

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-145603

Employee: Chad M. Canoy

Employer: Crown Reinforcing & K Bates

Insurer: American Home Assurance Company
c/o AIG Domestic Claims & Amerisure Companies

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

Date of Accident: January 2005

Place and County of Accident: St. Louis 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge 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 the award and decision of the administrative law judge dated April 14, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued April 14, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 31st day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Chad M. Canoy Injury No.: 03-145603
Dependents: N/A Before the
Employer: Crown Reinforcing & K Bates **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: American Home Assurance Company c/o AIG Domestic
Claims & Amerisure Companies
Hearing Date: February 13, 2008 Checked by: MV:cw

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - 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
 - Date of accident or onset of occupational disease: January 2005
 - State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? Not yet
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Contracted CTS while working as steel worker.
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: Both upper extremities

- Nature and extent of any permanent disability: Not determined

15. Compensation paid to-date for temporary disability: \$0

16. Value necessary medical aid paid to date by employer/insurer? \$0

Employee: Chad M. Canoy

Injury No.: 03-145603

17. Value necessary medical aid not furnished by employer/insurer? \$0

- Employee's average weekly wages: \$695.18

19. Weekly compensation rate: \$463.45/\$340.12

20. Method wages computation: statutory

COMPENSATION PAYABLE

21. Amount of compensation payable:

22. Second Injury Fund liability: Open

Total: \$0

23. Future requirements awarded: None

Said payments to begin 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 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: Chad M. Canoy

Injury No.: 03-145603

Dependents: N/A

Before the
Division of Workers'

Employer: Crown Reinforcing & K Bates
Steel Services

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

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company c/o
AIG Domestic Claim & Amerisure Companies

Checked by: MV:cw

ISSUES

A Hearing was held in the above-captioned matter at the Division of Workers' Compensation office in St. Louis, Missouri on Wednesday, February 13, 2008. The Claimant was represented by attorney Geoffrey Jones. The Employer, Crown Reinforcing and their Insurer, American Home Assurance Company c/o AIG Domestic Claims, Inc, were represented by attorney John D. Dietrick. The Employer K Bates Steel and its Insurer, Amerisure Companies were represented by attorney Stephen Barber.

The issues presented for resolution by way of this Hearing are occupational disease, arising out of and in the course of employment, medical causation, notice, permanent partial disability, temporary total disability and which law (pre-2005 or post-2005) applies in this case.

PREFACE

Claimant is an iron worker. He experienced a neck injury occurring October 24, 2002 while employed by Crown Reinforcing. While Claimant was treating for that injury he was diagnosed with carpal tunnel syndrome. The parties agree he has CTS, they however disagree what caused the condition, whether the condition is work related and further which employer is responsible for benefits for the CTS, if it is work related. The issues presented for determination in the present instance are: occupational disease, arising out of and in the course of employment, medical causation for carpal tunnel syndrome, nature and extent of injury, temporary total disability, notice of injury and the controlling law.

FINDINGS OF FACT

Based on all the competent, substantial and credible evidence and reasonable inferences there from, I find the following facts:

1. Claimant is an iron worker. He has been a member of the Iron Worker's Union for approximately seven (7) years. Claimant's job duties primarily included tying rebar, laying decking and connecting steel. Tying rebar requires the claimant to use shears and connect and tie rods of steel with wires using a twisting motion. Laying decking requires the claimant to carry and place sheets of metal and weld them in place. Connecting requires the claimant to beat pins into place in an effort to lock multiple pieces of steel together. This work involves the use of tools including pliers, wire cutters, impact wrenches, shears, wrenches, hammers and welders. All of his jobs since 1999 have been assigned out of the union hall.
1. The Claimant worked for Crown Reinforcing from October of 2002 until May of 2003. He worked 24 hours for Crown Reinforcing in June of 2003. From June 2003 to November 2004 Claimant worked for R&R Builders, K Bates Steel Services, Perfection Steel, Rod Busters and Select Steel Service. Since November of 2004 the Claimant has worked for Select Steel Services, Inc. He worked there continuously until April of 2006.

1. The original Claim for Compensation filed in connection with this case naming Crown Reinforcing and K Bates Steel as the Employers was filed on January 11, 2005. The Claimant was working at Select Steel Services at the time the Claim was filed. An Order of Dismissal was issued by the Division of Workers' Compensation dismissing Crown Reinforcing and its Insurer without prejudice on July 26, 2005. No Application for Review was filed in relationship to that Dismissal. A subsequent Claim for Compensation was filed on October 21, 2005 naming Crown Reinforcing and K Bates Steel as the Employers. The Claimant was working for Select Steel Service at the time the Claim was filed on October 21, 2005.

1. On October 24, 2002, claimant was climbing a ladder, during the course of his employment at Crown Reinforcing, when he struck his head on a 2 x 4. Claimant filed a claim for compensation for that incident, injury no. 02-151885. Claimant was dazed but continued working. Shortly thereafter Claimant developed neck pain. Claimant testified that his right arm started hurting approximately a month later and at around the same time he began having problems with his left upper extremity.

1. The Claimant denied reporting the hand symptoms to Crown Reinforcing and did not complete any Reports of Injury regarding the symptoms in his upper extremities. He never asked for medical treatment from anyone at Crown Reinforcing for the symptoms in his hands.

1. Dr. David Lange provided medical care to the Claimant beginning December 17, 2002 for the neck injuries sustained on October 24, 2002. (Ex. 3). Claimant complained of aching in his neck. Claimant also complained to Dr. Lange that over a week after he struck his head he had pain and paresthesias in his right elbow. (Ex. 3). On January 30, 2003 Claimant described for the first time to Dr. Lange paresthesias in two-thirds of the right hand, soreness and grip strength weakness. (Ex. 3). On that visit Claimant had a mildly positive Tinel's sign over the right carpal tunnel. (Ex. 3). Dr. Lange, who was treating Claimant at the request of Crown Reinforcing, referred Claimant to Dr. Bernard Randolph for an electrodiagnostic consult. (Ex. 3).

1. Dr. David Lange noted in his May 8, 2003 report that the Claimant's symptoms in his right hand had existed since shortly after the October 24, 2002 injury. He opined that his hand numbness was related to his injury in October of 2002. He stated that simply because this is not a cervical radiculopathy on electro diagnostics does not suggest that the problem does not exist nor did not follow his work related incident in October of 2002.

1. Dr. Bernard Randolph conducted electrodiagnostic studies on April 9, 2003. (Ex. H). The studies revealed moderate right carpal tunnel syndrome. (Ex. H). Dr. Randolph opined that the finding of carpal tunnel syndrome was not clinically significant to the injury of October 24, 2002.

1. On April 17, 2003, Dr. Lange opined that the electro diagnostic testing found no definite significant

radiculopathy related to the cervical spine. (Ex. 3). On May 1, 2003, Claimant described to Dr. Lange local paresthesias of the right hand after using a power washer at work the day before. Dr. Lange proceeded to opine that paresthesias was “related to his work-related activities of October 2002.” (Ex. 3).

1. Following Dr. Randolph’s initial consultation of April 9, 2003, he repeatedly provided reports at the request of Crown Reinforcing. Dr. Randolph opined that the carpal tunnel syndrome experience would not be caused by the description of the accident of October 24, 2002. (Ex. H). According to Dr. Randolph, Claimant’s duties as an iron worker were the substantial factor in the development of his carpal tunnel syndrome. (Ex. H). He reiterated that opinion in subsequent reports.
1. Dr. Randolph performed an independent medical exam of the Claimant on April 4, 2005. (Ex. H). He opined the mechanism of injury described by Claimant in October 2002 would not lead to the development of compression neuropathy at the levels of the wrist. (Ex. H). “Carpal tunnel syndrome may represent the effects of cumulative activities as an iron worker over time.” (Ex. H).
1. Dr. Robert Bernardi, a spine surgeon, examined the Claimant in association with his injury of October 24, 2002. Dr. Bernardi stated that Claimant’s right hand symptoms most likely represent symptomatic carpal tunnel syndrome. (Ex. 1). He concluded that since the Claimant had right arm paresthesias after his October 2002 event the carpal tunnel syndrome would be related to that incident but suggested evaluation by a hand surgeon. (Ex. 1).
1. The Claimant was seen by Dr. Robert Bernardi after the October 24, 2002 incident on November 18, 2003. Dr. Bernardi noted that with respect to his right hand symptoms he thought it most likely represented symptomatic carpal tunnel syndrome. He noted that it can be difficult to sort out between cervical radiculopathy and peripheral entrapment neuropathy such as carpal tunnel. However, he noted that in reviewing Dr. Lange’s note, it was quite clear that he complained of right arm paresthesia since very shortly after his October 24, 2002 accident. He believed that his right hand symptoms represented carpal tunnel syndrome. He further opined that he thought they were related to the work injury he describes in October of 2002.
1. Dr. Robert Margolis, a neurologist, performed an independent medical examination of the Claimant on October 31, 2004. (Ex. 5). Dr. Margolis opined that the nerve conduction study revealed significant right carpal tunnel syndrome. (Ex. 5). Dr. Margolis acknowledged he was uncertain how the carpal tunnel syndrome developed. (Ex. 5). Despite identifying at least two manners in which the carpal tunnel syndrome could have developed he opined that the development of carpal tunnel syndrome was related to the October 24, 2002 incident and assigned a disability rating of 25% of the right upper extremity at the wrist. (Ex. 5, pg. 4).
1. Claimant settled his claim for neck injuries arising on October 24, 2002, injury no. 02-151885, against Crown Reinforcing for 28.75% permanent partial disability of the body as a whole.

1. On January 19, 2005 the Claimant came under the care of Dr. Bruce Schlafly. (Ex. A). Dr. Schlafly is a specialist in hand surgery. (Ex. E, pg.49, ln.7-25). When examined by Dr. Schlafly, the Claimant complained of constant numbness in his hand, dropping items and difficulty sleeping. (Ex. A). He had positive Tinel's signs, bilaterally. (Ex. A). Dr. Schlafly recommended a right carpal tunnel release. (Ex. A). A right carpal tunnel release was performed on January 24, 2005. (Ex. A). Thereafter, Claimant was kept off of work until February 11, 2005 when he was released to light duty. (Ex. A).

1. Dr. Schlafly prepared a report in association with Claimant's medical care. (Ex. D). Dr. Schlafly's review of the records reflect that Claimant's first complaints of numbness in the right arm was on November 25, 2002. (Ex. D, pg. 1). Dr. Schlafly also noted that the Claimant did not injure his hands when he struck his head. Dr. Schlafly concurred with the opinion of Dr. Randolph in that Claimant's carpal tunnel syndrome was due to the cumulative trauma from his employment as an iron worker. (Ex. D, pg. 5).

1. Dr. Schlafly opined that Claimant's repetitive work with his hands as an iron worker was the substantial and prevailing factor in the cause of his bilateral carpal tunnel syndrome. (Ex. D, pg. 5; Ex. E, pg. 37, ln. 23-25). He further opined that Claimant suffered 25% permanent partial disability of the right hand at the wrist and 20% permanent partial disability of the left hand at the wrist. (Ex. D, pg. 5).

1. Dr. Schlafly provided additional deposition testimony. After reviewing additional materials, Dr. Schlafly opined that claimant's work at Crown Reinforcing is the substantial and prevailing factor in the cause of Claimant's right carpal tunnel syndrome. (Ex. E, pg. 37, ln. 23-25). Dr. Schlafly was aware of opinions by other physicians regarding Claimant's neck injury but disputed that the carpal tunnel syndrome was related to the October 24, 2002 event. Dr. Schlafly's diagnosis was consistent with the repeated diagnosis of carpal tunnel syndrome. (Ex. E, pg. 40, ln. 18-23). Dr. Schlafly disagrees with Dr. Bernardi's and Dr. Margolis' opinions. (Ex. E, pg. 46, ln. 13-18). Dr. Schlafly believes one could strike his head and injure his neck which might lead to some numbness in the hands but that type of injury would not lead to the development of carpal tunnel syndrome. (Ex. E, pg. 50, ln. 1-13).

1. Claimant testified the problems with his hands were constant and unchanged until he began treating with Dr. Schlafly.

1. Claimant continues to experience pain as a result of his bilateral carpal tunnel syndrome. Claimant elected to forego surgical intervention on his left wrist because surgical intervention did not greatly benefit his right wrist.

RULINGS OF LAW

Controlling Statutory Law

The version of law (pre- or post- August 28, 2005) controlling this claim is disputed. Crown Reinforcing

contends 2005 amendments to RSMo. Section 287 apply. The original Claim for Compensation was filed on January 11, 2005, naming Crown Reinforcing and K Bates Steel as the Employers. Claimant was working at Select Steel Services at the time the Claim was filed. An Order of Dismissal was issued by the Division of Workers' Compensation dismissing Crown Reinforcing and its Insurer without prejudice on July 26, 2005. No Application for Review was filed in relationship to that Dismissal. A subsequent Claim for Compensation was filed on October 21, 2005 again naming Crown Reinforcing and K Bates Steel as the Employers. The Claimant was working for Select Steel Service at the time the second Claim was filed on October 21, 2005. Claimant argues that the cause of action was not dismissed in its entirety and the claim against Crown Reinforcing relates back to the original date of filing.

In State ex. rel. Rowe Burns v. Whittington, 219 S.W.3d 224 (Mo.banc 2007), Plaintiff Burns filed a petition alleging he sustained personal injuries on August 22, 2005. In January 2006, Burns died and a relative filed an amended petition alleging wrongful death as a result of Alfred Burns' injuries. Defendants sought, and were granted, transfer of the cause of action to St. Louis County under 2005 amendments to the venue statute. The Supreme Court transferred the suit back to the Circuit Court of St. Louis City noting that the wrongful death claim was based on the same operative set of facts and the amendment did not constitute a new cause of action. *Id.*

The claim herein is based on the same set of operative facts as in the original claim. The first claim and the second are the same. The second filing relates back to the first. I find for Claimant and apply pre-2005 law.

Occupational Disease

Under the pre 2005 amendments to the workers' compensation laws, Section 287.063.2 read as follows: "the employer liable for the compensation in this Section shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure." Section 287.063.2 RSMo. 1994. Under the Last Exposure Rule of Section 287.063.2 RSMo. 1994, the last employer before the date of the claim is liable if that employer exposed the employee to the hazard of the occupational disease. Endicott v. Display Technologies, Inc., 77 S.W. 3d 612, 615 (Mo.Banc. 2002). In the instant case, the original Claim for Compensation filed against Crown Reinforcing which was dismissed and the subsequent Claim filed against Crown Reinforcing were both filed while the Employee was working for Select Steel Service, Inc. The Claimant worked as ironworker for Select Steel Services and therefore was exposed to the hazard of the occupational disease while at Select Steel Service, Inc. As a result, Select Steel Service, Inc. was the last Employer to expose the Employee to the hazard of the occupational disease prior to the filing of the Claim and as a result would be the liable Employer for the claimed occupational disease under the Last Exposure Rule. "This last exposure rule is not a rule of causation". Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 615 (Mo.banc 2002). "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.*

Occupational Disease/Last Exposure

Reviewing the substantial, competent and credible evidence in this case, it is clear that Claimant was exposed to the hazard of the occupational diseases complained of in his subsequent employment with Select Steel.

The last exposure rule operates in each of these cases to absolve named Employers from liability for Claimant's occupational diseases. This is so even though Dr. Schlafly places causation upon Employer Crown. The rule operates to place that liability on the subsequent employer. Once again, it is not a rule of causation.

The Supreme Court recently reaffirmed the application of the last exposure rule:

"The exception to the last exposure rule is usually invoked by downstream employers seeking to deny

benefits to a new employee with a pre-existing condition and shift liability back upstream to a prior employer. Here, [employee] interpreted the statute as an instruction to bypass the ordinary procedure of filing the claim against his then-current employer and instead file his claim against [previous employer]. [Employee] contends that [the subsequent employer] did not expose him to the hazard of the occupational disease that caused his injury because his repetitive activities at [subsequent employer] were different and less strenuous than those he performed at [former employer]. [Employee] identifies swinging a sledgehammer as the specific "hazard of the occupational disease" referenced in section 287.063 and as the "substantial contributing factor" referenced in section 287.067.7.

It is undisputed that [employee] had been performing repetitive work using his upper extremities throughout his tenure at [subsequent employer]. At the administrative hearing, [employee] described his various assignments and testified that he did not experience shoulder pain until he began overhead work around September 3. However, records of a medical consultation that Pierce received at [subsequent employer] indicate that he reported having pain "about 2 weeks after starting the repetitious work." The ALJ weighed the evidence and concluded that Pierce was exposed to the hazard of his occupational disease for more than three months at [subsequent employer].

The ALJ properly noted that grading the level of activity is not a factor once the employee has been exposed to repetitive activity for three months. The relevant statutes along with this Court's holding in Endicott create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws. [Employee's] medical records document his shoulder pain during several months of employment at [subsequent employer] before he filed the present claim. The last exposure rule of section 287.063 requires only that the employee be exposed to the "hazard of the occupational disease." It does not require that the hazard to which he was exposed be the "substantial contributing factor" to the injury. In other words, as to ... the most recent employer, [employee] need only show that he was exposed to the same type of hazard. Pierce v. BSC, Inc., SC87689, 207 S.W.3d 619,622 (Mo.banc. 2006).

Likewise, I am not going to distinguish between the levels of activity at the different employers. And Dr. Schlafly's opinion on causation does not change the responsible employer. I merely determine that Claimant was exposed to the hazard of the occupational diseases complained of while at subsequent Employer Select Steel. The last exposure rule operates here as a bright line test to absolve Crown and K Bates. The remaining issues are rendered moot. The claim is dismissed against the named employers and insurers. As I have determined the claims relate back, Claimant may file his claim against Select Steel services.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

