

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

Injury No.: 04-145674

Employee: Mike Brune
Employer: Johnson Controls
a/k/a Hoover Universal, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated April 15, 2014.

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 § 287.510 RSMo.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued April 15, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee:	Mike Brune	Injury No.: 04-145674
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Johnson Controls, aka Hoover Universal Inc.	Department of Labor and Industrial Relations Of Missouri
Additional Party	Second Injury Fund	Jefferson City, Missouri
Insurer:	Self c/o Underwriters Safety & Claims	Checked by: KOB
Hearing Date:	January 15, 2014	

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: On or about June 1, 2004
5. State location where accident occurred or occupational disease contracted: Saint Louis 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 happened or occupational disease contracted: Claimant used his hands in a repetitive and intense matter while working as an Assembly Tech for Employer.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Bilateral Hands
14. Compensation paid to-date for temporary disability: \$0
15. Value necessary medical aid paid to date by employer/insurer? Not determined
16. Value necessary medical aid not furnished by employer/insurer? To be determined

- 17. Employee's average weekly wages: \$733.61
- 18. Weekly compensation rate: \$489.07 / \$347.05
- 19. Method wages computation: By stipulation

COMPENSATION PAYABLE

- 20. Amount of compensation payable:

Employer to provide all benefits required for a compensable occupational disease, including but not limited to medical treatment and temporary total disability benefits.

TOTAL:

TBD

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean L. Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mike Brune	Injury No.: 04-145674
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Johnson Controls, aka Hoover Universal Inc.	Department of Labor and
Additional Party	Second Injury Fund	Industrial Relations Of Missouri
Insurer:	Self c/o Underwriters Safety & Claims	Jefferson City, Missouri
Hearing Date:	January 15, 2014	Checked by: KOB

PRELIMINARIES

The matter of Mike Brune (“Claimant”) proceeded to hearing to determine if Johnson Controls, also known as Hoover Universal Inc. (“Employer”) is liable to Claimant for workers’ compensation benefits. Attorney Dean Christianson represented Claimant. Attorney David Green represented Employer, which is self-insured. The Second Injury Fund claim was not addressed at hearing and is left open.

The parties stipulated that on or about June 1, 2004, Claimant was an employee of Employer in Earth City, Missouri, earning an average weekly wage of \$733.61. The rates of compensation are \$489.07 for temporary total disability (“TTD”) benefits, and \$347.05 for permanent partial disability (“PPD”) benefits. Employer paid some medical in an undetermined amount, and Claimant filed a timely claim.

Claimant seeks to recover medical treatment and associated benefits for carpal tunnel syndrome. Employer denies liability on several grounds. The issues to be determined are: 1) Did Claimant’s occupational disease arise out of and in the course of employment; 2) Is Claimant’s medical condition causally related to his work duties; 3) Is Claimant’s claim barred by his alleged failure to give timely notice; and 4) Is Employer obligated to provide future medical care and associated benefits to cure and relieve the effects of Claimant’s occupational disease? Key to the analysis of Employer’s potential liability is what is commonly known as the “last exposure rule” of §287.063.

Claimant’s exhibits A to N, and Employer’s exhibits 1 to 15, were admitted into the record without objection. All evidence was reviewed, but only that evidence necessary to support this award will be discussed.

FINDINGS OF FACT

Claimant is a 54 year old, right-handed man who is six feet tall and weighs 275 pounds. Other than a single pill for stress, he takes no medications, and he does not have diabetes, a history of wrist fractures, or other medical conditions. Currently, he is employed by RK Stratmann, performing silk screening for the Harley Davidson Company. He started as a temporary worker in 2012, then he was hired full time.

Claimant has a varied vocational history. Throughout the 1990's, Claimant worked for D&H Trucking, loading and driving delivery trucks. He last worked for D&H on December 16, 1998 – he was fired due to his driving record. For about a year thereafter, Claimant worked for OK Vacuum, in the warehouse and making deliveries. From August 2000 to May 2007, Claimant worked 40 to 60 hours per week for Employer as an “Assembly Tech,” performing a variety of tasks described below. For a few months in 2005, Claimant also worked a second, part-time job for Dairy Queen as a cook. Between May 2007 and 2012, when he started at RK Stratmann, Claimant worked consecutively for at least four different employers performing pick and pack duties in a warehouse, cleaning banks and healthcare facilities, and providing security services.

