnel syndrome?

Carpal tunnel syndrome is compression of the median nerve at the wrist. The median nerve serves the thumb, index, middle and one-half of the ring finger. The median nerve runs through the carpal tunnel which is a narrow space inside the wrist. Upon compression of the median nerve one may feel tingling and numbness in the thumb, index, middle and half of the ring finger. A carpal tunnel release is a rather simple operation which simply cuts the transverse carpal ligament at the wrist which takes the compression off the median nerve. Carpal tunnel

syndrome is diagnosed by its clinical symptoms as described and by nerve conduction studies which measure the impulses in the median nerve to determine whether those velocities have slowed. If the median nerve does not slow down, you are not developing carpal tunnel syndrome. (Exhibit Vol. II, Exhibit 15, pages 66 and 72)

Scientific evidence has established that CTS is not caused by work.

Thirty-five years ago few people had ever heard of carpal tunnel syndrome and fewer still had ever alleged that it was a work related phenomena. Over the years, it has become the illness and work injury du jour. Everyone in this country including physicians have assumed that carpal tunnel syndrome is a direct result of repetitive motion at work or that such contributed to the condition. Scientific studies now establish that the notion of carpal tunnel syndrome as a cumulative trauma disorder is no longer tenable. (Exhibit Vol. II, Exhibit 15)

Employer asked Dr. Nortin M. Hadler to review this case for purposes of trial. We would invite the Justices to review Dr. Hadler's *curriculum vitae* appearing as an exhibit to Dr. Hadler's deposition. (Exhibit Vol. II, Exhibit 15) The CV is eighteen pages long and it reflects an extraordinary body of work by Dr. Hadler. He graduated from Yale College *magnum cum laude* with highest honors in biology in 1964. He went to Harvard Medical School and graduated *cum laude* in 1968. He interned at Massachusetts General Hospital and was a clinical investigator at the National Institute of Health. He has been a Professor of Medicine at the University of North Carolina since 1973. He has served many adjunct academic appointments including Georgetown, Harvard, Harrow England, Paris V University and Maizuri Municipal Hospital in Kyoto, Japan. His academic and professional trainings include Phi Beta Kappa and AOA which is the equivalent of Phi Beta Kappa for medical students. He has been inducted as a Fellow in the American College of Rheumatology, the American College of Physicians and the American College of Occupational and Environmental Medicine Association. He has been board certified by the National Board of Medical Examiners and the American Board of Internal Medicine. He has served as an investigator for the NIH, World Health Institute and the Robert Wood Johnson

Foundation. He serves on a host of committees and foundations. He has also served as an editor and advisor on the editorial boards and advisory boards of a host of peer review publications including *The Journal of Occupational Environmental Medicine.* He has lectured all over the world and he has published over ninety peer reviewed articles, many of which are on the subject of this litigation. He has authored ninety-eight book chapters, review articles and editorial and other invited articles. He has also testified before Congress and with OSHA on proposed ergonomic standards. He has published eleven books, ten of which concern occupational and muscoskeletal disorders. (See Hadler's CV attached as an exhibit to his deposition appearing as Exhibit 15, Exhibit Vol. II)

Dr. Hadler is an extraordinary man with an extraordinary body of work. What he is first and foremost is a scientist. Regrettably, the Mississippi Workers' Compensation Commission ignored his testimony as to the scientific data now available which establishes that carpal tunnel syndrome is not a work related phenomena.

Dr. Hadler discussed several studies on carpal tunnel syndrome during his testimony that show that the belief that carpal tunnel syndrome is caused by repetitive movement is no longer a tenable hypothesis. Scientists have conducted what are known as cross-sectional studies and longitudinal studies. In cross-sectional studies, the investigative scientists compared people who did repetitive tasks at work with those who did not. They then determined whether one group was more likely than the other to develop carpal tunnel syndrome. In order to establish the best results the investigative scientists used nerve conduction test to determine if those people exposed to more repetitive movement had slower median nerves than the workers who had less strenuous tasks. These studies although sometimes inconsistent have established that workplace carpal tunnel syndrome is not scientifically tenable. One of the most famous cross-sectional studies (Schottland) established that median nerve conductivity of long-time poultry workers was not different from applicants for their jobs. In addition to the cross-sectional studies, Dr. Hadler pointed out that there are far more powerful and accurate studies for testing

whether physical tasks can impair median nerve conductivity than cross-sectional studies. These studies are called longitudinal studies. Few of these studies are conducted due to the amount of time and money consumed by them. Fortunately, two longitudinal studies have been conducted regarding carpal tunnel syndrome in the work place. Investigative scientists conducted longitudinal studies by measuring the nerve conduction of workers over a period of time. This allows the scientists to determine whether any of the workers experienced a change in their median nerve conductivity. If the median nerve doesn't slow down or is abnormal, they're not developing carpal tunnel syndrome. (Exhibit Vol. II, Exhibit 15, pages 66, 72)

Dr. Hadler's testimony is contained in his deposition which is Exhibit 15, Exhibit Vol. II. He also wrote the report which is attached to his deposition as an exhibit. In his report he sets forth the science which was un-refuted in this case which renders the Claimant's claim unsupportable and the work-related causal inferences "untenable". Dr. Hadler states in his report as follows, to-wit:

> There is a robust scientific literature that bears on all these points. I will cite that literature sparingly in my discussion, choosing only critical recent publications to single out. However, I have written extensively on this topic and refer the reader to the following for supplementary discussions and comprehensive reference lists:
>
> 1. Hadler, N.M.: Occupational Musculoskeletal Disorders. Second Edition. Philadelphia, Lippincott Williams & Wilkins, 1999, pp. 1-433.
> 2. Hadler, N.M.; Comments on the "Ergonomics Program Standard" proposed by the Occupational Safety and Health Administration. J. Occup Environ Med. 42: 951-969, 2000.
> 3. Hadler, N.M.: Rheumatology and the health of the workforce. Arthritis Rheum. 2001;44: 1971-4.
> 4. Hadler, N.M.: the 'Ergonomic Injury' as a Social Construction. Workers' Compensation Policy Review. 2001; 1(5): 20-25.
>
> The first reference, to my most recent monograph, is quite comprehensive regarding the issues raised by Ms. Johnson's case. The next 3 are recent reviews and commentaries that document the evolution of the literature since the completion of that monograph. This more recent literature is fully consonant with the precepts developed in the monograph. I also refer the reader to 2 recent, highly relevant legal proceedings:
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> 1. US Occupational Safety and Health Review Commission. Secretary of Labor, Complainant v. Dayton Tire (a Division of Bridgestone/Firestone) Respondent OSHRC Docket No. 93-3327 OSHA Inspection No. 102247533 Region 6 Case No. 95-00731.
> 2. US Occupational Safety and Health Review Commission. OSHRC Docket No. 98-0079. A.M. Herman, Secretary of Labor, USDOL v. Hudson Foods, Inc.
>
> The first is a landmark case. OSHA had cited Dayton Tire under the General Duty Clause asserting that the physical demands of "throwing tires" was a known hazard

likely to cause damage to the hands and arms of workers. Carpal tunnel syndrome was held to be a leading likely consequence. The Judge vacated the citation without equivocation on the grounds that no such hazard had been demonstrated. My testimony was the only "expert" input offered by the defense.

The second cite is to a case of similar nature but the hazard was to the arms of workers involved in poultry processing. This case is directly relevant to that of Ms. Johnson. The case proceeded through depositions before OSHA withdrew the citation in response to a motion by the defense attorneys. Again, I was the sole "expert" input for the defense.

Both of these cases pivoted on the specific evidence and are object lessons relevant to the issues in Ms. Johnson's case. In both cases, the physical demands of tasks were considerable, outstripping the demands placed on Ms. Johnson during her brief employment at Sanderson Farms. As we shall see, much of the relevant science was designed to assess hazards to the arms of workers whose tasks were demanding more in terms of repetitiveness than in forcefulness (data entry, for example). Nonetheless, there are a sufficient number of high quality studies in physically demanding industries to reject the "ergonomic hypothesis" that the physical content of tasks damages the median nerve for a wide range of physical exposures, easily encompassing the exposures that pertain to Ms. Johnson's task at Sanderson Farms.

....

I. Is the incidence of Carpal Tunnel Syndrome increased by the physical demands of materials handling tasks such as involved in Ms. Johnson's task?

In order to test the ergonomic hypothesis, one has to define both the exposure and the health effect. According to the deposition of Dennis Lewis, her supervisor, she was to "back up" the machine that automatically eviscerated the chickens. That entailed cutting the necks of some 3 chickens per minute while on the line. Her position was often deemed redundant in that she was "sent home every other day because we didn't need her" (p 10). That is the exposure over the course of 3 months that is at issue.

Defining the health effect, carpal tunnel syndrome, is not straight forward for reasons that will become clear shortly. However, there is one definition of Carpal Tunnel Syndrome that is incontestable. Carpal Tunnel Syndrome is whatever symptoms can be ascribed to impaired electrical conduction by the Median Nerve as it courses through the Carpal Tunnel in the wrist. The converse holds. If the Median conductivity is normal, whatever the symptoms, the person is not suffering from Carpal Tunnel Syndrome.

This definition has severe limitations in the practice of medicine. It also has severe limitations if applied to surveillance programs. I will discuss these limitations in Section II below. However, this definition facilitates the design and execution of powerful epidemiological studies probing for associations between impairment of median conductivity and physical demands of tasks. To the extent that such associations are elusive, the causal inference or "ergonomic hypothesis" is untenable.

There are many such studies. Most are cross-sectional in design; at one point in time, the Median Conductivity of people with the exposure (current and/or past) is compared with people who are not as exposed, the controls. Cross-sectional studies have inherent limitations. One relates to the definition of physical exposure. After all, we are considering forms of hand-arm usage, which are not peculiar to a particular workplace. Perhaps the controls perform tasks at their work or at home that are more demanding than the tasks under study. Are the physical demands of Ms. Johnson's job that different from many other materials handling jobs and avocations? Do we know that the work of a carpenter, or orthopedic surgeon, or recreational bowler is less demanding during the course of a week, or month, or year? There are other inherent

limitations to cross-sectional studies. Nonetheless, many have been published. The results are inconsistent; most discern no meaningful association with particular tasks and impaired median conductivity. One is particularly germane to Ms. Johnson's claim. Schottland et al.[1] tested the hypothesis that median conductivity of long-time workers in a poultry processing plant is not different in any important way from that of applicants for their jobs. There is no attempt to find cases of CTS; this study examines the risk to median conductivity. If there is no risk to median conductivity, by definition there is no risk for CTS. That's what they found; there was no clinically important difference between applicants and people employed for an average of some 7 years. In particular, there was no statistically discernible difference in sensory conductivity, which is the function of the median nerve that succumbs first to pressure in the carpal tunnel. I could argue that if a hazard is missed by such a cross-sectional study, it is too minor to be concerning. However, I need not resort to such a default argument.

There is far more powerful epidemiological design for testing the hypothesis that physical exposure can impair median conductivity. That is a longitudinal study. Few are done because, unlike cross-sectional designs, longitudinal studies consume time and resources. Fortunately, there are two:

a. A group of investigators from Portland, Oregon have been monitoring the median sensory conductivity of a group of volunteer workers for over a decade. They employ an electrodiagnostic technique that is considered particularly sensitive; they measure median sensory conductivity repeatedly along the length of the nerve in the palm. (It is also very time consuming to administer and quite uncomfortable.) The initial cohort consisted of 471 workers in a range of industries and performing a range of tasks with a preponderance of tasks with considerable physical demand. They went to considerable lengths to quantify physical demand, to account for shifting job descriptions, and for dropouts. After 5 years, there was no hint of an association between physical exposure at work and a change in median conductivity.[2] (Dr. Hadler also noted in his deposition that repeat nerve conduction studies were done after 10 years with the same results. Deposition of Hadler Page 71.)

b. A similar 5-year longitudinal study was performed in Sweden[3]. The exposure was usage of hand-held vibrating tools in the manufacture of paper-processing equipment. Because of the need to grip these tools tightly, as well as their heft, this is an exposure that ergonomists characterize as quite physically demanding. The comparison group was employed in less demanding tasks. Median motor conductively did not change as a function of this exposure over 5 years.

These 2 longitudinal studies are as high quality as any we have in clinical epidemiology. In fact, we are fortunate to have 2; most epidemiological insights are based on inferences drawn from cross-sectional studies. But we have 2 longitudinal studies and they are powerful. The median nerve's conductivity at the carpal tunnel is not placed at risk by physical demands at work for a

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[1] Schottland JR, Kirschberg GJ, Fillingim R, et al. 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: 627-31.

[2] Nathan PA, Keniston RC, Meadows KD, et al. Longitudinal study of median nerve sensory conduction in industry; relationship to age, gender, hand dominance, occupational hand use, and clinical diagnosis. J Hand Surg 1991; 17A:850-7.

[3] Nilsson T. Hagberg M, Berstrom L, Lundstrom R. A five-year follow-up of nerve conduction over the carpal tunnel. Stockholm workshop 94. Hand-arm vibration syndrome. Arbete Och Halsa Vetenskaplig Skriftserie 1995; 5:117-20.

wide range of physical exposures that encompass those of Ms. Johnson. (See his report attached as Exhibit to D to Hadler's deposition which is Exhibit 15, Exhibit Vol. II.)

Dr. Hadler testified as follows, to-wit:

Q. All right. Let's talk about the science of carpal tunnel and the studies that are in your report and maybe there's some studies that are not in your report.

Go through your premise that carpal tunnel is not a consequence of physical demands at work. With science, we want to hear what the scientific studies have shown.

A. Well, when you formulate that question scientifically, you have two challenges. What you're asking is are there physical exposures that we can isolate and study and is there a health effect that we can define.

The physical exposures we glibly say are repetitive motion. But we all use our hands, and it's not so easy to define those. I mean, as I like to point out, orthopaedic surgeons who are busy do a tremendous amount of repetitive forceful motion, and we would consider them the control group, allow them into the control group.

So - - and I don't know if some people are - - have the hobby of bowling. So defining the exposure is not quite as simple as one might think.

And the next issue is defining the health effect. And when you ask the carpal tunnel syndrome question, we have an advantage because we can define the carpal tunnel syndrome for epidemiologic purposes without symptoms.

You can say that carpal tunnel syndrome is whatever symptoms you have that are occurring in the setting of an abnormal median nerve conductivity at the wrist. So if the median nerve is not abnormal at the wrist, you still can have arm pain, but it's hard to call it carpal tunnel.

So in the epidemiology of carpal tunnel syndrome, there is the advantage that we have, a so-called gold standard, that we can measure nerve conductions. That's not true for most occupational musculoskeletal disorders.

We don't have a gold standard for backache. There is no MRI finding that says, "If you have this, you have a backache." The same thing's true for the shoulder and the elbow and general arm pain, the regional disorders of the arm.

But with carpal tunnel syndrome, we can ask, "Can I define exposures so that I can study them, and is there a consequence of median conductivity if you have that exposure compared to people who don't have that exposure," even though we know that anybody who doesn't have the exposure still has an exposure. We all use our hands. And none of us would like to see quadriplegics as a control because that's a disease.

Having said that, there are a lot of studies that use nerve conductions as the outcome. Almost all of them are what are called cross-sectional studies, such as the Schottland study we just mentioned. They take populations at one point in time and compare them.

So what Schottland did is took populations of workers in a poultry processing facility, I think there were two facilities in Alabama, and did their nerve conductions and compared those - - that population of people

who had been working, as I recall, an average of six or seven years in the factory with people of the same age and gender who were applying for the job.

And what they said is that you can't discern a difference in nerve conductions of any importance between those people who were working at the job for six years, and the job being white meat processing, with those people who are applying for that job. That's a cross-sectional study.

And it has a number of advantages. First of all, it's relatively easy to do. The committees are - - you've got your team, you do your studies and it takes you several months to do them.

Secondly, most of us would argue, is that if there is no difference, that's a first cut look at whether or not there's a hazard in the cross-sectional study. And the reason we're always concerned about cross-sectional studies is there are two obvious problems with them.

One is the one I just spoke to. Maybe the people who are applying for the job worked someplace else for the last six years, at a sewing machine factory or a mill or another poultry factory. I mean, how do you know that? That's one bias that you can try to control for, but it's hard.

The other bias that's even harder to control for is you're looking at one point of time at the work force that's been there for an average of six years. Maybe the people who are no longer there left because they had carpal tunnel syndrome, and you have the survivors.

Survivor bias is part of all cross-sectional studies, and there's no really good way - - you can try to go to the plant records and see who left and where they are and find them, but there's really no convenient way to deal with survivor bias.

So although the Schottland study is the only one I'm aware of that looked at poultry processing in a cross-sectional design, there are many other cross-sectional studies. By and large, they're as negative as the Schottland study. If they find a difference, it tends to be quite small and problematic.

So based on the cross-sectional studies we have some reassurance that for all the different studies that have been done that include poultry processing, it includes keyboard entry, it includes the editorial staff of newspapers, there are a number of them where a cross-sectional design was done. They're relatively reassuring for cross-sectional studies.

That's my first answer to you in terms of the epidemiology of carpal tunnel syndrome. Fortunately, there's a better design that gets rid of the issue of survivor bias, at least it makes it more manageable, and even gets rid of the issue of other confounding exposures, and that's called the cohort study or longitudinal study.

That's where you take the population of workers on day one and you measure their nerve conductions. And then you follow them out over time, letting them do their work, and see if their nerve conductions change as a function of exposure.

And those longitudinal studies are not done often. They've very expensive. They're very hard to do. It's hard to follow worker over time. And nerve conductions sound trivial, but they're not trivial to do well and they're not fun to have done on you. So to get volunteers to do this is - - to do it once is hard. To get them to do it repetitively is even harder.

Fortunately, we have two longitudinal studies. One has gone on for over a decade. One went on just for five years. And those longitudinal studies are both exceedingly reassuring.

In one of them, a group of - - started out with about 500 workers - - all submitted to a very fastidious form of the nerve conduction test, a sensory conductivity test that's very sensitive. They were all categorized as to their exposure in the workplace, whether their tasks were highly repetitive and highly forceful or less repetitive or less forceful or combinations. And they had repeat nerve conductions at five years and again at ten years.

And what was shown is that all the nerves slow down as a function of aging, which we've known for some time, but they don't slow differentially as a function of exposure in the workplace. So that's the first cohort study.

The second cohort study didn't have a wide range of exposures. What they did is they went to one plant in Sweden that, as I recall, was making heavy equipment involved in the paper manufacturing process, but there are two categories of exposure.

There were those who were using hand-held vibrating tools consistently, those workers, and those workers who were by and large clerical workers and warehouse workers who were not doing that. And they did motor conductivity on day one and they did motor conductivity after five years of exposure.

And what they showed is that the nerves slow down as a function of aging, but they did not slow down as a function of exposure to hand-held vibrating tools. In the ergonomic literature, hand-held vibrating tools are considered a highly forceful exposure because you need to grip so tightly or the thing falls out of your hand or can't be used, so that's considered a very forceful exposure.

So we have two longitudinal studies that in epidemiologic science would not just confirm the cross-sectional data I mentioned but actually supersede it.

So I can say to you with about as much confidence as we can generate in modern epidemiology that for this wide range of exposures over time, there is no risk to median conductivity at the wrist. If there is no risk to median conductivity at the wrist, by definition, there is no risk of carpal tunnel syndrome.

(Exhibit Vol. II, Exhibit 15, Page 65, Line 10 through Page 72, Line 21)

....

Q. (By Mr. Boone) Doctor, you were aware that this particular claimant worked approximately 14 weeks at Sanderson Farms and averaged 30 hours per week. Her job, essentially, was to back up an automatic machine that cut the necks of chickens, and she would be required to back up that machine, when necessary, which, according to the information I have, occurred one to three necks per minute; wherein, she would use scissors which her right hand and brace the chicken with her left hand.

The exposure that she was - - how would you characterize her physical demands and exposure, based on what I'm seeing?

A. Well, I remember the deposition of Dennis Lewis, that, I think, included most of the information you've given me.

This is - - this would not be - - there is a lot of discussion in the literature that we're talking about on how to categorize exposures in the workplace as to forcefulness, repetitiveness. It always seems to be easy because everybody thinks of data entry, where you can count keystrokes. But, in fact, it's not easy.

I think in most - - for this number of repetitions, it would be categorized as low repetition for almost all epidemiologic studies and low in force for almost all epidemiologic studies.

Q. Okay. Doctor, before we hash out other issues, assuming that Ms. Johnson does have bilateral carpal tunnel syndrome, can you say - - what would you say to a reasonable degree of medical probability whether that was caused or contributed to, aggravated or exacerbated by her work at Sanderson Farms?

A. I think an overwhelming likelihood that if she had carpal tunnel syndrome, the exposure we just discussed had nothing to do with it.

Q. And is that based on the science that you've talked about today?

A. Yes.

Q. Particularly, these three studies that you've outlined today?

A. Yes.

(Exhibit Vol. II, Exhibit 15, page 75 line 3 through 76 line 20)

Dr. Hadler set forth the science regarding carpal tunnel syndrome which is composed of both cross sectional studies and powerful epidemiological longitudinal studies which establishes conclusively that an association of hand usage and carpal tunnel syndrome is scientifically untenable.

The Mississippi Workers' Compensation Commission, however, relied on the testimony of Dr. Haimson and Dr. Passman, orthopedic surgeons from Natchez. Both Dr. Haimson and Dr. Passman were cross-examined extensively regarding their qualifications to give testimony on the etiology of carpal tunnel syndrome. Neither could point to a single scientific study suggesting that carpal tunnel syndrome is a work-related phenomenon. Their opinions were

nothing more than speculation. Dr. Passman and Dr. Haimson's testimony should have been excluded under the principles of *Daubert* and if not excluded, given no weight. We respectfully submit that MWCC erred in admitting their testimony and accepting their testimony as to causation. The Employer presented un-refuted scientific evidence through the testimony of Dr. Hadler that Claimant's alleged condition at Sanderson Farms had absolutely nothing to do with the physical requirements of her job. Claimant did not meet her burden of proof of showing a compensable claim based on substantial evidence and the MWCC erred in so finding.

The Employer in this case filed a motion to exclude the testimony of Dr. Passman and Dr. Haimson based upon Evidentiary Rule 702, specifically, the Employer in this case would show that the testimonies in the depositions of Dr. Passman which occurred on June 12, 2002, and December 7, 2005, and Dr. Haimson which occurred on November 12, 2004, should be excluded from consideration as neither Dr. Passman nor Dr. Haimson have any expertise whatsoever in the field regarding the etiology of carpal tunnel syndrome nor was either doctor able to support their opinions with any scientific data or facts that Claimant's limited exposure at Sanderson Farms caused or contributed to her alleged carpal tunnel syndrome. (Record Excerpts, Page 13 and T. Page 7-13) Specifically, Employer would show that Evidentiary Rule 702 provides as follows, to-wit:

> **RULE 702. TESTIMONY BY EXPERTS**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

It is noted that Mississippi Rule of Evidence 702 is patterned after the Federal Rule and that the leading cases explain the rule are *Daubert, et al. v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113, S. Ct. 2786 (1993),* and *Kumho Tire Company, Ltd., et al. v. Carmichael, et al, 526 U.S. 137, 119 S. Ct. 1167 (1999).* The charge of Evidentiary Rule 702, *Daubert and Kumho* is to insure that expert testimony is reliable. Such must be based on data that will stand up to scientific

inquiry and not conclusory statements that cannot be reasonably assessed for reliability.

The specific requirements of *Daubert* are as follows: (1) Whether the expert's technique or theory can be or had been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) Whether the technique or theory has been subject to peer review and publication; (3) The known or potential rate of error of the technique or theory when applied; (4) The existence and maintenance of standards and controls; and (5) Whether the technique or theory has been generally accepted in the scientific community.

We find the following exchange in Dr. Haimson's deposition which appears in Exhibit Vol. 1, Exhibit 13):

Q. You haven't done any scientific studies on the etiology or carpal tunnel syndrome, have you?

A. No.

Q. You've never written any papers on the etiology of carpal tunnel syndrome, have you?

A. No.

Q. You've never given any lectures on the etiology of carpal tunnel syndrome, have you?

A. I don't remember if I have or I haven't.

Q. You wouldn't consider yourself an expert on the etiology of carpal tunnel syndrome, would you?

A. Only in that it is a part of standard training of being an orthopedic surgeon.

Q. You've never had any special scientific training or research in the field of etiology of carpal tunnel syndrome, have you?

A. Again, not above what would be a part of the standard education of an orthopedic surgeon.

Q. Do you subscribe to the Journal of Hand Surgery?

A. No.

Q. You recognize that that's a peer review journal?

A. Yes.

Q. It's a respected journal?

A. Yes.

Q. Doctor, have you ever heard of the Schottland study?

A. I don't recognize that name.

Q. Maybe you'll recognize the facts. It was a cross-sectional study that determined that the median nerve conductivity of long-term workers in a poultry processing plant was not different in any important way from applicants who were applying for their jobs. Does that study ring any bells with you?

MR. BALL: Before he answers, I would object. You're testifying and telling the doctor what that study says. That's your opinion of what the study says. Also, you haven't given him the whole story of what that study says and whether the study was valid. I object to that question.

BY MR. BOONE:

Q. Do you recognize the facts of that study?

A. I don't recall that I've read that study.

Q. Doctor, have you ever read the Journal of Hand Surgery?

A. Yes.

Q. Do you have any memory of reading an article published back in 1992 that was entitled "Longitudinal study of median nerve sensory conduction in industry; Relationship to age, gender, hand dominance, occupational hand use and clinical diagnosis"?

A. What is your question?

Q. Do you recall ever reading that article?

A. I don't recall. No.

Q. Doctor, you say you haven't read that article or have no memory of it. Maybe you would recall what the substance of the article is about.

MR. BALL: I'm going to object again to your testifying and even summarizing what you think that article says, which is totally improper for you to do.

MR. BOONE: I'm going to see if he remembers the article.

MR. BALL: I want a continuing objection to that.

BY MR. BOONE:

Q. Doctor, This was a study that was conducted by some Portland, Oregon, investigators who went into industry and put workers into five categories from very light resistance/low repetition to very high resistance/high repetition. They did nerve conduction studies on them and came back five years later and did them again with the same people. They found no occupational link; that is, they found no evidence of any slowing of the median nerve regardless of the ergonomic overload. Do you recall ever reading an article like that before?

A. I don't have a recollection of reading that or not reading it.

Q. Are you familiar with the longitudinal study that they did in Sweden with hand-held vibratory tools?

A. Am I aware of it?

Q. Yes.

A. I'm not sure if I'm aware of it or not.

Q. The facts were that they took a group of workers who had used hand-held

vibratory tools. They did nerve conduction studies on them and they came back five years later and did it again and found no link to any kind of slowing of the median nerve related to their occupation. Are you familiar with that study at all?

MR. BALL: Same objection.

BY MR. BOONE:

Q. Are you aware of that study?

A. You're asking me do I remember - -

Q. Are you aware of it or have you heard of it?

A. I don't remember if I've heard of that study or not. I have certain knowledge of the clinical factors associated with what I do without necessarily remembering the references. I don't remember or recall probably the vast majority of all the articles and textbooks that I've ever read, but it doesn't mean that I don't have a knowledge of the information.

(Exhibit Vol. 1, Exhibit 13, Page 6 Line 14, through Page 10, Line 24)

.....

BY MR. BALL:

Q. I want to ask first of all, as far as your practice of many years and having done many carpal tunnel surgeries, have you ever had occasion to treat carpal tunnel syndrome that was caused by repetitive-use activities?

A. I honestly don't know if I can answer that question. I think I can say that a fracture is caused by a fall, if a person falls and puts out their arms and it breaks the bone. In terms of what causes carpal tunnel, I can have an opinion about it but I don't know for sure what causes it.

(Exhibit Vol. I, Exhibit 13, Page 30, Line 12 through Line 23)

....

Q. Do you know of any scientific literature that suggests that someone with the limited work exposure Debra Johnson had, particularly with her left hand, that her work at Sanderson Farms caused or contributed to her carpal tunnel syndrome?

A. No.

(Exhibit Vol. 1, Exhibit 13, Page 62, Line 15 – 20)

All references to above pages and lines come from the deposition of Dr. Robert Haimson of November 12, 2004, which is Exhibit 13 and appears in Exhibit Vol. I.

In Dr. Passman's deposition of December 7, 2005, we find the following, to-wit:

Q. In the course of your practice as an orthopedic surgeon, you have never conducted any scientific studies either longitudinal or cross-sectional regarding the etiology of carpal tunnel syndrome, have you?

A. No.

Q. Have you written any papers that have been published regarding the etiology of carpal tunnel syndrome?

A. No.

Q. Have you ever lectured at any medical school regarding the etiology of carpal tunnel syndrome?

A. No.

Q. Have you ever been underwritten by the National Institutes of Health or the World Health Organization to conduct a study on the etiology of carpal tunnel syndrome?

A. No.

Q. Have you ever been a professor at a medical school?

A. No.

. . . .

BY MR. BOONE:

Q. Doctor, are you familiar with the study that was published in 1992 in the Journal of Occupational Medicine regarding U.S. West directory assistance operators?

A. No.

Q. Have you written any books related to occupational musculoskeletal disorders?

A. No.

Q. In preparation for this deposition have you read the deposition of Bernita Smith, Mattie Walker or Dennie Lewis?

A. Not to my knowledge.

MR. BALL: I'm going to object to that. What does that have to do with his qualifications as an expert?

BY MR. BOONE:

Q. Are you familiar with the Schottland study?

A. (The deponent did not respond.)

Q. Have you seen the study or not? Are you familiar with the Schottland paper and study?

A. No.

Q. Are you aware of any scientific studies or papers suggesting carpal tunnel is a work-related phenomenon?

A. Repeat your question.

Q. Are you aware or do you have with you any papers suggesting that carpal tunnel syndrome is a work-related phenomenon?

A. No.

(Exhibit Vol. I, Exhibit 12, Vol. 2, Page 21, Line 3 through Page 24, Line 14)

In the deposition taken on June 12, 2002, of Dr. Passman we find the following:

Q. Do you know of any scientific studies that would point out how long someone would have to engage in repetitive work before they would acquire carpal tunnel syndrome?

A. I don't recall any offhand. I cannot imagine it being a valid study.

(Exhibit Vol. I, Exhibit 12, Vol. 1, Page 15, Line 22, through Page 16, Line 2).

Employer filed a written motion and argued such at the evidentiary hearing to exclude the testimony of Dr. Passman and Dr. Haimson inasmuch as neither was knowledgeable regarding the etiology of carpal tunnel syndrome nor was either able to offer any scientific data to support their opinions and in accordance with Rule 702 their opinions should have been excluded from consideration or the alternative, given no weight. (Record Excerpts, page 13; T. 7-13)

The Mississippi Supreme Court adopted in Rule 702 the same standard adopted by Federal Rules of Evidence 702 expressed by *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1973). (See Mississippi Rules of Evidence Rule 702)

In adopting the *Daubert* test, "There is universal agreement that the *Daubert* test has effectively tightened not loosened allowance of expert testimony. *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31 (Miss. 2003).

To satisfy Rule 702, the proponent of expert testimony now must not only demonstrate that the testimony will be relevant but also must make two separate showings. First, the proponent must demonstrate that the witness is qualified as an expert by knowledge, skill, experience, training, or education with regard to the topic of the proposed testimony as an expert witness may not offer an opinion in an area outside of that of his expertise. (See *Weinstein Federal Evidence*, Section 702.06, Paragraph 1 at 702-52 (2000))

Second, the proponent must establish the proffered expert testimony is reliable. Rule 702 imposes a special obligation upon a judge to insure that all scientific testimony is not only relevant but reliable. In this regard, the party offering the witness must demonstrate that (1) the proffered

testimony is based upon sufficient facts or data, (2) the testimony is the product reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Miss. Rules of Evidence 702). Accordingly, testimony that is not based on reliable data or methods is inadmissible under oath. (702) By requiring the foundation of reliable data and methodology, Rule 702 precludes testimony based on speculation.

The testimonies of Dr. Haimson and Dr. Passman are not reliable and do not meet the standards imposed by *Daubert*. The MWCC relied on the conclusory opinions of Dr. Passman and Dr. Haimson of an occupational link between Claimant's work and her alleged bilateral carpal tunnel syndrome. The testimonies in the depositions of Dr. Passman which occurred on June 12, 2002, and December 7, 2005, and Dr. Haimson which occurred on November 12, 2004, should be excluded from consideration as neither Dr. Passman or Haimson have any expertise whatsoever in the field regarding the etiology of carpal tunnel syndrome nor was either doctor able to support their opinion with any scientific data or facts that the Claimant's limited work exposure at Sanderson Farms would have caused or contributed to her alleged carpal tunnel syndrome.

In this case neither Haimson nor Passman were able to offer any scientific evidence that Claimant's exposure at Sanderson Farms caused or contributed to her alleged carpal tunnel syndrome. Compare the science that was offered by Dr. Nortin Hadler. Dr. Hadler is one of the world's leading authorities on muscoskeletal disorders. He is a medical doctor and a scientist. He has worked as an investigator for the National Institute of Health and World Health Organization. He has authored over two hundred publications and written eleven books. He has lectured all over the world and he outlined both cross sectional and long-term epidemiological longitudinal studies which establish that carpal tunnel syndrome is not related to repetitive work and certainly did not cause or contribute to Claimant's alleged carpal tunnel syndrome with her limited work exposure at Sanderson Farms.

Neither Haimson nor Passman could point to a single study supporting their position nor were they even aware of the Scholland study and the longitudinal studies noted herein which

establish that an association between carpal tunnel syndrome "whether caused or aggravated" is scientifically tenable.

It is noted that the Court of Appeals reversed the Full Commission in *Fresenius Medical Care & Continental Casualty Co. v. Woolfolk.* (920 So. 2d 1024 (Miss. App. 2005)) The court basically held that because there was no substantial evidence supporting a critical fact assumed and relied upon by Dr. Stringer (that a call from a patient to the claimant emotionally upset the claimant which induced a stress-related rupture and aneurysm), it did not need to decide whether the *Daubert* standard applied in workman's compensation cases in its decision. The Court of Appeals however noted that in Dr. Stringer's deposition testimony he was not able to cite any medical literature to support his opinions and based his opinions on factual assumptions and common sense analysis. The Court of Appeals found such was not sufficient evidence and reversed the Full Commission. While the Mississippi Worker's Compensation Commission operates under relaxed evidentiary standard, the Mississippi Supreme Court has stated that the Rules of Evidence are to be used as a guide to the admissibility of information in assisting the Commission in making its findings. *Nosser vs. First American Credit Corp*, 814 So 2d 178,180, (Miss. Appeals 2002). Mississippi Workers' Compensation Commission's Procedural Rule 8 states that "[i]n compensation hearings the General Rules of Evidence shall be relaxed so as to permit the introduction of any relevant and competent evidence." See *Georgia Pacific Corp. vs. McLaurin,* 370 So 2d 1359,1362 (Miss 1979). The rules are relaxed in order to address the actual substance of the case, not to permit speculations and assumptions to be introduced into evidence. The evidence must be competent. The Mississippi Supreme Court has adopted *Daubert* as a means of evaluating expert evidence because "expert evidence can be powerful and quite misleading because of the difficulty in evaluating it". *Daubert.* The Mississippi Supreme Court has always recognized that expert medical opinion does not necessarily constitute "substantial evidence". It is required that expert medical opinion be supported by valid medical reports and data. *Reichhold Chemical Inc. v. Sprankle,* 503 So

2d 799,800 (Miss. 1987), *Johnson v. H. K. Ferguson,* 435 So 2d 1191, 1196 (Miss 1983). We submit that regardless of whether *Daubert* is adopted as a rule of exclusion in workers' compensation matters, it certainly should be utilized as an objective standard to evaluate evidence. The Court in *Nosser* noted the relaxed standard but stated:

> ...the Mississippi Supreme Court has said that, in the name of fundamental considerations of due process, the traditional rules of evidence must guide the admissibility of information intended to assist the Commission in making its determination... (814 So 2d at 180)

Dr. Hadler has cited two very credible longitudinal studies and one cross-sectional study supporting his opinion that carpal tunnel syndrome is not a work-related phenomenon. Dr. Passman and Dr. Haimson cited no studies to suggest that carpal tunnel syndrome is a work-related phenomenon. However, the MWCC placed more weight on the testimony of Haimson and Passman notwithstanding that their opinions were mere speculative conclusions. Simply put, Dr. Haimson and Dr. Passman had absolutely no factual or scientific evidence to suggest that Claimant's activities at Sanderson Farms caused or contributed to her alleged carpal tunnel syndrome. The evidence is not reliable and credible to support the substantial evidence necessary for an award of compensation. In this case, fundamental due process would require that the evidence presented in this case be "guided" by the principles of *Daubert* and as a consequence the Commission should have embraced the science that was presented above speculative conclusion of Haimson and Passman. Regrettably the Commission did the exact opposite. Daubert provides the framework for determining whether expert medical opinion is competent. It is a "guide" to evaluate the evidence. Haimson and Passman offered nothing but speculative conclusions. Dr. Hadler offered compelling epidemiological studies. The Commission erred in choosing speculative conclusions over science.

This Court has repeatedly held that proof of medical causation must be established by expert testimony. *Cole v. Superior Coach Corp.,* 106 So. 2d 71, 72 (Miss. 1958), and must rise above mere possibility or speculation. *Daughtery v. Conley,* No. 2003-CA-02092COA, 2004 WL 2795066, at (Miss. App. Dec. 7, 2004); *Janssen Pharmaceuticals, Inc. v. Stuart,* 856 So. 2d

431, 436 (Miss. App. 2003); *Hedge v. Leggett & Platt, Inc.,* 641 So. 2d 9, 15 (Miss. 1994). Recovery must rest on reasonable probabilities. *Harrell v. Time Warner/Capitol Cablevision and Travelers Cas. And Sur. Co.,* 856 So. 2d 503, 511 (Miss. App. 2003). Though this method of evaluating expert testimony is incorporated within *Daubert* as part of the test for reliability and competency, it has been the law in Mississippi even prior to the adoption of *Daubert.* The Court in *Janssen* stated, "The adherence to a liberal standard does not avoid the requirement that the Claimant must offer proof in order to recover. It is well settled that proof of causal connection must rise above mere possibilities. These types of cases require expert medical opinion to help establish causation." *Janssen Pharmaceuticals, Inc., v. Stuart,* 856 So. 2d at 436 (Miss. App. 2003).

Dr. Haimson and Dr. Passman relied on pure speculation, they offered no scientific evidence. The Claimant's medical doctors, I am sure, are competent orthopedic surgeons but by their own testimony know nothing of the etiology of carpal tunnel syndrome. Their testimony does not meet the standard for competency and reliability under *Daubert* or any other standard that has been applied in evaluating the reliability and credibility of expert testimony.

In *Reichhold* the Court held as follows:

> [w]here medical expert testimony is concerned, this Court has held that wherever the expert evidence is conflicting, the court will affirm the commission whether the award is for or against the claimant. *Kirsch v. Greenville Sheet Metal Works,* 192 So. 2d 266, 268 (Miss. 1966).
>
> [1] This does not mean, however, that this Court rubber stamps the commission's verdict. The Court may take a closer look at the expert medical evidence undergirding the findings of the commission and the administrative judge. This principle was expressed in one recent case:
>
> > Expert medical opinion, however, does not always constitute substantial evidence on which the board may rest its decision. Courts have held that the board may not rely on medical reports, which it knows to be erroneous..., upon reports which are no longer germane..., or upon reports based upon inadequate medical history or examinations.... *Johnson v. H.K. Ferguson,* 435 So. 2d 1191, 1996 (Miss. 1983). *Reichhold Chemical, Inc. v. Sprankle,* 503 So. 2d 799 (Miss. 1987).

In the case at bar neither Haimson or Passman offered any scientific data to support

their theory. Only Dr. Hadler offered scientific data and such debunks the ergonomic hypothesis of carpal tunnel syndrome. It was error for the Commission to ignore that evidence. The Commission's acceptance of speculation over science was arbitrary and capricious and such fails the substantive evidence test.

In the Portland, Oregon study (See Exhibit Vol. II, Exhibit 15), the employees were divided into five groups as follows, to-wit:

(1) very light resistant, low repetition;

(2) light resistance, very high repetition;

(3) moderate resistance, moderately high repetition;

(4) heavy resistance, moderate repetition;

(5) very high resistance, high repetition.

A copy of the study is attached as an Exhibit to Dr. Hadler's deposition. (See Exhibit Vol. II., exhibits to Exhibit 15)

We note the Claimant's work at Sanderson Farms would have been classified as very light resistance low repetition. The least ergonomically challenging. (Exhibit Vol. II, Exhibit 15, Page 75)

The investigators in the Portland, Oregon study performed nerve conduction studies on this group of nearly 1,000 hands and came back five years later and then came back ten years later and repeated the nerve conduction studies both at the five-year point and ten-year point. The investigators over the course of five years and then ten years found that the slowing of the median nerve correlates with age but not occupational use and this was true for all classifications including very high resistance, high repetition. (Exhibit Vol. II, Exhibit 15)

The Swedish study was a similar five-year longitudinal study. The work exposure was of hand-held vibrating tools and because the need to grip the tools tightly ergonomists characterized this exposure as quite physically demanding. Median motor conductivity did not change as a function of this exposure over five years. (Exhibit Vol. II, Exhibit 15)

These powerful and compelling epidemiologist studies confirmed the findings of the Schottland study which found that the nerve conduction of long term poultry workers was not different in any important way than that of new applicants. (Exhibit Vol. II, Exhibit 15) Haimson and Passman as well as the Mississippi Workers' Compensation Commission have been so engrained with a popular notion that carpal tunnel syndrome is caused by work that they are simply blinded and unwilling to look objectively at the science. Both Haimson and Passman opined as to a relationship before either knew what the Claimant did at Sanderson Farms. Dr. Passman had written a letter under date of 09-05-01 (See Exhibits to Exhibit 14) prior to his deposition noting an association of work at Sanderson Farms with her alleged carpal tunnel syndrome but he, as noted in his deposition, did not know what she did at Sanderson Farms. In his deposition of 06-12-02 (Exhibit Vol. I, Exhibit 12), Dr. Passman testified as follows:

Q. Do you think it's significant that she had by nerve conduction study bilateral carpal tunnel syndrome and was only required to use her scissors in her right hand?
A. Yes.
Q. What do you think the significance of that is?
A. I don't understand the relationship between the chicken cutting and the left hand.
Q. Do you think there is a relationship in the right hand?
A. There could be.
Q. You can't say with any reasonable degree of medical certainty whether there is or not, can you?
A. No.
Exhibit Vol. I, Exhibit 12, Pages 18-19)

Similarly in Haimson's deposition he testified that he had written a letter of June 30, 2004, believing that Claimant's carpal tunnel syndrome was the result of her activities she was performing at work. (Exhibit Vol. I, see Exhibits to Exhibit 13) Yet at the time he wrote that letter, he did not know what she did. During cross-examination, he was under the impression that Claimant was using scissors in both hands. (Exhibit Vol. I, Exhibit 13, Page 39) The fact of the matter, Claimant did not use scissors in her left hand and did virtually nothing with her left hand. (Exhibit Vol. I, Exhibit 13, Page 40) Dr. Haimson further testified that she did not complain to him regarding her right hand and only complained about the left hand. (Exhibit Vol. I, Exhibit 13, Page 25) Claimant did almost nothing with her left hand and little with her right. Claimant's

attorney elicited opinions from both doctors with hypotheticals that asserted Claimant was repetitively grabbing chickens in her left hand and such was not the case. Even if such were true, neither Passman or Haimson was able to support their opinions of an association of her work to alleged carpal tunnel syndrome with any scientific evidence. We note both doctors were willing to conclude her work at Sanderson Farms caused her problems before either knew what she was doing at Sanderson Farms. Lisa Cain testified that in her 13 years at Sanderson Farms, no one had been injured doing her job. Further, both Lisa Cain and Dennis Lewis testified that her job was very easy and that it could be done with just her right hand. The left hand was not needed but could be used to steady the product. No tension was needed and no flexion of the left wrist occurred yet it was her left wrist that was operated on. (T. 115-120, Page E-6 Pages 8-11)

Claimant's work exposure at Sanderson Farms was extremely limited. Claimant was required to do virtually nothing with her left hand and little with her right. Claimant's nerve conduction study is not compelling and even a diagnosis of carpal tunnel syndrome in Ms. Johnson is tenuous. (See Exhibit Vol. II, Exhibit 15, Pages 77-78) We do know from the scientific studies that an association hand usage and carpal tunnel syndrome is scientifically untenable. (See Exhibit Vol. II, Exhibit 15) The Claimant has for a number of years sought to be permanently disabled. She testified that she had been on a 12-year quest for Social Security Disability benefits beginning in 1994 which is six years prior to her employment at Sanderson Farms, Inc. (T. 58) Dr. Hadler, in his report which is attached to his deposition and in his deposition, describes that between 5 and 10 percent of our population suffers from functional somatic illnesses which symptoms manifest themselves as dwelling on the aches and pains we all have in life. The Claimant in a sense fixated on those aches and pains and believes that she is disabled. The limited work exposure she had at Sanderson Farms did not contribute in any way to her wide-spread regional muscoskeletal pains as expressed in her applications for Social Security benefits. Dr. Hadler prior to Claimant's left carpal tunnel release predicted accurately

that such would afford her no relief. Her nerve conduction study was only marginally abnormal but completely normal for someone who is obese. The carpal tunnel release afforded her no relief because she suffers from her own functional somatic illness which has absolutely nothing to do with her work task at Sanderson Farms. (Exhibit Vol. II, Exhibit 15, Pages 77-88) Claimant considered herself totally disabled before her employment at Sanderson Farms and after her employment. The physical demands of her job had absolutely nothing to do with her feelings of disability. (Exhibit Vol. II, Exhibit 15, Page 100-101)

CONCLUSION

Neither Passman nor Haimson could refer to a single scientific study to suggest that Claimant's alleged carpal tunnel syndrome was caused or contributed by work at Sanderson Farms. The MWCC erred in allowing and relying on their testimony. Further, the Employer did establish by reliable and unrefuted scientific evidence that her alleged carpal tunnel syndrome was not caused or contributed by her work. Accordingly, the claim for benefits should have been denied and we respectfully request reversal of the MWCC's Order finding a compensable claim and awarding benefits. We believe it is error to accept opinions from physicians which are not supported by science when those opinions are contra to compelling epidemiological studies and the acceptance of unsupported opinions over supported opinions is by definition arbitrary and capricious. Such occurred in this case and we respectfully request reversal of the Mississippi Workers' Compensation Commission Order finding a compensable claim.

Respectfully submitted this the 8th day of Oct, 2009.

SANDERSON FARMS, INC.

By: _____
Douglas S. Boone, Its attorney

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IN THE SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SANDERSON FARMS, INC. — APPELLANT

VERSUS — CAUSE NO. 2009-WC-00840-COA

DEBRA F. JOHNSON — APPELLEE

CERTIFICATE OF SERVICE

I, Douglas S. Boone, do hereby certify that I have this day served a true and correct copy of the above and foregoing **BRIEF OF APPELLANT** by mailing a true and correct copy of the same, postage prepaid to the following, to-wit:

Honorable Michael M. Taylor
Pike County Circuit Court Judge
P. O. Box 1350
Brookhaven, MS 39602

Mississippi Worker's Compensation Commission
P. O. Box 5300
Jackson, MS 39297-5300

Honorable John Tyler Ball, Esquire
210 Main Street
Natchez, MS 39121

This the 8th day of Oct, 2009.

Douglas S. Boone

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SANDERSON FARMS, INC. — APPELLANT

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DEBRA F. JOHNSON — APPELLEE

I, Douglas S. Boone, attorney of record for Appellant in Civil Action No. 2009-WC-00840-COAdo hereby certify that pursuant to Mississippi Rules of Appellant Procedures 25 and 31, I have this day delivered for filing the original and three copies of the foregoing **BRIEF OF THE APPELLANT** by placing same in United States Mail, postage prepaid, to:

Ms. Kathy Gillis
Clerk of the Mississippi Supreme Court and the Court of Appeals
P.O. Box 249
Jackson, Mississippi 39205-0249

This the 8th day of Oct, 2009.

Douglas S. Boone