

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

Injury No.: 06-024718

Employee: Beverly Carney  
Employer: Wal-Mart Associates, Inc.  
Insurer: American Home Assurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged March 3, 2006  
Place and County of Accident: Alleged St. Charles 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 May 22, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued May 22, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

SEPARATE OPINION FILED  
\_\_\_\_\_  
John J. Hickey, Member

Attest:

SEPARATE OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the denial of the administrative law judge should be affirmed, but for very different reasons.

In denying compensation for employee's alleged occupational disease, the administrative law judge concluded "claimant failed to persuade that her employment at Wal-Mart is the prevailing or primary factor causing her bilateral carpal tunnel syndrome." Unfortunately, I believe denial of this claim is mandated for a much more fundamental reason. I deny compensation because the Missouri Workers' Compensation Law (Law) does not describe any benefits to be paid on account of occupational diseases. Having said that, I hope the Missouri courts and others smarter than me find authority in the plain language of the Law for the payment of benefits to occupational disease claimants. Strictly construing the statute, I found none.

2005 Amendments to the Workers' Compensation Law

Section 287.800.1 RSMo (2005)[\[1\]](#) provides that, "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

Section 287.020.10 RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

"The language in section 287.020.10...serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020...[I]t appears from the plain language of the statute, the legislature...intended to clarify its intent to amend the definitions and apply those definitions prospectively." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. 2007). Of particular interest in the instant case is the legislature's specific abrogation of all earlier case law interpretations of the phrases "accident" and "occupational disease."

Blank Slate

As to the phrases appearing in §287.020.10, the legislature has given us a blank slate. "The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. §1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction." *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo. banc 1991) (citations omitted).

In light of the directives of §287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Law giving the words and phrases their ordinary and usual meaning.

"The fundamental question in all compensation cases is whether the claimant is entitled to compensation..." *Harris v. Pine Cleaners, Inc.*, 296 S.W.2d 27, 29 (Mo. 1956). "In a workers' compensation proceeding, liability is not fixed until it is determined from whom the employee is entitled to recover." *Mikel v. Pott Indus.*, 896 S.W.2d 624, 626 (Mo. 1995) (citation omitted). "[L]iability is not fixed until it is determined who is entitled to what from whom." *Highley v. Martin*, 784 S.W.2d 612, 617 (Mo. App. 1989) (citations omitted). The "who" is the employee. The "whom" is the employer/insurer or the Second Injury Fund. See §§287.063.2, 287.067.8 and 287.220.1 RSMo. The "what" poses greater difficulties.

History of Occupational Disease Coverage under the Workers' Compensation Law  
At the heart of the Law is "the bargain" found in §287.120 RSMo, which provides, in relevant part:

1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.
2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

In exchange for a speedy and sure remedy for work-related injuries, employees gave up the right (in most instances) to sue their employers in civil suits. Employers, on the other hand, gave up their traditional defenses against such injury claims in exchange for certain liability under the Law and a release from all other liability. Section 287.120.1 imposes upon all employers the obligation to provide the benefits spelled out in Chapter 287. As will be shown, Chapter 287 spells out no benefits for occupational disease claimants.

When the Missouri Workman's Compensation Law was originally adopted by referendum by the citizens of Missouri, occupational diseases were explicitly excluded from its coverage. Section 3301 RSMo (1929) provided for compensation only for personal injuries by accident.<sup>[2]</sup> Section 3305(b) RSMo (1929) specifically excluded occupational diseases from the definition of "injury" and "personal injuries." Section 3305(b) provided, in relevant part:

The term "injury" and "personal injuries" shall mean violence to the physical structure of the body and such disease or infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the workman is at work... *Provided*, that nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases.

In 1931, the legislature amended section 3305(b) of the Law to allow employers and employees to elect coverage for occupational diseases:

*Provided*, that nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases, unless the employer shall file with the commission a written notice that he elects to bring himself with respect to occupational disease within the provisions of this act and by keeping posted in a conspicuous place on his premises a notice thereof to be furnished by the commission, and any employee entering the services of such employer and any employee remaining in such service thirty days after the posting of such notice shall be conclusively

presumed to have elected to accept this section unless he shall have filed with the commission and his employer a written notice that he elects to reject this act. (Bold emphasis added).<sup>[3]</sup>

Notwithstanding the addition of language to §3305(b) to add optional coverage for occupational diseases, the legislature did not modify §3301 to expressly provide that employers were liable to pay compensation for occupational diseases irrespective of negligence or that employers were released from other liability arising from occupational diseases.

### Compensability of Occupational Disease Claims

Before addressing the merits of employee's claim, I must consider 1) whether the Law, as amended, applies to occupational diseases; 2) the meaning of "occupational disease" under the Law, as amended; 3) whether occupational diseases are compensable under the Law, as amended; and, 4) if so, what amount of compensation is due on account of occupational disease.

1) Does the Law apply to occupational diseases? It clearly does. Section 287.110 RSMo provides:

1. This chapter shall apply to all cases within its provisions except those exclusively covered by any federal law.

2. This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

2) What is the meaning of "occupational disease" under the Law? Section 287.067.1 RSMo defines "occupational disease."

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.<sup>[4]</sup> 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.

It is worthy of note, by definition, occupational diseases are causally connected to work.

3) Are occupational diseases compensable under the Law? By the express language of §287.067, injuries sustained by occupational disease or repetitive motion are compensable subject to the restrictions set forth in the various sections of §287.067, including the "prevailing factor" restriction.

2. 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.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter.

An occupational disease due to repetitive motion 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.

...

7. Any employee who is exposed to and contracts any contagious or communicable disease arising out of and in the course of his or her employment shall be eligible for benefits under this chapter as an occupational disease.

8. 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 the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

#### 4) What amount of compensation is due on account of occupational diseases?

Section 287.067 says many things but it does not specify, quantify, or describe any amount of compensation (the "*what*") due for the occupational diseases described. Section 287.063 also deals with occupational diseases. That section provides, in part:

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 8 of section 287.067.

2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.

3. 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.

Despite the empty promise in subsection 2 of "compensation in this section provided," §287.063 does not specify, quantify, or describe any amount of compensation (the "*what*") due for the occupational diseases described.

Because §§287.063 and 287.067 do not describe *what* workers' compensation benefits are due an occupational disease claimant, I must move on through Chapter 287 looking for a statute spelling out the compensation due for the contraction of an occupational disease.

Section 287.120.1 sets forth the basic right of recovery for workers' compensation. That section provides that an employer is liable to an employee for workers' compensation benefits if the employee sustained personal injury by accident arising out of and in the course of his employment. Accident is clearly defined in §287.020.2:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury

caused by a specific event during a single work shift.

The definitional requirement that an injury by accident must be caused by a specific event during a single work shift excludes occupational diseases from the reach of §287.120 RSMo.

I next visit the statutory sections defining and quantifying particular workers' compensation benefits to see if they set out *what* compensation is due an occupational disease claimant. Relevant portions of selected statutes are set forth below.

*287.140.1 -- Medical Care* "In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical,...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

*287.170.1 -- Temporary Total Disability* "For temporary total disability the employer shall pay compensation...at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made. The amount of such compensation shall be computed as follows... (4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

*287.190.1 -- Permanent Partial Disability* "For permanent partial disability... the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made..."

*287.200.1 -- Permanent Total Disability* "Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made. The amount of such compensation shall be computed as follows:... (4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury..."

Each section quoted above specifies *what* benefit is due on account of and in relation to *injuries*. A review of §§287.240 (burial and death benefits), 287.241 (rehabilitation benefits), 287.190 (temporary partial disability), and 287.220 (Second Injury Fund benefits) reveals they are only available for injuries, too.

So, is an occupational disease an injury? Section 287.020(5), the modern-day incarnation of §3305 RSMo (1929), defines "injury":

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work. (Emphasis added).

My review of Chapter 287 reveals no statutes wherein the legislature specifically provided that "injury" or "personal injuries" include occupational disease. I find the phrases "injury *by* occupational disease" and "injury *by* repetitive trauma" in §287.067. My natural inclination is to interpret these phrases in such a

manner as to effectuate what I believe may have been the legislature's intent (to specifically state that injury includes occupational disease for some purposes). However, the phrases are not ambiguous so under the strict construction mandate of §287.800, I must apply them as they read.

Chapter 287, §§140, 170, 180, 190, 200, 220, 240, and 241 all set out benefits due on account of injuries. Injuries for purposes of the Law expressly do not include occupational diseases and they never have.

The Workmen's Compensation Act, as it was originally passed in this State, expressly excluded occupational disease and covered accidental injuries only. The words "accident," "injury," and "personal injuries" were carefully defined in the original Act, but, of course, were not intended to apply to occupational disease in any form because such disease was specifically excluded from the operation of the Act. [Sec. 3305, R. S. Mo. 1929 (Mo. Stat. Anno., sec. 3305, pp. 8238, 8239).] In 1931 the Legislature amended the above section of the Act by providing that an employer could elect to come under the Act as to occupational diseases. The amendment, however, did not change the definitions contained in said section and did not define "occupational diseases." It is, therefore, the duty of the courts to determine and apply the meaning of the terms mentioned in the above section in connection with occupational disease cases, even though they were not originally intended to apply to such cases.

*Renfro v. Pittsburgh Plate Glass Co.*, 130 S.W.2d 165, 171 (Mo. App. 1939) (determining the meaning of "accident," "injury," and "personal injuries.") (Emphasis added). The above-referenced sections setting forth the benefits due for injuries do not set out *what* compensation is due on account of occupational diseases.

Could it be that the legislature has repeatedly forgotten to explicitly declare *what* compensation an employer owes to an employee who sustains an occupational disease under the Law? Indeed, successive legislatures – including the legislature that first extended the Law to occupational diseases in 1931 – have repeatedly failed to explicitly so declare.

In 1957, the Missouri Supreme Court pointed out that the plain language of the Law does not explicitly set out compensation for occupational diseases. In *Staples v. A. P. Green Fire Brick Co.*, 307 S.W.2d 457 (Mo. 1957), the Court was asked to rule that deaths from occupational diseases were not subject to the 300-week limit found in §287.020(4) [5], because that limit explicitly applied to deaths occurring within three hundred weeks "after the accident." In rejecting the contention that "accident" should be so narrowly construed, the Court pointed out that even the basic right of recovery under the Law is limited to injury or death "by accident" and does not explicitly extend to occupational diseases.

[I]t might be held with equal logic that there could be no recovery of weekly compensation at all in occupational disease cases, for § 287.120(1) which provides the basic right of recovery of compensation under the Act specifies that compensable injury or death shall be "by accident."

*Id.* at 463.

Until now, Missouri courts have saved the populace from the General Assembly's repeated failure to explicitly provide workers' compensation benefits to occupational disease claimants. [6] Under the liberal interpretation permissible under the Law until August 28, 2005, the courts were allowed to effect legislative intent through common sense interpretations of the Law. "Construction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ.*, 217 S.W.3d 301, 305 (Mo. banc 2007) (citation omitted). It indeed would have been an absurd result if the *Renfro* court or the *Staples* court had concluded that the Law did not provide compensation for occupational diseases in light of the 1931 occupational disease amendment. It would be nice to rely on the wisdom of the *Staples* court now but I cannot because the legislature abrogated all cases interpreting the meaning of "accident." I have been specifically directed by the legislature "to construe the provisions of [Chapter 287] strictly," so that is what I will do.

"The legislature is presumed to know the existing case law when it enacts a statute." *Hudson v. Dir. of Revenue*, 216 S.W.3d 216, 222-223 (Mo. App. 2007) (citation omitted). Therefore, I must presume that when the legislature abrogated the cases that expanded the definition of "injury" and "accident" to bring occupational diseases within the breadth of Chapter 287, and §287.120 in particular, the legislature was aware the courts had already pointed out that the plain language of §287.120 did not provide for the payment of workers' compensation benefits on account of occupational diseases or for the release of employer from other liability resulting therefrom.[\[7\]](#) The legislature's failure to so provide when amending the Law must be presumed purposeful.

The Law, as amended, does not set forth any compensation due on account of occupational diseases.

### Conclusion

It is clear the Law provides for occupational diseases. See §287.110. "We do not understand the words 'provided for' to mean 'compensated for.' ...It follows that, if a right or remedy be completely destroyed by the act, it would be 'provided for' or 'prescribed' or 'defined,' as we interpret those words." *Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 622 (Mo. 1936). Unfortunately for claimant, and countless workers like her, what the legislature *provided* to those sustaining non-accidental harm to their bodies arising out of and in the course of employment is nothing. Occupational disease claimants may have to resort to the courts to recover damages for their personal injuries.

Claimants will not bear the inconvenience alone. Although employers may initially rejoice upon discovering that §287.120.1 does not make an employer liable for workers' compensation benefits to an occupational disease claimant, that joy may be tempered when employers discover that they are liable to occupational disease claimants under §§287.063 and 287.067 without the benefit of the release from other liability set out in §287.120.2. Then again, employers will be somewhat comforted upon learning that the compensation they owe under Chapter 287 is zero dollars.

Arguably, the result of the 2005 changes to the Missouri Workers' Compensation Law, including the blanket abrogation of common law interpretations, is that Missouri law regarding recovery for occupational diseases has reverted to what it was in the early twentieth-century, when occupational disease cases were pursued in the courts through personal injury lawsuits.[\[8\]](#)

For the foregoing reasons, I begrudgingly concur in the decision to deny compensation.

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John J. Hickey, Member

## AWARD

Employee: Beverly Carney

Injury No. 06-024718

Dependents: n/a

Employer: Wal-Mart Associates Inc.

Before the  
DIVISION OF WORKERS'  
COMPENSATION  
Department of Labor and Industrial

Additional Party: State Treasurer, as custodian of the  
Second Injury Fund

Relations of Missouri  
Jefferson City, Missouri

Insurer: American Home Assurance Co.

Hearing Date: Monday, March 10, 2008

Checked by: KD/cmh

#### 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; See award
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: alleged 3/3/06
5. State location where accident occurred or occupational disease was contracted: St. Charles 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?  
No; See award
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 alleges occupational disease as a result of her work hanging up lingerie, putting up freight, and cashiering
12. Did accident or occupational disease cause death? n/a Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: alleged bilateral carpal tunnel/upper extremities at the wrists
14. Nature and extent of any permanent disability: n/a; see Award
15. Compensation paid to-date for temporary disability: none
16. Value necessary medical aid paid to date by employer/insurer? \$1,416.58
17. Value necessary medical aid not furnished by employer/insurer? n/a; see Award
18. Employee's average weekly wages: \$478.38
19. Weekly compensation rate: \$318.60 for ttd
20. Method wages computation: by agreement of the parties

## COMPENSATION PAYABLE

21. Amount of compensation payable: none; See Award, issue as to compensable injury found in favor of the employer and insurer.

22. Second Injury Fund liability: No; see award, claim as against the Second Injury Fund is denied.

Total: n/a

23. Future requirements awarded: n/a

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Beverly Carney

Injury No: 06-024718

Dependents: n/a

Employer: Wal-Mart Associates Inc

Additional Party State Treasurer, as custodian of  
the Second Injury Fund

Insurer: American Home Assurance Co.

Before the  
DIVISION OF WORKERS'  
COMPENSATION  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: KD/cmh

The claimant, Ms. Beverly Carney, and the employer and its insurer, Wal-Mart Associates, Inc. and American Home Assurance Co, appeared at hearing by and through their counsel and entered in to certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. The claimant acknowledges that the claim as against the Second Injury Fund is to remain open. The claimant is seeking a temporary or partial award in the matter, whereas the employer and insurer have put compensable injury by occupational disease in issue, and seek a final award denying compensation.

The parties announce that the issues to be resolved at hearing are as follows:

Injury by occupational disease;  
Medical causation;  
Future medical care; and  
Temporary total disability.

Ms. Carney appeared at hearing and testified on her own behalf. The claimant further submitted the deposition testimony of Bruce Schlafly, M.D. The employer and insurer submitted the deposition testimony of Anthony Sudekum, M.D.

## EXHIBITS

The following exhibits are in evidence.

### Claimant's Exhibits

- A. Certified medical records of St. John's Urgent Care Center
- B. Certified medical records of Dr. Richard Parcinski;
- C. Medical records of Dr. Subbarao Polineni
- D. Diagnostic records NYDIC Open MRI of America
- E. Medical records of Hand Therapy of Chesterfield
- F. Deposition of Bruce Schlafly, M.D., taken on November 14, 2007

### Employer and Insurer's Exhibits

- 1. Deposition of Anthony Sudekum, M.D., taken on 1/17/08

## SUMMARY OF WITNESS TESTIMONY

### Beverly Carney

Ms. Carney relates that her date of birth is 6/12/45, which would make her 62 years of age as of the date of hearing. When questioned as to a carpal tunnel syndrome claim filed in early March of 2006, Ms. Carney recalled that she stopped working at Wal-Mart shortly after that filing. The claimant notes that she worked in the lingerie department of the store, and from time to time would work in other sections such as children's clothing. Ms. Carney recalls that she worked almost nine years with Wal-Mart; that she had no breaks in service; and that while working at Wal-Mart she had no other employment, including self employment.

Ms. Carney recalls that she performed a number of different functions at work, but confirms that she would spend most of her time, at least four or five hours a shift, hanging clothes. She further recalls that her other duties included answering telephones; working on registers to perform checking of the purchases of customers; working the changing rooms; greeting customers at the entrance; and moving and putting up boxes of freight containing women's intimates such as bras, panties, and other lingerie. Ms. Carney further relates that she was on the hiring committee. Ms. Carney states that she would hang approximately fifty pieces of lingerie in an hour, and that the number of pieces put up could vary from 20 per hour while also working the register, to a maximum of about 100 pieces per hour.

Claimant notes that she would put up freight about two hours a night, two nights a week. The claimant recalls that for the two years prior to March of 2006 she worked 40 hours a week, five days a week. She states that she worked a shift from 4:00 p.m. to midnight or until 1:00 a.m., and occasionally would work until 4:30 in the morning when putting up freight. Claimant specifically notes the size of a 4 pound box of baby diapers, stating that in order to carry such a package she is obliged to grasp the package with her hands a little beyond shoulder to shoulder distance apart.

Ms. Carney describes the process of putting up lingerie as follows: she would open the box of lingerie, and a box of hangers, and would use one hand to hold the lingerie while using the other to clip both ends of the hanger onto the garment. She would then place the garment onto a rod.

Ms. Carney recalls that once she advised her employer as to her carpal tunnel syndrome, the employer continued to have her working registers as much as two hours at a time. She recalls that she would take products off of a conveyor belt, scan the item, and place the item into a bag. She further recalls she would perform some scanning of numbers into the register, and would also make change for cash purchases.

Ms. Carney recalls that she would answer telephones a couple of hours a night; that she would perform a lot of telephone answering a couple of days in a week; and that she would not have any telephone duty as many as one or two times a in a week.

Claimant relates that she first started noticing problems with her wrists after three or four years working at Wal-Mart. Ms. Carney notes that her complaints started off as minor and worsened over time, and she describes her symptoms as a strong numbness and tingling from the end of her fingers to her wrists. Claimant notes that at first she would shake her hands to relieve the pain, until it got so bad that shaking the hands gave her no relief. The witness relates that the pain became unbearable, woke her up at night, and got to the point that she was unable to work

Ms. Carney notes that her daughter worked in the office of Dr. Parcinski, the claimant's personal physician, and that the claimant went to see Dr. Polineni based on her daughter's suggestion. Claimant recalls that Dr. Polineni ran some tests and concluded that she had severe carpal tunnel in both hands. Claimant recalls that Dr. Polineni recommended that she remain off of work; that he provided her with splints to wear on her wrists, and that he also provided her with a cortisone shot to the wrists that temporarily relieved her complaints for about four months. Claimant relates that the number of cortisone shots she could have were limited, with the last one provided in April of 2007.

Claimant recalls that she advised her employer of her diagnosis that same night, and that she was referred to Unity Corporate Health. Ms. Carney recalls that her diagnosis as to carpal tunnel syndrome was confirmed, and that she was advised that she needed to have surgery.

Ms. Carney states that her employer then referred her to Dr. Sudekum. Claimant recalls seeing Dr. Sudekum twice in 2006, but does not recall receiving any treatment or other care from his office.

Ms. Carney acknowledges that ten to twelve years ago she had complaints as to her right hand. Claimant recalls that she had slight pain in her wrist and a weakness to the point that she was unable to grip and use a pair of scissors. Ms. Carney relates that she cannot recall seeing Dr. Parcinski for her right handed complaints, but would not have a dispute if told that he had such records from the mid 1990's.

Claimant relates that her right handed complaints cleared up, and came back while working at Wal-Mart. Claimant describes her new complaint as a different symptom, with numbness and pain that got really bad. Ms. Carney relates that she has stopped using her hands to perform a variety of functions of every day life, including camping, fishing, and playing computer games. Ms. Carney further states that she does not crotchet or sew; that she is not mechanical and does not uses wrenches; that prior to 2006 she did household duties but did not do yard work; and states that her daughter now lives with her and helps by performing the household duties Ms. Carney once performed.

Ms. Carney advises that she has more pain than numbness, and that the pain is unbearable without the Percocet prescribed by her family physician. Claimant acknowledges that she worked at Dillards beginning in April of 2006, performing the same employment as she did for Wal-Mart, opening cartons, hanging up lingerie, and answering telephones. Ms. Carney notes that she worked at Dillards for about a year prior to being terminated for missed time from work that she relates her hand complaints.

Ms. Carney relates that her hands have worsened since leaving Wal-Mart, and that she has yet to have the surgery for bilateral carpal tunnel syndrome.

Ms. Carney did not have a memory as to having seen Dr. Parcinski in the mid 1990's with respect to complaints as to her right wrist, thumb, and arm. The claimant did recall that she saw a therapist; agreed that she had nerve testing in 1994; agreed that she may have had swelling in her right palm; that she may have complained of awakening in the morning due to her complaints; and may have been prescribed the use of Tylenol and wrist splints, all the while believing that it was a therapist and not Dr. Parcinski to provide such care. Ms. Carney also acknowledges having a bone scan done in the past, and acknowledges that she might have been referred to an orthopedist or other specialist by Dr. Parcinski at the time. Ms. Carney

acknowledges that she had physical therapy for perhaps a month. Ms. Carney further notes that her prior complaints were not the result of an injury, and does not believe she was working at the time of her prior complaint as to the right upper extremity.

The claimant acknowledges that she is on Toprol for high blood pressure; that she was diagnosed with the condition while still working at Wal-Mart; and acknowledges that her treatment began at a low dosage, and has increased over time to the point that for the two years prior she had been taking 100mg per day.

Ms. Carney further acknowledges that she has neck complaints that travel down her right upper extremity to her wrist. Claimant recalls having Dr. Polineni order tests; recalls having an MRI; and does not recall having any treatment or medication to the neck either recommended or provided to date.

Bruce Schlafly, M.D.

On 5/16/07 Dr. Schlafly, a specialist in hand and orthopedic surgery, performed a medical evaluation of Ms. Carney at her attorney's request, and provided his opinion as to causation and need for treatment with respect to what he diagnosed as a bilateral carpal tunnel syndrome. Dr. Schlafly was aware that Ms. Carney had complaints of neck pain, and acknowledges that he reviewed an MRI of the cervical spine (Claimant's Exhibit D), and further affirms that his evaluation and medical opinion in the matter does not include an evaluation as to the cervical spine, but is only with regard to complaints at the hands bilaterally.

Dr. Schlafly notes that his evaluation as to diagnosis, causation, and need for treatment is based on his review of the medical records; a history provided by Ms. Carney; and his clinical findings subsequent to his examination of the claimant on 5/16/07.

Dr. Schlafly opines that the work performed by the claimant at Wal-Mart is the substantial and prevailing factor in the cause of her bilateral carpal tunnel syndrome. During cross examination on behalf of the employer and insurer, Dr. Schlafly was asked what he meant by the terms "substantial" and "prevailing", and his response in both instances was to refer to whatever the dictionary definition says those terms mean. When asked why he used both terms, he replied "I don't know", but was aware that the legislature had affected the law by a change from "substantial" to "prevailing". Dr. Schlafly acknowledged that did not know the legal standard for medical causation that applied in this matter (Claimant's Exhibit F, at pp. 28, 29).

Dr. Schlafly was aware that Ms. Carney performed stocking, working the registers, and hanging lingerie; he was unaware that the claimant's duties also included acting as a greeter and working in the fitting room.

Dr. Schlafly further acknowledged that he was aware the claimant worked at Wal-Mart "full-time", but was not aware of the number of hours a week worked, or the number of days worked in a week. In response to the question as to the number of hours worked by the claimant per day hanging clothes, Dr. Schlafly noted that the claimant worked an eight or nine hour shift, and that her statement that she worked a majority of her shift hanging clothes meant to Dr. Schlafly that she performed the hanging of clothing at least one half of eight or nine hours. Dr. Schlafly noted that he was not aware as to the number of garments the claimant would hang in a given shift.

Dr. Schlafly further acknowledged that he was unaware of the weight of the garments that the claimant would hang, nor was he aware of the type or weight of the merchandise that the claimant would put up at night, referred to by the claimant as "putting up freight" .

Dr. Schlafly noted that the claimant stated that it was "customary" for her to work on the registers, and he would agree that claimant did not work a few hours on the registers on every shift, but rather believed that she worked on registers for a couple of hours on more than half of her shifts.

Dr. Schlafly was further aware that the claimant had diagnostic studies performed in 1994 that showed mild slowing of the median nerve at the wrist compatible with early nerve entrapment syndrome. Dr. Schlafly acknowledged that he was unaware what activities of the claimant would have caused this mild slowing of the median nerve at the wrist; acknowledged that the cause could be "spontaneous"; and noted that one of the most prevalent causes of carpal tunnel is one that remains unknown.

Anthony Sudekum, M.D

Dr. Sudekum relates that he is a hand and upper extremity surgeon, and that on January 2, 2006, he had the opportunity to perform an evaluation of Ms Carney and her upper extremity complaints shortly after Dr. Doumit at Unity Corporate Health had confirmed the diagnosis of carpal tunnel syndrome. Dr. Sudekum notes that an NCV performed on 11/08/05 revealed evidence of moderately severe bilateral carpal tunnel syndrome, and that Dr. Polineni treated the claimant for that condition by giving steroid injections to both wrists and by prescribing wrist splints. Dr. Sudekum confirmed the diagnosis, released the claimant to full and unrestricted duty at work, and did not recommend surgical intervention inasmuch as the claimant was reporting some resolution of her symptoms after the steroid injections. Dr. Sudekum notes that steroid injection is seldom a long term solution; that he anticipated that the claimant would eventually need surgery; and states that it was not his habit to recommend surgery while conservative treatment is causing the symptoms to abate.

Dr. Sudekum notes that prior to his second and last visit with Ms. Carney on 3/13/06, he received further medical records, including notes from the office of Dr. Polineni along with an MRI scan report. In his letter dated 1/28/06 (See Exhibit 2 to the deposition of Dr. Sudekum, Employer and Insurer's Exhibit No.1, containing all of the doctor's reports) Dr. Sudekum notes the findings on MRI as to what he identifies as a "significant osteoarthritis affecting her neck, including disc osteophyte complexes with impingement at C4-5 and C5-6 and foraminal impingement on the right side at C3-4". Dr. Sudekum then concludes that the claimant is suffering from a double crush syndrome, meaning a compression of the spinal nerves both at the neck and more distally at the wrist in the carpal tunnel region. Dr. Sudekum relates that he had a follow up appointment with Ms. Carney on 5/11/06 that she failed to attend, and that he then prepared a report dated 5/15/06 addressing causation as it related to her work activity at Wal-Mart. In his deposition, at page 13, when asked if he had an opinion with a reasonable degree of medical certainty on the question as to causal relationship to work, Dr. Sudekum replied that he believed work at Wal-Mart may have served as a minor contributing factor to the development of her carpal tunnel syndrome, but did not feel that her work was a primary or prevailing causal factor in the development of bilateral carpal tunnel syndrome.

In his report dated 5/15/06 and in the context of the issue as to causal relationship, Dr. Sudekum further identified "significant nonwork-related risk factors which would predispose her (Ms. Carney) to peripheral neuropathies such as carpal tunnel syndrome, including female sex, age over 60, cervical spine arthritis and being moderately overweight". Dr. Sudekum goes on to say that these four factors put Ms. Carney at a significantly increased risk for the development of carpal tunnel syndrome.

In his deposition, at page 11, Dr. Sudekum explains the rationale for identifying gender and age as predisposing risk factors as a matter of statistical analysis showing that two-thirds to three-fourths of carpal tunnel syndrome within the population is suffered by women, and that the prime years for carpal tunnel syndrome are between the fifth and seventh decades. As for obesity, Dr. Sudekum notes that an individual qualifies as obese if their body mass index is greater than 30, and notes that at five foot one and 177 pounds, Ms. Carney qualifies with an index of approximately 33.5. Dr. Sudekum notes that studies show that obese patients have a three to four times greater chance of developing carpal tunnel syndrome. He notes that some ascribe to the theory that the reason obese individuals are at greater risk is the same as for pregnant women who have carpal tunnel syndrome, inasmuch as in both instances there is a greater likelihood of fluid retention. Dr. Sudekum notes that a separate discussion is whether obese individuals with excess soft tissue around the wrist suffer from a direct pressure, leading to compression of the nerve.

With respect to arthritis causing compression of the nerve at the cervical spine, Dr. Sudekum notes that the double crush syndrome that he finds in Ms. Carney is generally accepted in the neurosurgical and hand surgical literature as a real phenomenon, where the compression of the spinal nerves at the neck and at the more distal median nerve at the wrist have a synergistic effect leading to a worsening of symptoms, and to a greater likelihood of need for treatment. Dr. Sudekum notes, at page 12 of his deposition, that the same nerves that are compressed at the cervical spine as a result of such conditions as foraminal stenosis and osteophyte formation are the same nerves that converge and form the median nerve at the carpal tunnel, leading to the possibility of a synergistic effect when there is a compression at both neck and wrist.

Irrespective of the issue as to causation, Dr. Sudekum concludes and recommends that claimant

undergo bilateral open carpal tunnel releases.

## INJURY BY OCCUPATIONAL DISEASE/MEDICAL CAUSATION

The parties do not dispute whether March 3rd of 2006 is an appropriate date of injury for purposes of the applicable law in this matter. The issue as to date of injury is particularly important in the context of the issues as to injury by occupational disease and medical causation, inasmuch as the applicable legal standard was amended effective August 28 of 2005 by operation of Senate Bills 1 & 130. The applicable standard, as contained in Section 287.067 RSMo Cum. Supp. 2006, has been determined to be a substantive change in the law, and to be given prospective application only. Lawson v. Ford Motor Co., 217 S.W.3d 345, 350, (Mo.App. E.D., 2007). In Lawson, at pages 348-349, the court notes as follows with respect to the change in the legal standard:

As Ford correctly notes, the legislature amended several sections of the Workers' Compensation Act in 2005. In particular, portions of [section 287.067](#) and [287.020](#) were rewritten. Specifically, section 287.067.2 discusses when an injury by occupational disease is considered compensable. Prior to 2005, the section stated that such an injury will be compensable if it "is clearly work related and meets the requirements of an injury which is compensable as provided in [subsections 2 and 3 of section 287.020](#)." [Subsections 2 and 3 of section 287.020](#) previously contained definitions for "accident" and "injury." Prior to 2005, those definitions included language which concluded that an injury was compensable if it is work related, which occurs **\*349** if work was a "substantial factor" in the cause of the disability.

After the 2005 amendments to the statutes, the definition of a compensable injury by occupational disease was changed to use the language "prevailing factor" in relation to causation. Specifically, section 287.067.2 states:

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.

Section 287.020.3 defines "injury" using similar terms.

Section 287.808 RSMo. Cum Supp 2006 provides that "The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true." Further, Section 287.800 RSMo. Cum. Supp. 2006 provides as follows:

1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
2. Administrative law judges, associate administrative law judges, legal advisors, the

labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986). "Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause". Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

Medical causation as to an overuse condition of the upper extremities cannot be considered uncomplicated. The commission may not substitute an administrative law judge's personal opinion on the question of medical causation for the uncontradicted testimony of a qualified medical expert. Wright v Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo banc 1994), citing Merriman v. Ben Gutman Truck Service, Inc., 392 S.W.2d 292, 297 (Mo. 1965).

Injuries caused by repetitive trauma have been treated as occupational diseases. Prater v. Thorngate, Ltd., 761 S.W.2d 226 (Mo. App. 1988); Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575 (Mo. App. 1987); Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548 (Mo. App. 1972). The case law as to repetitive use has been codified at Section 287.067.3 RSMo. Cum. Supp. 2006, and provides as follows:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion 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.

The claimant is obliged to show that cumulative trauma suffered to the right and left wrists while performing her duties at Wal-Mart was the prevailing factor in causing the bilateral carpal tunnel syndrome. Drs. Schlafly and Sudekum disagree as to whether the work performed by Ms. Carney was the prevailing factor. 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). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). The claimant bears the burden of proving that an exposure to a harm at work was the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

All of the physicians to render an opinion as to diagnosis (Drs. Doumit, Parcinski, Polineni, Sudekum, and Schlafly) conclude that Ms. Carney is suffering from the effects of bilateral carpal tunnel syndrome. Further, Doctor Sudekum acknowledges that the involved work performed by Ms. Carney may have been a contributing factor in the development of bilateral carpal tunnel syndrome. Dr. Sudekum does not point to any history of repetitive trauma or use outside of the work place to refute medical causal relationship. He also does not suggest that the involved condition is the result of ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day to day living, two

instances where the involved medical condition will not be compensable by operation of Section 287.067.3.

To the contrary, Dr. Sudekum concludes that work performed at Wal-Mart “may have served as a minor contributing factor to the development of her bilateral carpal tunnel syndrome...”, and argues that Ms. Carney has significant nonwork related risk factors putting her at “significantly increased risk for the development of carpal tunnel syndrome”, and on that basis concludes that her work was not the primary or prevailing causal factor.

Three of the four factors cited by Dr. Sudekum, gender, age, and weight, are personal characteristics of the involved claimant; the fourth, arthritis of the cervical spine, is a pre-existing medical condition that exacerbates the complaints of the claimant at the carpal tunnel due to the synergistic effect of having nerve compression at both the level of the neck and at the wrist. Dr. Schlafly acknowledged that there were a number of articles suggesting a linkage between sex, weight, and age with respect to causation as to the development of carpal tunnel syndrome. He was further aware of the claimant’s history of ncv in 1994 showing mild slowing of the median nerve compatible with early nerve entrapment syndrome, and was unable to offer an opinion as to the cause of that finding, inasmuch as he was unaware as to whether the claimant was working at the time, nor was he aware of any other physical activities at the time that might have been the cause. Dr. Schlafly notes that the cause of carpal tunnel syndrome can be “spontaneous”, and agrees that one of the most prevalent causes of carpal tunnel syndrome is simply unknown.

In Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C., 248 S.W. 3d 101, 106 (Mo.App. W.D. 2008), the court interpreted the effect of certain language in an amendment to Section 287.110 of the Workers’ Compensation Act as contained in SB 1 & 130, the same legislation that adopted the legal standard “prevailing factor” as contained in Sections 287.020 and 287.067. The court noted as follows with respect to rules of statutory construction:

The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used. United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907, 909 (Mo. banc 2006). In doing so, a court considers the words used in the statute in their plain and ordinary meaning. Id. at 910. Only in those cases “[w]here the language of the statute is ambiguous or where ‘its plain meaning would lead to an illogical result,’ ” will this court “ ‘look past the plain and ordinary meaning of a statute.’ ” Nichols v. Dir. of Revenue, 116 S.W.3d 583, 586 (Mo.App. W.D.2003) (citation omitted).

The Concise American Heritage Dictionary defines “prevailing” as 1) Most frequent or common; predominant; 2) Generally current; widespread; prevalent. The Cambridge Dictionary of American English defines the word “prevailing” in terms of “existing and accepted”. The involved statute, Section 287.067.3, gives some direction as to the meaning of “prevailing factor” by making it clear that the legislature defines the term more particularly as “the primary factor, in relation to any other factor causing both the medical condition and disability.” (Emphasis added). The term “primary” is defined in the Concise American Heritage Dictionary as “1. Occurring first in time, sequence, or importance. 2. Primal. 3. Fundamental. 4. Immediate; direct. 5. Of or being a fundamental or generative part.” The Cambridge Dictionary of American English defines the word “primary” as “more important than anything else; main”.

Assuming that it is appropriate to consider the word “primary” in its plain and ordinary meaning with regard to the application of Section 287.067.3, it is apparent that the legislature did not mean for the term “prevailing” to be synonymous with such concepts as “frequency of occurrence” or “prevalence”, but rather, for purposes of deciding close questions as to causation, intended the meaning to be more closely akin to such concepts as predominance; being adjudged to be the first in importance; and to be deemed fundamental or key. An example of the usage by the legislature of the term “prevailing” to mean “prevalent” or “existing and accepted” is the Missouri Prevailing Wage Act as found in Chapter 290 RSMo, wherein the prevailing or most frequently paid wage in the locality where a public works project is located is used to set the wages to be paid to workers. It seems apparent that while the differences in interpretation of the word “prevailing” may be viewed as slight in terms of prevailing wages versus causation in the workers’ compensation context, it is nonetheless real, and the difference serves the specific purposes the word is to serve in the respective labor acts.

With respect to the application of the concept “prevailing factor”, defined as the “primary factor in relation to any other factor”, to the claim of Ms. Carney, the testimony of Ms. Carney is found to be generally consistent with the other evidence in the matter, and to be worthy of belief. The only inconsistency worth specific note is the testimony of Ms. Carney that the reason for her termination from her employment at Dillard’s related to her complaints as to her hands; in contrast, on Page 1 of his 5/16/07 report, Dr. Schlafly notes that the history given to him by Ms. Carney included a statement that earlier that month Ms. Carney had lost her job “because she had to miss work due to other health problems (diarrhea)”.

The opinion of Dr. Sudekum is found to be supported by the facts and to be more credible than that of Dr. Schlafly on the issue as to causation. Dr. Schlafly is found to have rendered an opinion that is lacking all of the facts pertaining to the nature of the various job duties performed by Ms. Carney. For example, Dr. Schlafly was not aware that the job duties performed by Ms. Carney included time spent working in the fitting room, and time spent serving as a greeter. He makes no reference to claimant’s duties involving answering telephones, yet Ms. Carney testified that two days a week she would perform a lot of telephone answering. He was further unaware of the number of hours or days a week the claimant worked, basing his conclusions on the knowledge that the claimant worked “full-time”. Dr. Schlafly further acknowledged that he was not aware of the weight of the items hung by Ms. Carney, or the weight of items taken out of boxes when she hung up freight; and he was unaware as to the number of times she put up lingerie on hangers in a single work shift.

Further, it is unclear whether or not Dr. Schlafly appreciates the applicable standard with respect to medical causation in a workers’ compensation claim. His suggestion that “prevailing” means “whatever the dictionary says” (Deposition of Dr. Schlafly at pp. 28,29 ) suggests that he was unaware that ‘prevailing’ factor specifically means the primary factor; further, it is unclear whether his reference to the dictionary definition was intended to refer to one or the other meanings of “prevailing” as elaborated upon earlier in this award.

As for the testimony of Dr. Sudekum, his statements are found to be consistent with the evidence and to generally worth of belief. Dr. Sudekum concludes that the claimant’s work was a minor contributing factor, but not the prevailing or primary causal factor of her bilateral carpal tunnel syndrome. As to his reference to predisposing factors unique to Ms. Carney as to her gender, age, and weight, those characteristics may statistically suggest that the claimant is more susceptible to suffering from carpal tunnel syndrome than the mill run of individuals, but such predisposing factors should not necessarily “knock the claimant out of the box” if a strong case is made as to exposure to a harm at work peculiar to the employment leading to a diagnosis of occupational disease. More persuasive as an argument bearing on causation is the suggestion that the claimant’s double crush phenomenon, with a symptomatic degenerative cervical arthritis, is a non-work related factor that puts the claimant at a significantly increased risk for the development of carpal tunnel syndrome. Dr. Polineni, in his note dated 12/5/05, acknowledges the likelihood of Ms. Carney suffering a double crush syndrome. Dr. Schlafly notes the finding of cervical spine arthritis, but does not opine as to a double crush syndrome, nor does he debunk the notion that such a condition has a significant bearing as to causation. He further does not comment as to the likelihood of a surgery at the carpal tunnel relieving the claimant of some or all of her complaints at the wrist, given the existence of a symptomatic cervical arthritis.

Lastly, the claimant has a prior history of making upper extremity right hand complaints with diagnostic evaluation suggesting early nerve entrapment syndrome. Claimant noted at hearing that those prior complaints eventually resolved. Dr. Schlafly acknowledges that the cause of this early median nerve entrapment is unknown to him; that the cause could be spontaneous; and that the most prevalent cause of carpal tunnel is one that remains unknown.

From all of the evidence, the claimant has failed to persuade that her employment at Wal-Mart is the prevailing or primary factor causing her bilateral carpal tunnel syndrome. Inasmuch as the claimant is found to have failed to prove, as a matter of a reasonable probability, that her work was the prevailing or primary factor causing the involved medical condition, the issues as to medical causation and injury by occupational disease (repetitive motion) are found in favor of the employer and insurer. The claim for compensation must be denied.

## FUTURE MEDICAL CARE/TEMPORARY TOTAL DISABILITY

A finding in favor of the employer and insurer on the issue of medical causation and injury by occupational disease renders the issues moot as to future medical care and temporary total disability.

### LIABILITY OF THE SECOND INJURY FUND

Second Injury Fund liability is premised on the combination of prior permanent disability with permanent disability from a compensable work injury that is considered subsequent or the last in time injury in relation to those prior disabilities. In the matter of the claim of Ms. Carney, the involved last injury has been found not to be a compensable injury under the workers' compensation act. Inasmuch as a finding of compensable injury is a necessary precondition for a finding in favor of the claimant on the issue as to second injury fund liability, the claim as against the second injury fund must be and is hereby denied.

Date: May 22, 2008

Made by: /s/ KEVIN DINWIDDIE  
KEVIN DINWIDDIE  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ JEFFREY W. BUKER  
Jeffrey W. Buker  
Director  
Division of Workers' Compensation

[1] All statutory references are to the Missouri Revised Statutes (Cum. Supp. 2005) unless otherwise indicated.

[2] "If both employer and employe have elected to accept the provisions of this chapter, the employer shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employe by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employe or any other person."

[3] Renumbered §3695 RSMo in 1939.

[4] This provision makes no sense to me. The only diseases covered by the Law are occupational diseases. §287.110 RSMo. We will never get to the question of compensability for any disease until we have concluded that disease is an occupational disease. Is this section saying that even though an ordinary disease of life is itself an occupational disease, it is not compensable unless it follows as an incident of a *separate* occupational disease? That mind-boggler is for another day.

[5] "'Death' when mentioned as a basis for the right to compensation means only death resulting from such violence and its resultant effects occurring within three hundred weeks after the accident."

[6] I was a State Representative when the Missouri General Assembly ushered through the major 1993 amendments to the Law without specifically setting forth benefits for occupational diseases, so rest assured my observations are not designed to cast aspersions on the legislature that most recently failed to do so with the 2005 amendments to the Law.

[7] The legislature was no doubt aware of the *Staples* opinion because it amended §287.020.4 RSMo to add the following clause to the language quoted in footnote 6: "...except that in cases of occupational disease, the limitation of three hundred weeks shall not be applicable."

[8] Even if I err in concluding that the §287.120.2 release of liability is inapplicable, I think claimants will nonetheless have the right to pursue tort actions for the contraction of occupational diseases. I recognize this Commission has no authority to rule on constitutional issues, but I suspect the legislature's complete destruction of the common law remedy for the contraction of an occupational disease – undoubtedly an injury to the person for constitutional purposes – runs afoul of the open courts guarantee of the Missouri Constitution (Art I, §14), as well as, the state and federal due process clauses (Missouri Constitution, Art. I, §10; Constitution of the United States, 14th Amendment).

