

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 01-146289

Employee: Joseph Bolek
Employer: Silgan Containers Corporation
Insurer: Broadspire Insurance administered by RSKCo
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: December 14, 2001
Place and County of Accident: Lawrence County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated May 6, 2005.

This award is only temporary or partial, 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 section 287.510 RSMo.

The award and decision of Associate Administrative Law Judge David L. Zerrer, issued May 6, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Joseph Bolek

Injury No. 01-164372

Dependents:

Before the

Employer: Pacesetter Corp.

**DIVISION OF WORKERS'
COMPENSATION**

Additional Party:

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Liberty Mutual Fire Insurance Co.

Hearing Date: August 10, 2004

Checked by: DLZ

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: September 1, 2001
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant alleged carpal tunnel syndrome bilateral
12. Did accident or occupational disease cause death? No Date of death? N/a
13. Part(s) of body injured by accident or occupational disease: Both wrists/hands
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? None
17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: \$400.00
19. Weekly compensation rate: \$266.67
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: None

Unpaid medical expenses: -0-

-0- weeks of temporary total disability (or temporary partial disability)

-0- weeks of permanent partial disability from Employer

-0- weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning , for Claimant's lifetime

22. Second Injury Fund liability: Yes No Open

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential () payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: NONE

23. Future requirements awarded: Not applicable

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joseph Bolek

Injury No: 01-164372

Before the
DIVISION OF WORKERS'
COMPENSATION

Dependents:

Employer: Pacesetter Corp.

Additional Party

Insurer: Liberty Mutual Fire Insurance Co.

Checked by: DLZ

On August 10, 2004, the parties appeared before the undersigned Associate Administrative Law Judge for a temporary hardship hearing. The Claimant appeared in person and by his attorney, Darren J. Morrison. The Employer appeared by its attorney, Raymond E. Whiteaker. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is a party to this claim; however, the Second Injury Fund is excused from participation in this hearing by agreement of all the parties, it being agreed that no evidence adduced at this hearing will prejudice any issue involving the Second Injury Fund in this claim. This claim is consolidated for trial with claims 01-146289 and 01-164373.

The parties have entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 1st day of September, 2001, Pacesetter Corporation was an employer operating subject to the Missouri Workers' Compensation Law; the Employer's liability was fully insured by Liberty Mutual Fire Insurance Co.; on the alleged injury date of September 14, 2001, Joseph Bolek was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the employment occurred in Greene County, Missouri, and the parties agree that Greene County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of his injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident/occupational disease Claimant's average weekly wage was \$400.00, sufficient to allow a compensation rate of \$266.67 for temporary total disability and permanent partial disability; no temporary benefits have been paid prior to the date of this hearing; the Employer has paid no medical benefits prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

ISSUES

Whether the Claimant sustained an accident/occupational disease.

Whether the accident/occupational disease arose out of the course of and scope of employment.

Whether the accident/occupational disease caused the injuries and disabilities for which benefits are now being claimed.

Whether the Employer is obligated to pay for past medical expenses.

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

DISCUSSION

Claimant is a male aged 29 years at the date of the hearing. Claimant testified that he currently resides in Cortland, Illinois. Claimant testified that he graduated high school from Stockton, Missouri, High School and attended Southwest Missouri State University for a time earning 15-20 credit hours. Claimant further testified that after several temporary employments, Wurth Supply Company employed him in January 1999 as a bin runner and that his job task was to obtain bolts, nuts, and various small supplies in order to package the item for delivery to customers. He would also remove items received from inventory and put the items into bins awaiting sale and shipping. Claimant testified that he did this job task for about six months when he started having complaints of pain in both of his hands and wrists, the right greater than the left. Claimant reported these complaints to his supervisor who caused Claimant to be treated by Dr. McMurray. Claimant testified that Dr. McMurray diagnosed Claimant with tendonitis of both wrists and prescribed some anti-inflammatory medication and physical therapy.

Claimant testified that after his treatment regimen was completed, he was moved out of the job of bin runner and was placed in the warehouse as order filler and that after the change in work assignments, Claimant had no problem with pain in his wrists. Claimant further testified that he was thereafter promoted to inside sales purchasing manager where he sold items to walk-in customers and acted as purchasing manager to order inventory and to find new products for the Employer to sell. Claimant testified that he had no problem with either of his wrists while working as a sales/purchasing manager. Claimant left the employment of Wurth Supply Company in February 2001.

Claimant testified that in July or August 2001, the Pacesetter Corp employed him. Claimant was employed for about two months as a sales representative. Claimant's job task included making appointments with people to sell doors, windows, patio covers, and sidings. Claimant testified that he normally would call on two customers per day and that his job did not involve any repetitive tasks to demonstrate products to prospective customers. Claimant testified that he suffered no effects to either hand or wrist during his employment at Pacesetter and that he neither sought nor had any treatment for either of his hands or wrists while employed at Pacesetter.

On October 10, 2001, current Employer employed Claimant. Claimant testified that at the time Silgan hired him, he was given a physical exam administered by Dr. Schrunk. The result of Dr. Schrunk's pre-employment physical was that Silgan hired Claimant. Claimant was assigned to the job of "slitter operator", which entailed Claimant handling chipboard and metal to be used in the manufacturing of various types of cans for soups, Slimfast, and other products.

Claimant testified that he worked 12-hour shifts and that he worked four days on and four days off. Claimant's job task as a slitter operator was to feed tin into a machine. The tin was placed in stacks. Claimant would pick up stacks of tin and feed the stacks of tin into the machine. The pieces of tin were approximately 7-8 inches x 5-6 inches wide, the stacks were about 4 inches tall each and weighed about 35 pounds for each stack. Claimant stated that he did not personally know how many pieces of tin he handled per shift but that it was his understanding that he would handle about 100,000 pieces of tin per each shift.

Claimant testified to perform his job task, he would retrieve a stack of tin, located about five feet above the floor, from a machine and carry it about 6-7 feet to the hopper, which was located 4-5 feet from the floor. Claimant

testified that the hopper was about the level between his waistline and his chest. Claimant further testified that the pieces of tin were slippery and that he had to keep the stack in good alignment in order for the tin pieces to feed into the hopper properly.

Claimant testified that after about two weeks doing the slitter operator job, his hands and wrists began to be painful. He stated that his hands would swell from just below his wrists and into his hands. He also stated he would wake up at night with pain in his hands. Claimant stated that he told his supervisor about the pain in his hands and wrists and that the swelling in his hands was making it difficult to pull the pieces of tin off the machine. Claimant testified that he was told that he had to give it time for his hands to adjust to this type of work. Claimant further testified that the pain complaints did not subside but got worse until his hands would hurt every time he picked up a stack of tin pieces. Claimant requested to his supervisor that treatment be provided and Claimant was sent to Dr. Schrunck for treatment and referred to Aurora Hospital. Claimant was no longer employed at Silgan after December 14, 2001.

Claimant testified that after his employment at Silgan terminated, Fairfield Resorts hired him as a telemarketer. Claimant sat in front of a computer and called people in an attempt to sell travel plans to customers. Claimant testified that his actual use of the computer was limited to two keystrokes during his work there.

Claimant testified that after his employment at Fairfield Resorts, he was employed by Kohl's Department Stores as an advertising team member where Claimant worked while the store was closed on the overnight shift putting up and taking down sale price signs and other marketing signs.

Next, Claimant moved to Cortland, Illinois, in March 2004 where he continued to work for Kohl's Department Stores. At this store his job task was shoe department supervisor where he was in charge of setting up displays, selling shoes, and answering questions, etc. Thereafter, about April 2004, Claimant began working for Comp USA Stores where Claimant's job task is sale of computers, printers, peripheral equipment, and accessories for computers. Claimant testified that his symptoms have not changed in any of his employments since Silgan and that none of his employments subsequent to Silgan required any repetitive motion with either hand or wrist.

Claimant testified that his current symptoms and complaints include that his hands swell whenever he does much activity to stimulate blood flow to his hands; sometimes his hands will lock up and not move easily; and that he has some kind of growth in his hands. Claimant also testified that when he takes a shower his hands become extremely wrinkled and he further testified that he suffers numbness in both hands in the nighttime, causing him to be awake at night.

Claimant testified that Dr. Schrunck, Dr. Koprivica, and Dr. Hoffman have all recommended additional treatment for Claimant's symptoms but no employer has authorized any additional treatment. Claimant further testified that he believes his job task at Silgan has caused Claimant's current complaints and need for medical treatment.

On cross-examination Claimant admitted that his hand and wrist problems at Wurth Supply were during the time of his first job task and that after his treatment, Claimant had no problem with his hands or wrists for the remainder of his employment. Claimant admitted that he was off work for about 5-6 months before being employed by Pacesetter and that he worked for Pacesetter for about 2 months.

Claimant further admitted that the problems he experienced at Wurth Supply Co. were different than at Silgan

because he did not experience hand swelling, hands locking up, or stinging sensation in his hands while at Wurth Supply Co., but Claimant did exhibit those symptoms while employed at Silgan. Claimant also admitted that the growths on the back of his hands and hand wrinkling and numbness were all experienced for the first time after performing his job task at Silgan.

Claimant further admitted on cross-examination that he did not complain about hands or wrists during the pre-employment physical and that he was not having any symptoms at that time.

On cross-examination by Silgan, Claimant admitted that he was off work for two weeks while under treatment at Wurth Supply Co., and further, that the medical records show left wrist was improved after treatment but that the right wrist was improved 25% and that the right wrist popped and swelled. Claimant further admitted that part of his job task at Wurth involved breaking down about 40 boxes each day and that the boxes weighed between 3 and 40 pounds each. Claimant also admitted that the pain in his wrist experienced at Silgan was about the same as at Wurth Supply Co. but that the pain was more intense at Silgan than at Wurth Supply Co.

Dr. Koprivica testified by deposition on behalf of Claimant. Dr. Koprivica testified that the Claimant suffers from a cumulative injury due to Claimant's employment activities at Silgan and that Claimant is in need of additional treatment. Dr. Koprivica testified that Claimant might suffer from bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and bilateral thoracic outlet syndrome. Dr. Koprivica further testified that additional treatment is necessary to narrow the differential diagnoses including, but not limited to, electro-diagnostic testing and consultation with a hand surgeon. In addition, Dr. Koprivica recommended a bone scan and vascular work-up to determine if Claimant is suffering from thoracic outlet syndrome. Dr. Koprivica further recommended diagnostic studies to determine if Claimant is suffering from some other disease or condition that could produce the symptoms of which Claimant complains. Dr. Koprivica opined that Claimant's job task at Silgan involving repetitive work activities caused the need for the recommended treatment.

FINDINGS OF FACT AND RULINGS OF LAW

Whether the Claimant sustained an accident/occupational disease.

Whether the Claimant gave the Employer proper notice.

Whether the accident/occupational disease arose out of the course of and scope of employment.

Whether the accident/occupational disease caused the injuries and disabilities for which benefits are now being claimed.

The Claimant testified in detail as to the job tasks he performed in his several employments, particularly with regard to Wurth Supply Co., Pacesetter, and Silgan. The history related to the treating and examining physicians supports Claimant's testimony with regard to his job tasks. Claimant's job at Silgan involved repeated steps for periods of twelve hours for each shift. I find that Claimant's duties at his work at Silgan required several repetitive tasks using the hand, wrists, elbows, and arms. I find that Claimant has suffered an occupational disease, which is the subject of this claim, and that such occupational disease was caused by repetitive motion tasks conducted at the work place. Since this claim is based on an occupational disease injury, and Claimant testified that he reported his

complaints to the Employer when the problem arose, I find that Employer was given proper notice of Claimant's injury. I find this issue in favor of Claimant.

The evidence adduced from Claimant at the hearing, as well as the evidence adduced from Dr. Koprivica's deposition testimony, indicates that Claimant's complaints of pain in his hand, wrists, and elbows are directly related to his work, and there is no other evidence offered at the hearing which would tend to show that Claimant's symptoms are caused by some idiopathic or non work-related cause. Claimant performed repetitive tasks everyday at work for twelve-hour shifts, four days each week. Claimant was required to use his hands, his wrists, and his elbows and arms constantly to perform his job task. After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant's occupational disease caused the injuries and disabilities for which benefits are now being claimed. I find this issue in favor of Claimant.

As to whether Claimant's occupational disease arose out of the course and scope of employment with Employer, the facts must be examined within the context of Section 287.063, and in this particular claim, Section 287.067. The evidence adduced at the hearing is clear that Wurth Supply Co. employed Claimant from January 1999 thru February 2001. The evidence further shows that Claimant was treated for tendonitis of the wrists/hands by medications and physical therapy. Claimant testified that after a period of treatment during the summer of 1999, his complaints resolved, no further treatment was sought by the Claimant, and the Claimant testified that he had no further problem with his hand up until the time he left employment with Wurth Supply Co. in February 2001, a period of about one and one-half years after initial treatment.

Claimant was next employed by Pacesetter. Claimant testified that he had no problems with his hands/wrists during the tenure of employment with Pacesetter. Claimant testified concerning his job task at Pacesetter, which did not include any consistent repetitive tasks in order to perform his duties.

Claimant was next employed by Silgan in October 2001, a period of more than two years after any treatment or report of symptoms from his bilateral tendonitis. Claimant's job task at Silgan involved intensive repetitive motion of his upper extremities. Claimant started to experience pain symptoms in his extremities, some of which were similar to his 1999 complaints and some of which Claimant testified were new and were never experienced at the time of his 1999 treatment. Claimant has a compensable occupational injury. The question for determination is which employer is responsible under the law to provide treatment for Claimant's injuries. Section 287.063 states that when the injury is in the nature of an occupational disease, which this claim is, the employer in whose employment the employee was last exposed to a hazard of occupational disease for which the claim is made, is liable for the compensation benefits provided for in Chapter 287. I find that Employer, Silgan, exposed the Claimant to the hazard of occupational disease by Claimant's job task of repetitive motion in his work on a constant daily basis. However, Employer Silgan employed Claimant for a period of less than 90 days when the injury occurred. Therefore, Section 287.067 must be applied to determine if the provisions of Section 287.067 are controlling. Most notably, the provisions of Section 287.067.7 provide for an exception to the provisions of Section 287.063, if the injury is due to repetitive motion; if the exposure to the repetitive motion is less than 90 days; and the evidence demonstrates that the exposure of the repetitive motion with a prior employer was the substantial contributing factor to the injury.

The evidence adduced at the hearing is clear that Claimant's injury is due to repetitive motion and that he was

exposed to repetitive motion for less than 90 days at Employer Silgan. The remaining point to be examined is whether a prior employer's exposure of Claimant to repetitive motion is the substantial contributing factor in causing the need for Claimant's requested treatment. Employer Wurth urges that it cannot be liable for Claimant's injuries because it is not the immediate prior employer. However, Claimant's immediate prior employer did not subject Claimant to exposure to repetitive motion, therefore, the immediate prior employer in this claim could not be liable to Claimant for compensation benefits. Employer Silgan urges that Wurth Supply Co. is the proper employer who has liability for compensation benefits because it did expose Claimant to repetitive motion and that employment was the substantial contributing factor in causing Claimant's current need for treatment. Claimant did receive treatment for symptoms similar to the symptoms complained of in the instant claim. However, Claimant last received treatment in 1999 for those complaints; Claimant testified that his symptoms resolved after the 1999 treatment; and Claimant testified that he feels the symptoms that he now complains of are different than the ones he experienced in 1999.

Dr. Koprivica testified that in his medical expert opinion, the Claimant's repetitive motion injury and current need for treatment, which he recommended, was caused by Claimant's work at Employer Silgan. Dr. Koprivica based his opinion on the fact that Claimant had a pre-employment physical exam by Dr. Schrunk (one of Claimant's treating physicians for this injury), and that Claimant was diagnosed with repetitive trauma symptoms after working for Silgan. Dr. Koprivica further opined that Claimant's job as a slitter operator at Silgan as well as Claimant's full resolution of his complaints in 1999 caused the need for the treatment which Dr. Koprivica recommended. After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant's need for treatment for this injury is caused by his employment at Employer Silgan and that Claimant's employment at Employer Wurth was not the substantial contributing factor in causing Claimant's current need for treatment. *Mayfield v. Brown Shoe Company* 941 S.W. 2d 31. Therefore, Section 287.063 is the controlling statute in this claim. I find that Employer Silgan was the last employer to expose Claimant to repetitive motion and is therefore liable for compensation benefits due to Claimant under injury 01-146289.

Whether the Employer is liable to pay for past medical expenses.

Based on the ruling set out in the above issues, I find that Employer is not liable to Claimant for the reimbursement of medical expenses incurred by Claimant prior to the date of this hearing.

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

Based on the ruling set out previously in this award, I find that Employer is not liable to Claimant to provide future medical care in order to cure and relieve the Claimant of the effects of his injuries.

Claimant's attorney has requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney is hereby awarded an attorney fee of 25% of the amount of this award. Claimant's attorney is hereby granted a lien on the proceeds of this award unless and until the attorney fee is paid in full.

Date: May 6, 2005

Made by: /s/ David L. Zerrer
David L. Zerrer
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secrest
Patricia "Pat" Secrest
Director
Division of Workers' Compensation