Claimant provided very detailed testimony describing his various tasks for Employer. Employer produced door panels for Chrysler pickup trucks and headliners for Chrysler vans. As an Assembly Tech, Claimant rotated through three different jobs: the Door Department, the Headliner Department, and Machine Operator. In every job, he used both hands.

In the Door Department, Claimant performed various tasks in preparing a door panel. One task required him to take interior pieces of the door panel and pop them into a centerpiece. He would strike the piece with his hand to pop it into place. Popping in the panel typically took two hits since there were two clips. After placing the pieces, he put the panel into a machine for spot welding and cupping, flipped it to another machine, and removed it to a rack when the process was complete. He processed 250 to 300 panels per shift. Employer eventually provided the Assembly Techs with a pipe topped with a rubber ball to strike the parts, thus eliminating the activity of hitting the panels by hand.

At the Headliner Department, Assembly Techs put coat hooks, lights, visors, and air ducts into a headliner of a cargo van. Working with another Tech, Claimant processed 240 to 320 headliners per day. The first step in the Headliner process was to carry the headliner from a rack to a worktable with a coworker. There, visors were installed, which required Claimant to twist and pop the part into place and secure it with two screws. Claimant also slid and popped the lights and covers into place. As a hydraulic hoist raised the headliner so it could be transferred to the next station, Claimant prepared new parts for the next headliner. At the second worktable, Claimant glued wire harnesses by squeezing a triggered glue gun for up to 20 seconds. Claimant also used hand-held clippers to trim wires. When the headliner reached the third worktable, Claimant checked to make sure all of the lights were working. Claimant would also install coat hooks at this worktable, which required wiggling them into place and screwing them in with one screw. Claimant then placed the completed headliners in a rack to be shipped to Chrysler.

Finally, Claimant worked as a Machine Operator. He loaded plastic parts, like arm rests, onto a conveyor belt, applied glue, and ran the parts through two different machines. Once they were processed, he removed the parts, checked for defects and scraps, and sent the parts down the line. When the parts required application of vinyl, Claimant loaded two or three rolls of vinyl into the machine per day. This required him to roll the vinyl bolts over to the machine and put a pipe through the center to hoist the vinyl rolls up. He processed hundreds of parts per shift.

Claimant testified candidly that his hand and wrist problems started when he was working for D&H Trucking in the late 1990's. He acknowledged the records show several doctor visits for hand complaints before he started working for Employer, and he thought Dr. Schlafly and Dr. Sudekum sounded like familiar names. He saw no doctors during the year he worked for OK Vacuum because his hands were better than when he worked at D&H. Claimant hired attorney Nancy Mogab, who filed a workers' compensation claim on September 1, 2000 against D&H ("Injury No. 98-178197"). Ms. Mogab also sent him to a doctor to be evaluated with regards to his hands and wrists. However, Claimant did not receive any treatment related to the claim filed against D&H. He dismissed Injury No. 98-178197 as of August 25, 2003 without receiving any benefits.

Claimant's hands were not symptom free when he started working for Employer in 2000, but they were better than they had been at D&H. However, after working several years for Employer, Claimant's hands started hurting and going numb. Although Claimant could not remember the year, he testified credibly he reported the symptoms to Demarco Howard, his supervisor in the Headliner Department. The medical records suggest Claimant's report was in the spring of 2005, since he was sent to Dr. Byler on May 12, 2005. I find Employer authorized and directed care with Dr. Byler because she communicated with and sought authority to treat from Sue Sparks, Employer's nurse. Based on the NCV Dr. Phillips performed on June 6, 2005, Dr. Byler diagnosed rather severe right and more moderate left sensory motor median neuropathy across the carpal tunnels. She suggested Nurse Sparks send Claimant to a hand specialist.

Employer authorized Claimant to see Dr. Mitchell Rotman for evaluation of bilateral carpal tunnel syndrome on June 14, 2005. Based on his symptoms and nerve studies, Dr. Rotman diagnosed bilateral carpal tunnel syndrome. He wrote:

Carpal tunnel is idiopathic. It is not caused by his work activities. Perhaps his symptoms are triggered by some of his work activities just like they are triggered from hand positioning at night or while driving.

In his June 14, 2005 report, Dr. Rotman indicated Claimant would benefit from bilateral carpal tunnel releases, "[s]ince he has not had enough relief with conservative care and certainly based on the advanced nature of his carpal tunnel condition as noted on the nerve studies." Employer denied further treatment.¹

Claimant has never had the treatment Dr. Rotman prescribed. He has continued problems, worse in his right hand as compared to the left, including numbness, tingling and

¹ Claimant hired attorney Michael Londoff, who passed away in 2005. Attorney Radford "Skip" Raines took the case over, but according to Claimant, took no action. Attorney Christianson entered on Claimant's behalf in 2012.

shooting pain to the elbows. The pain comes and goes, and he drops things. The symptoms are affecting his ability to perform his current job. He wants the surgery.

Employer's cross-examination of Claimant revealed Claimant had problems remembering doctor's visits and other events that occurred a decade or more ago. In addition, Claimant was less than completely candid on job applications and had pleaded guilty to passing bad checks.

The medical records establish that Claimant's bilateral hand complaints date back to mid-1998. On August 17th of that year, Claimant consulted with Dr. Scheu, a plastic surgeon, for left hand numbness when on the phone and at night. Dr. Scheu felt continued conservative treatment would be beneficial. On December 16, 1998, after consideration of nerve conduction studies, Dr. Anthony Sudekum diagnosed moderate to severe bilateral carpal tunnel syndrome and offered surgery. However, before the surgery could be scheduled, Claimant was in a motor vehicle accident, which led to his termination from his then employer, D&H Trucking, and derailed his course of treatment.

On October 28, 1999, Dr. Shuter examined Claimant for the workers' compensation case that resulted from the motor vehicle accident with D&H. In describing his preexisting disabilities, Claimant reported the onset of hand numbness approximately two years prior and complained of numbness, tingling, pain and weakness. Dr. Shuter provided a 25% permanent partial disability rating of each hand and noted the preexisting condition was a hindrance or obstacle to employment.

On June 6, 2001, in conjunction with Injury No. 98-178197, Dr. Bruce Schlafly examined Claimant for complaints of numbness and pain in his hands. Consistent with all the other records, Claimant reported a progressive onset of symptoms in 1997 that required him to seek treatment in 1998. Although Claimant was working for Employer at the time of the exam, Dr. Schlafly concluded Claimant's work for D&H Trucking was the substantial factor in the cause of his carpal tunnel syndrome. He recommended injections or surgery, but agreed Claimant had 25% permanent partial disability in absence of treatment. Claimant dismissed Injury No. 98-178197 prior to a hearing, without receiving any benefits.

From 2004 to 2005, Claimant saw his primary care physician, Dr. Peter Montgomery, for various rashes, strains, colds, and pains, especially in his back. The records do not reflect complaints about his hand pain and numbness. In May of 2005, at Employer's direction, Claimant was examined by Dr. Cynthia Byler, and later by Dr. Mitchell Rotman, whose opinions are set forth above. Claimant filed the current claim on or about July 25, 2005. Employer filed the First Report of Injury on August 3, 2005 with a date of injury of June 1, 2004, and alleged Claimant failed to give Employer notice.

After Dr. Rotman reached his initial opinion that Claimant's bilateral CTS was idiopathic, Employer/Insurer continued to provide him with additional information and ask for supplemental reports. Despite reviewing x-rays, job descriptions, parts of Claimant's deposition, and prior medical records, Dr. Rotman did not change his opinion. On May 24, 2013, he wrote:

[Claimant's] need for surgery, which I had recommended in 2005 based now on records that were noted as far back as 1998, clearly suggests that his work at Johnson Controls

has nothing to do with his idiopathic carpal tunnel condition which had been progressing for several years by the time he took the job at Johnson Controls.

Unchanging too was Dr. Rotman's diagnosis of CTS, and his opinion that Claimant needed surgery to cure and relieve from the effects of the CTS.

Dr. Bruce Schlafly examined Claimant on two separate occasions, issued reports, and testified by deposition on behalf of Claimant. On June 6, 2001, Dr. Schlafly first examined Claimant, and noted complaints of numbness and pain in his hands. Dr. Schlafly reviewed electrical studies, diagnosed bilateral CTS that was "not severe," and proposed three options: 1) live with it; 2) take cortisone injections; or 3) undergo surgery. Based on his experience that truck drivers are a group at risk for CTS and given Claimant's work with his hands, it was then Dr. Schlafly's opinion that Claimant's work at D&H was the substantial factor in the cause of his bilateral CTS. In the absence of further treatment, in Dr. Schlafly's opinion, Claimant had PPD of 25% of each wrist.

When Claimant returned to see Dr. Schlafly in November 2012, he was still complaining of numbness and pain in the hands. Dr. Schlafly reviewed an electrical study from June 2005 and, on exam, found a positive Tinel's sign and abnormal two-point discrimination at the tip of the right index finger. Based on a fairly stated, factually sound hypothetical,² Dr. Schlafly diagnosed CTS, opined that his work at Employer, Johnson Control, was the substantial factor in the cause of the bilateral CTS, and recommended surgery.

RULINGS OF LAW

I. Occupational Disease Arising out of and in the Course of Employment/Medical Causation.

a. Applicable Law.

The date of injury in this case predates August 28, 2005, the effective date of the major legislative changes to the Missouri Workers' Compensation Act (the "Act"). Such post-injury amendments are not applicable to this claim. *Goad v. Treasurer of State*, 372 S.W.3d 1, 7 (Mo. Ct. App. W.D. 2011), citing *Angus v. Second Injury Fund*, 328 S.W.3d 294, 297 n. 2 (Mo. App. W.D. 2010) (strict construction principle enacted as part of 2005 amendments to workers' compensation law did not apply to pre-amendment injuries); *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349-50 (Mo. App. E.D. 2007) (holding that 2005 amendment to workers' compensation causation standard inapplicable to pre-amendment injury); *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 139 (Mo. App. E.D. 2002)³ (1993 amendment to

² Employer's challenge to the adequacy of the hypothetical is without merit. It is not essential that a hypothetical question include all the facts the evidence tends to prove. It is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish, and fairly presents his claim or theory. *Dolan v. D. A. Lubricant Co.*, 416 S.W.2d 40, 42 (Mo. Ct. App. 1967). The sufficiency of a hypothetical question is addressed to the sound discretion of the trial court *Franklin v. Mercantile Trust Co.*, 650 S.W.2d 644, 650 (Mo. App. 1983).

³ 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. 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.

workers' compensation causation standard not retrospectively applied). As such, all statutory references are to the Mo. Rev. Stat. Chapter 287 (2000).

Claimant alleges he contracted an occupational disease. Mo. Rev. Stat. § 287.067 (2000) states:

An “occupational disease” is hereby defined to mean ... an identifiable disease arising with or without human fault out of and in the course of 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 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.

Claimant alleges Employer is liable for his occupational disease by operation of the “last exposure rule,” found at Mo. Rev. Stat. §287.063 (2000), which provides:

- (1) An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of Section 787.067, Mo. Rev. Stat..
- (2) The employer liable for the compensation in this section provided shall be the employer whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length.

One of Employer’s defenses involves the application of the “three month rule,” which in some circumstances shifts liability from the last employer to expose a worker to the hazards of the disease. Mo. Rev. Stat. §287.067 (2000) reads:

- (7) With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

In addition to these specific statutory provisions, in 2004, the Act required that a claimant prove that it is “probable” that the accident caused the claimed injury. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. 1973), and that work is a “substantial factor” in the cause of the resulting medical condition or disability. § 287.020.2; *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo. Ct. App. E.D.1998). Finally, unlike the strict construction of the current Act, in 2004, “all of the provisions of this chapter shall be liberally construed with a view to the public welfare....” Mo. Rev. Stat. §287.800 (2000). Under liberal construction, a claimant would meet his burden of proof if he establishes that the pre-existing condition was simply “increased, intensified, or aggravated” by the accident. *Winsor v. Lee Johnson Construction*, 950 S.W.2d 504, 509 (Mo.App. W.D.1997); *Rector v. City of Springfield*, 820 S.W.2d 639 (Mo.App. S.D.1991)(It does not matter that part of claimant’s problem may have come from a pre-existing condition.

The simple worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is sufficient to meet the requisite “change in pathology” necessary to establish liability).

- b. Claimant’s work for Employer exposed him to disease-producing conditions and the hazards of occupational disease.

I find Claimant’s work for Employer exposed him to conditions that are hazards in causing his medical condition. Claimant credibly testified⁴ in detail regarding the tasks he performed on a regular basis for Employer. He worked on a fast-paced line, processing hundreds of pieces and parts. He lifted, pounded, clipped, snapped, flipped, pushed, glued, and loaded with his bilateral hands all shift long. Dr. Schlafly opined the work Claimant performed is the substantial factor in the cause of his bilateral carpal tunnel syndrome.

I am not persuaded by Dr. Rotman’s opinion that CTS is idiopathic - it is too extreme to be worthy of belief and contrary to past decisions from the Missouri Court of Appeals which have said that carpal tunnel syndrome is a known occupational disease. *Cuba v. Jon Thomas Salons, Inc.*, 33 S.W.3d 542, 545 (Mo. Ct. App. E.D. 2000).⁵ See also *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575 (Mo.App. S.D. 1987), and *Weniger v. Pulitzer Publishing Co.*, 860 S.W.2d 359 (Mo.Ct. App. E.D. 1993). Dr. Schlafly is more persuasive. I find Employer exposed Claimant to an occupation or process in which the hazards of the disease of CTS exist.

- c. Last Exposure Rule.

By definition, a repetitive motion injury takes time to develop, and can occur over the course of successive employments. To avoid litigation between multiple employers, the Missouri Legislature long ago enacted the so-called “last exposure rule.” Mo. Rev. Stat.. §287.063 (2000). This last exposure rule is not a rule of causation. *Endicott v. Display Technologies, Inc.* 77 S.W.3d 612, 615 (Mo. 2002)(citations omitted). Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease. *Id. citing Maxon v. Leggett & Platt*, 9 S.W.3d 725, 730 (Mo.App.2000).

This rule places liability for repetitive motion injuries on the last employer to subject the employee to the hazards of the disease, prior to the filing of the Claim. Mo. Rev. Stat.. §287.063 (2000); see *Oswald v. National Fabco Manufacturing, Inc.*, 77 S.W.3d 611 (Mo. 2002); and *Endicott, supra*. It is a rule of convenience. *White v. Scullin Steel Co.*, 435 S.W.2d 711, 716 (Mo. App. 1968). It recognizes that injuries of this sort take time to develop, and it attempts to eliminate delays in the provision of medical care by focusing on the true purpose of the law: providing benefits to injured workers in the quickest and simplest way possible. *Id.*

The two most instructive cases are *Endicott v. Display Technologies*, 77 S.W.3d 612 (Mo. 2002), and *Copeland v. Associated Wholesale Grocers*, 207 S.W.3d 189 (Mo.App. S.D.

⁴ Although on cross-examinations, Employer’s attorney raised several issues that could call into question Claimant’s memory and character, I do not find any flaws in his testimony regarding his job duties. The inaccuracies are minor or irrelevant, and the acts of dishonesty are unrelated to this claim. His testimony in this matter is worthy of belief.

⁵ *Cuba* was overruled by *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612 (Mo. 2002) regarding application of the three month rule, and overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) on standard of review, but not on recognition of CTS as a known occupational disease.

2006). Endicott had a recurrence of bilateral CTS in 1997 while working for employer #1, and was diagnosed with right elbow bursitis in 1998 when working for employer #2. After he began working for employer #3⁶, Endicott filed his repetitive trauma claim with a date of injury in 1997. *Endicott*, 77 S.W.3d at 614. The Supreme Court held employer #3 liable pursuant to the last exposure rule of §287.063.2, stating, “This last exposure rule is not a rule of causation. Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease (citations omitted).” *Id.* at 615. Because employer #3 was the last employer to expose him to repetitive motion, the hazard of his disease, employer #3 was solely liable.

In *Copeland v. Associated Wholesale Grocers*, 207 S.W.3d 189 (Mo.App. 2006), Copeland was diagnosed with bilateral CTS in 2000 while working for employer #1. *Id.* at 190-191. After employer #1 terminated Copeland, he had bilateral CTS releases in April of 2000. *Id.* at 191. Copeland began working for employer #2 in June of 2000, doing the same activities that he did for employer #1. *Id.* Copeland filed his Claim against employer #1 in June of 2001, later adding employer #2 by amendment. *Id.* The Missouri Court of Appeals found employer #2 liable for Copeland’s surgically repaired bilateral CTS, because although both employers exposed Claimant to a hazard for developing CTS, employer #2 was the last to so expose Claimant, and, as with *Endicott*, the three-month rule did not apply to the claim. *Id.* at 192-194.

With respect to the application of the last exposure rule, it is not Claimant’s burden to prove that his work with Employer *caused* his CTS. The Act and cases interpreting it “create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws.” *Pierce v. BSC, Inc.*, 207 S.W.3d 619, 622 (Mo. 2006). The last exposure rule of section 287.063 requires only that the employee be exposed to the “hazard of the occupational disease.” *Id.* It does not require that the hazard to which he was exposed be the “substantial contributing factor” to the injury. *Id.* In *Tunstill v. Eagle Sheet Metal Works*, 870 S.W.2d 264, 272 (Mo. Ct. App. S.D. 1994), the court noted that the terminology “was last exposed to the hazard of occupational disease,” in Mo. Rev. Stat. §287.063.2, cannot be construed as “was last *injuriously* exposed to the hazard of occupational disease.” Held the *Tunstill* court, “[t]he statute does not so read, and it may not be so interpreted. Exposure to disease-producing conditions is not synonymous with contraction of the disease. If the legislature wanted to require a causal relation between the exposure and the disability, it would have so stated.” Thus, Employer cannot avoid liability where Claimant contracted the disease pre-employment.

Employer was the last employer to expose Claimant to the hazards of developing the occupational disease prior to the filing of this claim. As such, Employer is liable to provide the compensation as provided by law.

⁶ Endicott actually worked through a temporary agency for a brief time before the last employer hired him full time.

d. Dismissed Prior Claim

Employer argues that D&H trucking should be held liable for benefits. Employer asserts Claimant was originally diagnosed with, and offered surgical treatment for, CTS while working for D&H, and Dr. Schlafly originally found the work for D&H to be the substantial factor causing CTS. Moreover, Employer emphasizes while it would have been the last employer to expose Claimant to the hazards of CTS when Claimant filed Injury No. 98-178197 in 2000 against D&H, at that time it could have used the exception to the last exposure rule to shift liability back to D&H because Claimant was only 36 days into his employment with Employer.

This argument might have validity if Injury No. 98-178197 was the subject of this hearing. In fact, Claimant voluntarily dismissed Injury No. 98-178197 on or about August 25, 2003, and as such has no effect on subsequent matters. Once Plaintiffs voluntarily dismissed their entire action without prejudice, it is as if that suit had never been filed. *Hart v. Impey*, 382 S.W.3d 918, 921 (Mo. Ct. App. S.D. 2012)(citations omitted). In *Royal Ins. Co. v. Rousselot*, 720 S.W.2d 2 (Mo. Ct. App. W.D. 1986), the court held the claimant's dismissal of his claim without prejudice, upon which the Division had entered its order of dismissal without prejudice, was not an adjudication of the claim, and was no bar to claimant's refiling the same and its hearing by the Division. *Id.*, citing *Hugelman v. Beltone Kansas City Hearing Service Company*, 389 S.W.2d 220, 223 (Mo.App.1965)(“There was no appropriation of the claim and subsequent voluntary dismissal without more does in no sense constitute an appropriation under either the general law or under the Workmen's Compensation Law. The dismissal was without prejudice, and there was no determination of any rights or issues.”).

II. Notice.

I find Claimant testified credibly that he gave notice to his supervisor in a timely manner. However, even if Claimant had failed to give notice, his claim would still be viable because his case is governed by the law in effect at the time of the injury. Contrary to Employer's contention that the 2005 notice requirement applies retroactively, and following the analysis of Administrative Law Judge Timothy Wilson in *James Truelove v. Fag Bearing and Liberty Mut. Ins. Co.*, 95-102424, 2009 WL 3050586 (Mo. Lab. Ind. Rel. Com. Sept. 10, 2009), I find that the 2005 change to the notice requirement for occupational disease is a substantive change in the law. Accordingly, I find that Mo. Rev. Stat. §287.420 (2000) governs this case, and not Mo. Rev. Stat. §287.420 (2005). As such, the notice requirement in §287.420 does not apply to occupational diseases. *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 616 (Mo. 2002). Claimant did not have any statutory obligation to provide Employer with notice of his occupational disease.

III. Future Medical Care and Related Benefits.

An employer is required to provide an employee with medical care [to] wholly or partially relieve the effects of a work-related injury. *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 554 (Mo. Ct. App. E.D. 2004). Employer shall provide Claimant with medical treatment to cure and relieve his bilateral CTS, and all related benefits under the Act.

CONCLUSION

Employer is liable for Claimant's occupational disease pursuant to the "last exposure rule," which is a rule of convenience adopted by the Missouri Legislature long ago to avoid delays and disputes in occupational disease cases. Employer shall immediately provide Claimant with all medical treatment and other benefits necessary to cure and relieve the effects of his disease.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation