

TEMPORARY AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 10-051990

Employee: Ricky Blanchard
Employer: Staples, Inc.
Insurer: Indemnity Insurance Company of North America
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties submitted the following issues for determination by the administrative law judge: (1) whether employee suffers from an occupational disease; (2) whether the occupational disease arose out of and in the course of employment; (3) whether work is the medical cause of the alleged injury; (4) whether employer is responsible for providing future medical care; (5) whether employee provided notice as required by law; and (6) whether the claim is barred by the statute of limitations. Employee requested a temporary award ordering the provision of medical care and all associated benefits under the Missouri Workers' Compensation Law. Employer requested a final award denying benefits.

The administrative law judge concluded that employee failed to establish that his work is the prevailing factor in causing the resulting medical condition and disability, and denied employee's claims against the employer and the Second Injury Fund.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred because: (1) she failed to understand the extent of employee's hand activities at work and thus incorrectly relied on Dr. Goldfarb's opinions over those of Dr. Beatty; and (2) her interpretation of the 2005 amendments raises the bar so high that employee has no court remedy whereby to seek redress, thereby violating employee's constitutional rights of due process and equal protection of law.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Employee worked for employer for about 23 years. Employee last worked for employer as a shipping supervisor; he held this position for the last five to seven years of his employment. Previously, employee performed a number of different jobs throughout

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employer's warehouse. Employee's duties as a shipping supervisor involved both supervisory tasks and manual labor.

Employee provided extensive and detailed testimony regarding his job duties. We credit employee's testimony and find the following facts as to his work tasks. Employee's daily duties began with checking time sheets to determine who was working that day. From there, employee proceeded to his computer to see if there were any problems such as errors in past orders that needed his attention. This work could last as long as two to three hours, though it was not usually continuous. Employee then helped pass out "pick tickets," a computer printout with a customer's order printed on it. For years the pick tickets came out of the printer on a continuous roll and had to be separated by manually tearing the pages apart. Over the last two years of employee's work, the pick tickets were printed on individual sheets. Employee typically handled between 200 to 500 tickets at a time, though he could see up to 2000 throughout the day. Each of the tickets had to be scanned using a scan gun. Employee performed this task by holding the individual tickets in his left hand, while holding the scan gun in his right, using his right index finger to work the trigger. After scanning the tickets, he placed them in a tray for other employees to retrieve and process.

Employee occasionally processed the pick tickets himself, which involved locating the ordered items within employer's warehouse. Employee used a cart which he pushed or pulled throughout the warehouse, while handling items as small as pens and as heavy as cases of coffee mugs. Employee pulled these items off shelves or racks and loaded them onto the cart.

Three to four times per week, employee packed shipping boxes. This task involved removing items from the pick cart and placing them on a packaging table. Employee used a tape gun to put cardboard boxes together. To use the tape gun, employee held it in his right hand and started the tape on one side of the box, then pulled it over to the other side. Employee then applied pressure to the box with the gun and twisted the gun with his wrist so that the tape would tear off. Employee then loaded the box with the items, closed up the box, and taped the top using the tape gun. Next, employee stapled the pick ticket to the box, picked up the box from the table, and placed it on a nearby conveyer belt. These boxes weighed anything from 2 pounds to 60 pounds. Employee could not say how many boxes he filled in an average day, as it varied.

Every day for 2 to 3 hours, employee worked in the "UPS manifest area," which involved taking boxes off a conveyer belt and placing them on a scale. Employee then removed the pick ticket from the box using his left hand. Employee estimated he removed 200 to 300 of these tickets in a typical day. After removing each ticket, employee picked up a scan gun with his right hand, and scanned each ticket three times, using his right index finger on the trigger of the scan gun. Employee then put the pick ticket in a tray. A shipping label would print from a machine; employee would grab the label and pull the sticker off with his right hand and affix it to the box. Employee then lifted the box and placed it on another conveyer belt. From there, the box travelled to another location where the boxes were removed and placed on skids or pallets. Employee would stack the boxes 3 to 7 feet high on the skid, then shrink wrap the skid using a roll of shrink

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wrap that employee manipulated by placing the index and long fingers of both hands into the ends of the tube. After affixing one end of the shrink wrap between two boxes, employee would circle around the skid approximately 15 times.

After the skids were shrink wrapped, employee moved them with a pallet jack machine, a stand-up forklift vehicle which a person operates using buttons and a rotating handle. Employee would drive the skids to a truck using the pallet jack machine.

In addition to the foregoing duties, employee performed managerial tasks including supervision, training, and discipline of between 15 and 40 other employees. Employee's daily job tasks varied somewhat, due to his helping out wherever he was most needed.

Employee testified that the description of his work duties contained in the 2003 and 2010 job descriptions prepared by employer were incomplete, because they did not include all of the physical tasks that he performed on a daily basis. We note that employer did not present any live witnesses to rebut employee's testimony as to his job duties, or to show that employer's written descriptions of his duties were more accurate than employee's testimony. Employer points to the affidavit from Sherri Weber describing employee's job duties, but we consider this evidence less persuasive. Ms. Weber's statements contained in the affidavit were not subject to cross-examination, and are far less detailed than employee's testimony regarding his duties, and as such we do not find them to materially contradict his testimony.

After careful consideration, we credit employee's testimony on this point. We find employee's testimony regarding his work duties more persuasive than the written job descriptions and the Weber affidavit provided by employer.

Carpal tunnel syndrome

Employee began to experience symptoms in his right hand and elbow in approximately 2002. Employee wasn't aware of any particular accident that caused these symptoms. Employee went to his family physician, Dr. Faron, for treatment. Dr. Faron ordered an MRI of employee's neck. Employee's symptoms receded.

In 2005, employee again experienced some symptoms in his right arm, and returned to Dr. Faron. Again, employee wasn't aware of any particular injury in connection with these symptoms. Treating doctors performed an electrical study on his arm. Employee's symptoms again receded, although he returned to Dr. Faron in 2006 for right arm complaints.

In February 2010, employee developed right arm symptoms, including numbness and tingling, that were much worse than he experienced previously. Employee returned to Dr. Faron, who prescribed physical therapy. Employee attended three sessions of physical therapy but obtained no relief. Dr. Faron ordered an MRI of employee's neck and referred him to Dr. Yoon, who in turn ordered electrical studies. Based on these studies, Dr. Ahmad, an associate of Dr. Yoon, informed employee that he had carpal tunnel syndrome.

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After learning he had carpal tunnel syndrome from Dr. Ahmed, employee informed Karen Stoverick, employer's director of human resources, of his diagnosis. Employee asked Ms. Stoverick if employer would cover the costs of his surgery, given the fact employer was in the process of winding down operations at the warehouse where employee worked. Ms. Stoverick sent employee to BarnesCare, where doctors examined employee and referred him to Dr. Charles Goldfarb, who specializes in upper extremity surgery. It appears from the medical record that employee's conversation with Ms. Stoverick must have taken place between June 4, 2010 (the date Dr. Ahmed diagnosed carpal tunnel syndrome), and July 19, 2010 (the date employee went to BarnesCare). It also appears from the medical record that the first date that a diagnostician rendered an opinion linking employee's work duties to his injuries was July 29, 2010, when Dr. Goldfarb suggested that work may have played a role in the development of employee's right arm symptoms.

Employee continues to experience complaints, including numbness and tingling in his right hand. Employee's thumb is weak, which makes it difficult to hold onto things. Employee is interested in obtaining further medical care for his condition.

Employee has high blood pressure and diabetes; he takes medications prescribed by his family physician for each condition. Employee smoked cigarettes for 20 years, though he stopped 6 or 7 years ago. Employee also has a history of neck pain in 2004 or 2005 with radiation into his elbow and hand.

Expert medical opinions

Employee provides the testimony of Dr. Michael Beatty, who examined employee and diagnosed right carpal tunnel syndrome and right cubital tunnel syndrome. Dr. Beatty recommends that employee undergo surgery for both conditions. Dr. Beatty testified that having multiple risk factors may impact the clinical presentation of a diagnosis such as carpal tunnel syndrome, but ultimately opined that employee's work for employer is the prevailing factor causing these conditions.

Employer, on the other hand, provides the testimony of Dr. Charles Goldfarb, who examined employee and who also diagnosed right carpal tunnel syndrome and right cubital tunnel syndrome. Dr. Goldfarb agrees that employee needs treatment for these conditions, including surgery. Dr. Goldfarb testified that there are a number of factors that might play a role in causing these conditions, including cervical spine issues, diabetes, a history of smoking, and hypertension. Dr. Goldfarb noted that employee's description of his work duties differed from the written description that employer had provided him. Dr. Goldfarb initially indicated that if employee's reports of significant elbow flexion or repetitive wrist flexion/extension were accurate, then work may be the predominant factor in the development of his nerve symptoms. But after employer provided Dr. Goldfarb with written descriptions of employee's work duties, Dr. Goldfarb changed his opinion and determined that work is not a prevailing factor causing the conditions he diagnosed in employee's right arm. Specifically, Dr. Goldfarb reasoned, as follows:

- Q. In your opinion is there a medical causal relationship between his job duties and his current problems and complaints?

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- A. It's obviously a difficult question. I think there are a number of factors in play here including cervical spine issues, diabetes, history of smoking, even his hypertension, which increase the likelihood of a patient such as Mr. Blanchard developing carpal tunnel syndrome. If a patient works in the state of Missouri and work is the prevailing – work must be the prevailing cause of carpal tunnel syndrome or cubital tunnel syndrome development, then in his case I cannot state that work was the prevailing cause and I think his medical co-morbidities are more important.

Transcript, page 661.

It appears that Dr. Goldfarb's medical opinion is premised on the conclusion that employee's non-work "co-morbidities" cumulatively outweigh employee's work as a causative factor, and therefore work cannot be the prevailing factor. As discussed in more detail below, we believe that Dr. Goldfarb's reasoning reflects a misconception of what constitutes a "prevailing factor" for purposes of the Missouri Workers' Compensation Law. More importantly, we simply find Dr. Goldfarb's reasoning unpersuasive. We find the opinions of Dr. Beatty in this matter more persuasive. Specifically, we credit Dr. Beatty's testimony that employee's work for employer is the prevailing factor causing his right carpal tunnel and cubital tunnel syndromes. We also credit the uncontested expert opinion that employee needs treatment, including surgery, for his right carpal tunnel and cubital tunnel syndromes.

Conclusions of Law

Occupational disease arising out of and in the course of employment

Section 287.067.1 RSMo provides, as follows:

In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

We have credited Dr. Beatty's opinion that employee suffers from right carpal tunnel and cubital tunnel syndromes, and that work is the prevailing factor in causing these conditions. Beatty's credible findings demonstrate that employee sustained an occupational disease that appears to have had its origin in a risk connected with the employment, and that appears to have flowed from that source as a rational consequence. We conclude employee sustained an occupational disease arising out of and in the course of his employment for purposes of the foregoing section.

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Medical causation

Section 287.067.2 RSMo provides, as follows:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

In the context of occupational disease, the courts have clarified that:

A claimant must submit medical evidence establishing a *probability* that working conditions caused the disease, although they need not be the sole cause. Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee.

Vickers v. Mo. Dep't of Pub. Safety, 283 S.W.3d 287, 292 (Mo. App. 2009)(citations omitted)(emphasis in original).

Again, we have credited Dr. Beatty's opinion that employee suffers from right carpal tunnel and cubital tunnel syndromes, and that his work is the prevailing factor in causing these conditions. Given Dr. Beatty's credible findings, we conclude that employee's occupational exposure was the prevailing factor in causing the resulting medical conditions of right carpal tunnel and cubital tunnel syndromes, and associated disability.

We have noted that Dr. Goldfarb appears to have premised his medical causation opinion in this matter on his view that employee's non-work "co-morbidities," considered cumulatively, outweigh work as a causative factor. We note that Dr. Goldfarb appears to have relied on a definition of "prevailing factor" that departs from the plain language of the foregoing section. As the parties are undoubtedly aware, the version of § 287.800 RSMo applicable to this case requires that we strictly construe the language of the Missouri Workers Compensation Law. Strictly construing this language, we find no support for the proposition that employee's work exposures must prevail over a combination of each of employee's non-work risk factors. Section 287.067.3 does not define a prevailing factor as the primary factor "in relation to all other factors combined," but rather "in relation to any other factor." For this reason, we believe Dr. Goldfarb's opinion in this matter is not only factually unpersuasive, but also inapposite for purposes of resolving the question of medical causation under § 287.067.3.

Notice

Section 287.420 RSMo sets forth the requirements for the notice employees must provide employers regarding a work injury, and provides, in relevant part, as follows:

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No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

Under the foregoing language, the triggering event in the context of an injury by occupational disease is "diagnosis of the condition," and the courts have interpreted this language, as follows:

Strictly construing Mo. Rev. Stat. § 287.420 (Cum. Supp. 2005), "the condition" is referring to the previously stated occupational disease or repetitive trauma. Therefore, the question then becomes, at what point is an occupational disease or repetitive trauma diagnosed? Looking to the plain, obvious, and natural import of the language, it follows that a person cannot be diagnosed with an occupational disease or repetitive trauma until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure.

Allcorn v. Tap Enters., 277 S.W.3d 823, 829 (Mo. App. 2009).

Pursuant to *Allcorn*, the thirty-day notice period did not begin to run for this employee until a diagnostician made a causal connection between his injuries and his work-related activity or exposure. We have found that the date a diagnostician first made a causal connection between employee's carpal tunnel syndrome and some work-related activity or exposure was July 29, 2010, when Dr. Goldfarb suggested that if employee's work duties as described to him were accurate, then there may be a causal connection between his work and his injuries. It appears that employee did not provide employer with a written notice meeting all of the elements of the statute within thirty days of this date.

The next question is whether employee can prove employer was not prejudiced by his failure to provide the written notice specified by statute. We have found that employee provided Ms. Stoverick actual notice of his diagnosis at some point between June 4 and July 19, 2010. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994).

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo. App. 2000)(citations omitted).

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Because we have determined that employer had actual notice of employee's hand complaints as of June or July 2010, employee has made a prima facie showing of absence of prejudice and the burden shifts to employer to show it was prejudiced.

After a careful review of the transcript, we can find no evidence to suggest that employer was prejudiced by failure to receive written notice of employee's injury. This is an occupational disease case alleging a gradual onset of injury, thus there was no accident for employer to investigate nor any witnesses to interview before memories faded. We note that employer had employee examined by its physicians at BarnesCare a little over a month after employee was first diagnosed with carpal tunnel syndrome by Dr. Ahmad. Given these circumstances, we are persuaded employer had a fair opportunity to investigate employee's claim, have him treated to minimize his injuries, and gather evidence for its defense, despite employee's failure to provide a written notice to employer meeting each of the elements of the statute. For these reasons, we conclude that employee's claim is not barred by § 287.420.

Statute of limitations

Section 287.430 RSMo provides, as follows:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.

Section 287.063.3 RSMo additionally provides, as follows:

The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

The foregoing sections make clear that the statute of limitations does not begin to run in cases of occupational disease until it becomes reasonably discoverable that an "injury" has been sustained related to the exposure. Section 287.020.3(1) RSMo provides that "[i]n this chapter, the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment." It follows that the statute of limitations did not begin to run for employee until it was reasonably discoverable to him that his occupational disease had resulted in an injury arising out of and in the course of employment. In the context of this case, it appears this first occurred during Dr. Goldfarb's evaluation on July 29, 2010;

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employee filed his claim for compensation on October 4, 2010. We conclude that employee's claim is not barred by the statute of limitations.

Future medical treatment

Section 287.140.1 RSMo provides: "In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Both Drs. Beatty and Goldfarb identified a need for future treatment referable to employee's right carpal tunnel and cubital tunnel syndromes. We have credited their uncontested testimony on this point. We conclude that employer is obligated to provide future medical treatments that may reasonably be required to cure and relieve from the effects of employee's work injuries.

Award

We reverse the award of the administrative law judge. Employer is liable to furnish employee's future medical treatment. Employee's claim against the Second Injury Fund is reinstated.

This award is subject to a lien in favor of Dean Christianson, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued June 11, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 28th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Member

DISSENTING OPINION FILED

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Ricky Blanchard

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge was correct and should be affirmed.

The primary source of confusion in this case derives from employee's failure to provide a complete or consistent account of his job duties. This is first seen in the records of Dr. Goldfarb. Based on employee's description of his job duties at the time of his initial evaluation in July 2010, Dr. Goldfarb was under the mistaken impression that employee's job involved repetitively tearing labels over a number of hours each day. But as far back as 2007 or 2008, employer had changed the method of printing pick tickets such that the tickets were printed individually; thus, employee had not been required to repetitively tear labels for at least two years before the onset of his carpal tunnel symptoms in early 2010. Employee also failed to apprise Dr. Goldfarb that he frequently changed job duties and rotated around the warehouse to the extent he was needed for various tasks. Finally, employee failed to tell Dr. Goldfarb that the bulk of employee's day was actually spent assigning work, supervising, and disciplining other employees, rather than performing any hand or wrist intensive tasks. Given this incorrect picture of employee's job duties, Dr. Goldfarb originally opined that employee's work may be a causal factor in the development of his carpal tunnel and cubital tunnel syndromes. But when employer provided Dr. Goldfarb with a more complete account of what employee actually did at work, Dr. Goldfarb opined that work was not a prevailing factor in causing employee's symptoms.

Similarly, it appears that the only information employee initially provided Dr. Beatty about his work was that he operated a standup truck and that this was his most bothersome problem. Between Dr. Beatty's issuance of his initial evaluating report and the time of his deposition, employee's counsel provided Dr. Beatty with some additional information including pictures of the equipment employee worked with. But Dr. Beatty failed to discuss the relevance of this additional information in either his subsequent report or at his deposition. In fact, Dr. Beatty wholly failed to provide any explanation of his opinions or to identify any specific work tasks that he believed contributed to the diagnosis of carpal tunnel or cubital tunnel syndromes. His report and deposition contain only his ultimate opinions, unsupported by any analysis or medical reasoning. Worse, Dr. Beatty acknowledged that at the time of his initial evaluation, he didn't have *any* of employee's medical records, and conceded on cross-examination that he had very limited information about employee's prior medical history. It is no surprise, then, that Dr. Beatty's ultimate causation opinion takes the form of a "concurrence" with employee's opinion that work caused his symptoms. *Transcript*, pages 114, 129. It doesn't appear to me that Dr. Beatty has actually even reached an independent medical opinion in this matter; instead, he has faithfully endorsed the *employee's* theory as to the medical causation of his injuries.

The cause and development of an occupational disease is not a matter of common knowledge. There must be medical evidence of a direct causal connection. The question of causation is one for medical testimony,

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without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence.

Vickers v. Mo. Dep't of Pub. Safety, 283 S.W.3d 287, 292 (Mo. App. 2009)(citations omitted).

Where Dr. Beatty's opinions in this matter amount to a threadbare endorsement of employee's lay opinion regarding the source of his complaints, where they are unsupported by any medical analysis or reasoning, and where the doctor clearly had a truncated view of the pertinent facts, I must seriously question whether employee has met his burden as described in the foregoing quote from *Vickers*.

I find Dr. Beatty's testimony in this matter wholly unpersuasive. I believe the administrative law judge correctly weighed the medical evidence and reached the appropriate result. I would affirm the decision of the administrative law judge.

Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

FINAL AWARD

Employee:	Ricky Blanchard	Injury No.:	10-051990
Dependents:	N/A		Before the
Employer:	Staples Inc		Division of Workers' Compensation
Additional Party	Second Injury Fund		Department of Labor and
			Industrial Relations
			Of Missouri
Insurer:	Indemnity Ins Co of North America		Jefferson City, Missouri
Hearing Date:	March 8, 2012		Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? NO
3. Was there an accident or incident of occupational disease under the Law? NO
4. Date of accident or onset of occupational disease: Alleged April 10, 2010
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? Not determined.
8. Did accident or occupational disease arise out of and in the course of the employment? NO
9. Was claim for compensation filed within time required by Law? Not determined.
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant engaged in repetitive activities.
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: Alleged right upper extremity
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$952.31
- 19. Weekly compensation rate: \$634.87 / \$422.97
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: Dismissed

TOTAL: \$0.00

23. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of n/a % of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: n/a

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Ricky Blanchard	Injury No.: 10-051990
Dependents:	N/A	Before the
Employer:	Staples Inc	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and
		Industrial Relations
		Of Missouri
Insurer:	Indemnity Ins Co of North America	Jefferson City, Missouri
Hearing Date:	March 8, 2012	Checked by: KOB

PRELIMINARIES

The matter of Ricky Blanchard (“Claimant”) proceeded to hearing at the Division of Workers’ Compensation in the City of St. Louis to determine whether Claimant sustained a compensable injury, among other things. Attorney Dean Christianson represented Claimant. Attorney Matthew Barnhart represented Staples, Inc. (“Employer”) and Indemnity Insurance Company of North America (“Insurer”). The Second Injury Fund did not participate.

The parties stipulated that on or about April 10, 2010, Claimant was an employee of Employer, and that both parties were subject to the provisions of the Missouri Workers’ Compensation Law. At the time, Claimant earned an average weekly wage of \$952.31, with corresponding rates of compensation of \$634.87 for total disability benefits and \$422.97 for permanent partial disability benefits. Employer paid no temporary total disability benefits, and no medical benefits. The parties stipulated to the St. Louis Division of Workers’ Compensation as being the proper venue for this matter.

The issues for determination are:

1. Did Claimant sustain an occupational disease arising out of and in the course of employment;
2. Are Claimant’s job activities the prevailing factor in causing his medical condition;
3. Did Claimant give proper notice of his injury;
4. Is the claim barred by the statute of limitations; and
5. Is Employer liable to provide future medical care?

Claimant requests a temporary award ordering treatment to cure and relieve the effects of his injury. Employer and Insurer request the issuance of a final award denying the claim. The parties stipulated if Claimant prevails, the Second Injury Fund will be left open, but if Employer prevails, the Second Injury Fund claim will be dismissed.

FINDINGS OF FACT

Claimant is a 57-year-old man who is diabetic, has cervical problems, takes medication for high blood pressure, and carries 215 pounds on his 6'3" frame. He quit his 20-year habit of smoking in 2007. Claimant is currently a receiving clerk for a light fixture company, having landed that job after a period of unemployment following the closing of Employer's warehouse in 2010. He worked in the shipping department of Employer or its predecessor for twenty-three years, the last five to seven years as Shipping Supervisor.

As a Shipping Supervisor, Claimant was responsible for overseeing, coordinating, and disciplining 12 to 40 shipping personnel at a time. The essential duties of a Supervisor, Shipping, according to Employer's 2003 and 2010 job descriptions and Claimant's testimony, included the following:

1. Supervises and coordinates activities of shipping personnel. Trains, evaluates and disciplines assigned staff;
2. Coordinates all specific unit activities to meet productivity goals and operating objectives;
3. Determines work procedures, prepares work schedules and expedites workflow (the 2010 description also included: "prints and hands out tickets to warehouse personnel to ensure an even work flow");
4. Studies and standardizes procedures to improve efficiency of subordinates and processes;
5. Oversees the shipping or product in the warehouse (2010 included a ship out time goal);
6. Keep time and personnel records;
7. Prepares and generates warehouse productivity reports for management;
8. Researches errors and recommends/implements corrective action;
9. Supervises the verification of records on outgoing shipments. Responsible to maintain inventory practices which result in inventory accuracy.

There is no significant difference between the 2003 and 2010 descriptions, other than the later document attempts to designate the percentage of time spent at each task, and it specifically includes the responsibility of printing and handing out pick tickets, which is consistent with Claimant's testimony. The essential duties of the Shipping Supervisor are sedentary. The Shipping Supervisor had some assistance fulfilling his essential duties; for example, Sherri Weber ran production reports, and Paulette prepared tickets to be handed out to the order fillers.

Some of the essential functions involved the use of his hands, like logging timesheets with pen and paper, checking email on the computer, assigning work and scanning tickets. Prior to 2008, Employer had a dot matrix printer, so processing pick tickets involved tearing multiple sheets of perforated paper after the orders were printed. In 2008, the new system did not require any tearing, only the use of a scan gun. The number of tickets processed daily could vary from a few hundred to a thousand.

In addition to the essential duties of the Shipping Supervisor position and because meeting production goals was his responsibility, Claimant often jumped in to perform the tasks of his shipping personnel depending on demands and staffing. In many cases, he had regularly performed these tasks as a picker/packer, loader, machine operator and forklift operator prior to

becoming Shipping Supervisor. Claimant testified in precise detail regarding the tasks he performed alongside the personnel he supervised. These tasks including picking order items from bins or racks, performing all elements of packing including forming/taping the box, loading the product and packing material, lifting the package to the conveyer belt, stacking packages on skids, shrink wrapping loaded skids, and moving skids with a hand operated standing pallet jack.

Occasionally, particularly at the end of a shift, Claimant helped run the UPS manifest station, which involved placing the box on a scale, scanning the ticket and applying the shipping label. Claimant testified he worked the UPS manifest for two to three hours every day. However, Sherri Weber, a co-worker whom Claimant supervised, explained that when production picked up at the end of a shift, Claimant would often take over a position at the UPS manifest to allow one of the designated UPS workers to help pick and pack. She testified by affidavit, "Ricky did not do this every day but at times he would perform this task for one to two hours." Given Claimant's overall responsibilities, Ms. Weber's testimony on the UPS station is much more believable than Claimant's description of near constant manual labor. Sherri and Claimant both testified when Claimant started having the problems with his upper extremities, Employer was in the process of winding down business at the St. Louis warehouse, and in the final few months of Claimant's employment, production was slow.

I find Claimant to be a dedicated employee who rose through the ranks with Employer, mastering the various jobs within the shipping department, until he earned the position of Supervisor. His work ethic made up for his lack of a high school degree, which is otherwise a requirement for the job. While Claimant could capably perform the job tasks of all the personnel he supervised, he was not primarily responsible for performing those tasks on a regular basis. His non-supervisory manual work was physical, but also varied, sporadic and unpredictable.

Claimant alleges his work is the cause of right carpal tunnel and cubital tunnel syndromes as of February 2010 (although the claim is for an April injury). A review of Claimant's primary care records indicates he has treated regularly for hypertension, diabetes since 2007 (uncontrolled at times), erectile dysfunction, and back pain. He made complaints of and was diagnosed with "probable carpal tunnel syndrome (and)...medial epicondylitis—left" in February 2000. On February 7, 2002, Claimant had developed right upper extremity paresthesias and pain, including middle finger numbness and pain radiating from the neck, and x-rays revealed degenerative changes of the cervical spine at multiple levels. In September 2004, Claimant complained of bilateral shoulder pain. At a January 2005 physical exam, Claimant complained of upper body paresthesias. Bilateral NCV/EMGs revealed bilateral mild ulnar sensory and right motor neuropathy, and symptoms improved with conservative treatment. The evaluating physician noted electrodiagnostic evidence of there being a carpal tunnel syndrome on the right. In May 2006, the focus was on right upper extremity paresthesias, and Dr. Faron, Claimant PCP, diagnosed peripheral neuropathy, recommended behavior modification, and noted "likely related to repetitive strain at work." In 2009, Claimant was diagnosed with and began treatment for osteoarthritis.

Claimant testified his upper extremity problems got worse in 2010. In February 2010, Dr. Faron diagnosed "tennis elbow" on the right, recommended physical therapy or orthopedic consultation, and medication for symptoms. Beginning in April 2010, Dr. Faron focused on

diagnosing and treating right radicular, shoulder and arm pain. Diagnostic studies revealed multilevel cervical DJD with bilateral foraminal narrowing and stenosis. Physical therapy was ineffective, but symptoms improved with epidural steroid injections. In May 2010, Claimant saw Dr. Yoon and Dr. Ahmad. Testing revealed severe right carpal tunnel syndrome, moderately severe ulnar neuropathy and chronic cervical nerve root compression at multiple levels. Trigger point injections were administered.

Claimant testified he first learned he had carpal tunnel syndrome in May from Dr. Ahmed. He said he told Karen Stoverick, the designated workers' compensation person for Employer. She authorized him to go to BarnesCare Westport, and he was then referred to Dr. Charles Goldfarb, a hand surgeon.

When Claimant first saw Dr. Goldfarb on July 29, 2010, he indicated he was seeing the doctor for "right wrist and right elbow pain" that had been present since 2005 but had worsened in 2010. Claimant's complaints, exam, and testing all supported a diagnosis of right carpal and cubital tunnel syndromes. Claimant described his job as generally sedentary, but with "a great deal of repetitive activities with tearing of labels, perforated sheets on a repetitive back and forth basis" with the right upper extremity. Dr. Goldfarb felt Claimant would benefit from carpal and cubital tunnel releases. He felt, "based on the patient's description of his work activities which seem to be in an elbow flexed posture and repetitive in nature, work seems to have played a role in the development of these symptoms." Noting a difference between Claimant's description of tearing forms and the job description, Dr. Goldfarb reiterated significant elbow flexion or repetitive wrist flexion/extension activity as described was necessary to establish work as the predominant factor in the development of his nerve symptoms.

After he issued the initial report, Dr. Goldfarb received and reviewed additional information regarding Claimant's work responsibilities and medical history. Based on his further understanding of the patient, Dr. Goldfarb did not believe work was the prevailing cause of Claimant's nerve symptomology, citing three major reasons: 1) he has several clear predisposing factors including cervical spine disease and diabetes; 2) his job description does not contain tasks that would lead to the diseases diagnosed; and 3) the fact both nerves are involved would be unusual for work-related development.

At his deposition of July 21, 2011, Dr. Goldfarb identified five medical conditions that could predispose Claimant to the development of carpal and cubital tunnel syndromes: hypertension, poor circulation, diabetes, cervical radiculopathy and history of smoking. He also explained the significance of the fact Claimant had not ripped pick tickets for two years prior to the onset of the symptoms at issue. Dr. Goldfarb considered the fact Claimant performed manual labor on an intermittent basis, depending on need.

Dr. Goldfarb conceded the critical issue of causation posed a difficult question. However, acknowledging the standards of the Missouri Workers' Compensation Law, he could not state that in this case work was the prevailing cause. Rather "his medical co-morbidities are more important." He did "not believe that [Claimant]'s work was the prevailing cause of the development of his carpal and cubital tunnel" syndromes.

Claimant saw Dr. Michael Beatty, a hand surgeon, on February 21, 2011, at his attorney's request. He took a history of right hand numbness and tingling, which had been intermittent for three years, and more persistent in the last year. He acknowledged Dr. Goldfarb's recommendation for surgery, but did not have those records, nor did he have any other records prior to forming his opinion. On examination, Dr. Beatty found evidence of carpal tunnel and cubital tunnel syndromes. Dr. Beatty wrote, "As a result of and following the examination, we discussed his work situation and the patient feels that his job description as explained to me would be the causative basis for his upper extremity problems, and I would concur." He identified the "standup truck" as the most bothersome activity. After the exam, Claimant provided more details about his work, and Claimant's attorney provided the medical records. Dr. Beatty's final report held the following conclusions: 1) Claimant's diagnosis is right carpal tunnel and right cubital tunnel syndromes; 2) it is his opinion that Claimant's work for Employer would be the prevailing factor in causing the aforementioned diagnoses; 3) Claimant should not operate the "standup truck"; and 4) Claimant would benefit from surgery.

Dr. Beatty did not initially have a comprehensive understanding of Claimant's medical history, initially relying on a one-page history filled out by Claimant. He did not have a full understanding of Claimant's cervical pathology, nerve tests, prior diagnoses of carpal tunnel syndrome and peripheral neuropathy, or general prior medical conditions. Upon questioning by Claimant's attorney, Dr. Beatty confirmed Claimant had the diagnosis of carpal tunnel syndrome in 2005.

Currently, Claimant complains of numbness and tingling in the right thumb, index and ring fingers, which can turn white and lose feeling. These symptoms get worse with repetitive activities and improve with relaxation. Claimant's right elbow gets numb with pressure, like resting it on a hard surface, and the symptoms get worse with repetitive activities. Claimant wants treatment for these symptoms.

RULINGS OF LAW

Based on the findings of fact, and considering the Missouri Workers' Compensation Law, I find Claimant has presented insufficient evidence to establish that he suffers from an occupational disease arising out of and in the course of his employment at Employer, and that his claimed occupational disease was caused by his job duties. Because the analysis is essentially the same, the first two issues if the case identified above are combined for discussion purposes.

I. Arising out of and in the Course of Employment / Prevailing Factor

Claimant has the burden of proof. Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002)¹; see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable

¹ This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999); see also *Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.D. 2004).

Claimant alleges he contracted the occupational disease of carpal and cubital tunnel syndromes as a result of his work for Employer. Pursuant to §287.067(2)(2005), "(a)n injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability...." Prevailing factor is defined as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." *Id*; see *Bond v. Site Line Surveying*, 322 S.W.3d 165, 170 (Mo.App. W.D. 2010). There is no dispute regarding Claimant's diagnosis or symptoms. Rather, the pivotal issue is whether work is the prevailing or primary causative factor.

In cases involving medical causation, which is not within the common knowledge or experience, the claimant must present medical or scientific evidence showing the cause and effect relationship between the complained-of condition and the asserted cause. *McGrath v. Satellite Sprinkler Systems, Inc.* 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986). See also, *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999).

Medical experts are required where, as here, causation of alleged carpal and cubital tunnel syndromes is at issue. In this case, the experts reached divergent opinions, and neither opinion is perfect. Based on all the credible evidence of record, including the doctor's areas of expertise, the foundation on which each opinion is based, their understanding of the duties involved, and the depth of the analysis provided, I find the opinion of Dr. Goldfarb to be more credible and consistent with evidence than Dr. Beatty's opinion.

Both experts have qualification by training and experience to render an opinion on causation in this, and any other case involving the upper extremities. Dr. Beatty's practice focuses on plastic and reconstructive surgery, surgery of the hand, and cosmetic surgery, and he has teaching experience. Dr. Goldfarb is a board certified orthopaedic surgeon who reviews for and publishes in several medical journals, has given presentations at regional and national levels, and is an associate professor of Orthopaedic Surgery.

While the experts are giving opinions within their respective areas of expertise, the factual foundations on which each builds his opinion are disparate. Dr. Goldfarb initially gave an opinion of causation based on information shown to be inaccurate and incomplete, and specifically identified the causative activity he thought was the problem (elbow in flexed posture with ripping of pick tickets). When he reviewed additional information regarding Claimant's medical history with risk factors, and he learned Claimant had not performed the ripping of pick tickets for two years prior to the onset of symptoms, he changed his opinion with respect to causation under circumstances I find to be reasonable. Dr. Beatty, on the other hand, had only Claimant's description of his medical history and job duties when he agreed with Claimant's opinion that work caused his injuries. Rather than waiting for the additional information, he

jumped to the conclusion Claimant sought, and did not change that initial opinion in the face of additional relevant information.

The amount of manual labor Claimant performed as a Shipping Supervisor is a major issue in this case. The work Claimant described in extraordinary detail was performed on a sporadic and unpredictable basis, dictated by demand and staffing. While he may have performed many of those hand-intensive tasks before he became a Supervisor, Claimant could not perform such tasks at the intensity he described and fulfill his sedentary obligations as a Supervisor. Yet, the intensity of his handwork decreased, with the supervisory duties and the closing of the plant, the symptoms worsened. Dr. Goldfarb ultimately had the best understanding of the type and intensity of work Claimant performed, and was most consistent with the facts found. Dr. Beatty's initial conclusion was merely reinforced by the detailed information Claimant provided after the fact, but I find the information to be less than credible because it reflects an intensity of work Claimant no longer performed by the time of the onset of the alleged occupational disease.

Finally, Dr. Goldfarb provided a better-quality analysis of the situation than did Dr. Beatty. He applied the proper legal standard in the State of Missouri, acknowledged the existence of medical co-morbidities, and explained how those conditions affect the issue of causation. Dr. Beatty used the appropriate legal terms in response to counsel's inquiries, but did not demonstrate a good understanding of the legal standard by which causation is determined in Missouri Workers' Compensation cases. Nor did Dr. Beatty scrutinize medical co-morbidities or otherwise support his initial conclusion with medical facts.

The keystone issue of medical causation turns on the medical expert deemed most credible by the finder of fact, who in this case is Dr. Goldfarb. For the above reasons, I find Claimant's work is not the prevailing factor in causing his carpal and cubital tunnel syndromes. The co-morbid medical conditions are more important factors than the work. Claimant had uncontrolled diabetes, and twenty-year smoking history, high blood pressure, and severe cervical radiculopathy. He had a history of upper extremity problems, having been diagnosed with left carpal tunnel syndrome in 2000 and right carpal tunnel syndrome in 2005.

Other specifics pointing to non-work related causative factors are that Claimant's symptoms seemed to worsen in an inverse relationship to the intensity of his manual labor. His work was more repetitive and intense before he became a Supervisor, but his symptoms got worse after becoming a Supervisor, and worse still as production slowed before the plant closed. In that time, his diabetes was out of control and his cervical condition was symptomatic. Given these multiple factors, Claimant has failed to establish that Claimant's work is the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Claimant has not established a compensable claim.

II. Other Issues

Having failed to establish he suffers from a compensable occupational disease arising out of and in the course of employment, Claimant is not entitled to workers' compensation benefits, including medical treatment. The issues of notice and statute of limitation are moot.

Pursuant to the stipulation of the parties, and because there is no compensable primary claim, the claim against the Second Injury Fund is denied. This is a final award.

Dated: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation