

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

Injury No.: 00-179572

Employee: Joann Cenatiempo
Employer: William Rice Designs
Insurer: American Family Mutual Ins. Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: January 26, 2000
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 temporary or partial 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 temporary or partial award and decision of the administrative law judge (ALJ) dated March 31, 2005. The award and decision of Administrative Law Judge Edwin J. Kohner, as issued March 31, 2005, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions as to disability and causation, including the issues of arising out of and in the scope of employment, notice, medical causation, future medical care, temporary total and permanent partial disabilities and the statute of limitations. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002), *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001), *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003).

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Joann Cenatiempo Injury No. 00-179572
Dependents: N/A Before the
Employer: William Rice Designs DIVISION OF WORKERS'
Additional Party: Second Injury Fund (Open) COMPENSATION
Insurer: American Family Mutual Ins. Co. Department of Labor and Industrial
Hearing Date: February 23, 2005 Jefferson City, Missouri
Checked by: EJK

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Alleged date of accident or onset of occupational disease: January 26, 2000
5. State location where alleged accident occurred or occupational disease contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how alleged accident happened or occupational disease contracted: Employee alleges occupational disease in her hands/wrists from inputting data on a computers.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Hands/wrists
14. Nature and extent of any permanent disability: 15% Permanent partial disability of the claimant's right wrist
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Joann Cenatiempo Injury No. 00-179572

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$596.54
19. Weekly compensation rate: \$397.69/\$314.26
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21.	Amount of compensation payable:	
	2.5 weeks of temporary total disability benefits	\$ 994.23
	26.25 weeks of permanent partial disability from employer/insurer	\$8,249.33
22.	Second Injury Fund liability: Open	
	TOTAL:	\$9,243.56
23.	Future requirements awarded: Carpal tunnel release on left wrist	

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

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% which is awarded above as costs of recovery of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dewayne A. Johnson, Esq.

FINDINGS OF FACT AND RULINGS OF LAW

Employee:	Joann Cenatiempo	Injury No. 00-179572
Dependents:	N/A	Before the
Employer:	William Rice Designs	DIVISION OF WORKERS=
Additional Party:	Second Injury Fund (Open)	COMPENSATION
Insurer:	American Family Mutual Ins. Co.	Department of Labor and Industrial
Hearing Date:	February 23, 2005	Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a bookkeeper, suffers from carpal tunnel syndrome. The issues for determination are (1) Occupational disease arising out of and in the course of employment, (2) Notice, (3) Medical causation, (4) Future medical care, (5) Temporary Disability, (6) Permanent disability, and (7) Statute of Limitations. The Second Injury Fund claim remains open pursuant to an agreement among the attorneys. The evidence compels an award for the claimant.

At the hearing, the claimant testified in person and offered a deposition of Shawn L. Berkin, D.O., and medical records from St. John's Mercy Medical Center and David W. Strege, M.D. The defense offered a deposition of Henry G. Ollinger, M.D., an extract of the claimant's deposition, and a copy of the pleadings.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the occupational disease was contracted in Missouri.

SUMMARY OF FACTS

This claimant began working for this employer on February 14, 1986, as a bookkeeper in charge of accounts payable and receivable, payroll, invoices, inventory, supplies, and sales taxes. The position also involved filing, general clerical work, and answering phones. In 1987, sweeping, mopping, and cleaning were added to her responsibilities. She began working only four to five hours per day or twenty hours per week. Until 1998, she tracked the accounts payable and receivable, and the sales tax by journal entries done by hand. She also used a typewriter and calculator for the taxes, and a typewriter for the invoices. She performed these activities on an irregular basis and in varying amounts of time per shift. However, she testified that she typed constantly during this time on these various tasks.

In 1992, she began to notice her right hand tingle, fall asleep, and swell. She would awaken with numbness and pain in her hand. See Exhibit A. She began to drop objects. On September 29, 1993, the claimant complained about numbness to Dr. Wendt and reported that she did a lot of typing, bowling, video game playing, all of which seemed to aggravate her symptoms. See Exhibit A. She wore a brace at night, which had helped her until that date. See Exhibit A. The Phalen's sign was positive. See Exhibit A. Dr. Wendt's treatment recommendations were rest, ice, elevation, Ibuprofen, and the use of splints at night. See Exhibit A. In 1994 or 1995, she began working thirty to thirty-five hours per week. Her title changed to office manager. Her hands continued to have the same symptoms and she continued to wear the splints every night, and during the day if she awoke with pain in her hands. In 1998, she began working eight hours per day, forty hours per week and performed bookkeeping 75% of her time. The activities she did by hand (filing, cleaning, clerical/secretarial, scanning, printing, receptionist) continued. She began to use the computer for invoices. She would input numbers off documents but not transcribe from dictation. She does not sit at a computer and type throughout her entire shift. She continued to do the variety of duties throughout her shift.

In 2000, the splints (which had been working) were not as effective. She had continuing pain in her hands, even while using the telephone and hair dryer at home. On January 26, 2000, she saw Dr. Ryan with similar symptoms, especially awakening with hand numbness after wearing the wrist splints. See Exhibit A. Dr. Ryan also described her as obese. See Exhibit A. The Phalen's sign was positive on the right. See Exhibit A. Dr. Ryan suspected carpal tunnel syndrome, ordered a nerve conduction study, and recommended continued use of the splints. See Exhibit A. The nerve conduction study revealed minimal findings.

On October 3, 2000, Dr. Strege examined the claimant, and the claimant reported that she told him she was an office manager/bookkeeper who did keyboarding during her workday, that she had pain in her hands since 1988 with numbness and pain that awoke her at night. See Exhibit C. She also reported that she had an eight to ten year use of splints and that activities, such as using the telephone and hair dryer, caused increasing symptoms. See Exhibit C. The Phalen's test elicited paresthesias in the fingers of both hands. See Exhibit C. Dr. Strege noted the January 28, 2000, EMG/nerve conduction study revealed bilateral carpal tunnel syndrome. He opined that there was progression since an EMG study in April 1997. See Exhibit C. Dr. Strege noted carpal tunnel syndrome and recommended surgery. See Exhibit C.

Dr. Strege surgically released the right carpal tunnel on November 14, 2000. See Exhibit D. She no longer has pain, tingling, or swelling in her right hand. She was off work for two and one-half weeks after the surgery and received vacation pay. None of the physicians gave the claimant any off work slips. The claimant's personal health insurance paid for the surgery. See Exhibits C, D. As of December 1, 2000, her pre-operative numbness in the right hand resolved. Dr. Strege scheduled surgery for her left hand in December 2000, but the surgery has not yet occurred. She still has symptoms in her left hand and wants the surgery on her left hand. On January 14, 2003, Dr. Strege examined the claimant's symptomatic left hand and noted surgery for the left hand would be scheduled. See Exhibit C. On February 4, 2003, he noted the procedure scheduled for February 21, 2003, was canceled. He continued to note that surgery would be scheduled. See Exhibit C.

The claimant never asked her supervisor, Mr. Rice, or anyone else considered a supervisor, for medical treatment and never demanded treatment from her employer after she thought the symptoms in her hands were related to her work. She told her employer about the surgery but never asked him to pay for it. The claimant

testified that she thought the condition was related to her work in January 2000, when the nerve conduction tests was run, even though she did not have the surgery until November 2000. The claimant is 5', 6" tall. Her weight has generally been approximately 185 lbs. for the last fifteen years. She is right-handed.

Dr. Berkin

Dr. Berkin evaluated the claimant in March 2004, and took a medical history that she had an onset of numbness and pain in her hands and arms in October 2000. See Dr. Berkin deposition, page 9. The claimant's complaints were pain, weakness, and fatigue in her hands, as well as difficulty gripping. See Dr. Berkin deposition, page 11. She did not say these symptoms were constant. She did not mention any symptoms in her elbows. See Dr. Berkin deposition, page 23. On examination, Dr. Berkin noted the Phalen's test was positive on the left. See Dr. Berkin deposition, page 13. She was 5', 6" tall, weighing 196 lbs., which he characterized as obese. See Dr. Berkin deposition, page 24. He diagnosed bilateral carpal tunnel syndrome caused by her work as a bookkeeper for the employer. See Dr. Berkin deposition, pages 15-17. Dr. Berkin did not ask her how many hours per week she worked for the employer. He knew she did a number of different tasks, but he thought all would be hand-intensive, whether it was typing, filing, or handling papers. He knew she did not type all day. See Dr. Berkin deposition, pages 21-22. Dr. Berkin testified that if obesity is the cause of carpal tunnel syndrome, it is because there is an extra collection of fluid in the carpal tunnel, which puts pressure on the median nerve. See Dr. Berkin deposition, pages 25-26. He testified that an age and gender combination (such as in this case, with the employee being between 40 and 60 years of age and female) has been established as a risk factor in the development of carpal tunnel syndrome. See Dr. Berkin deposition, page 26. He opined that the claimant suffered a forty percent permanent partial disability to her right wrist and a thirty percent permanent partial disability to her left hand and that the overall disability was greater than the simple sum of the individual disabilities. See Dr. Berkin deposition, pages 17, 18.

Dr. Ollinger

Dr. Ollinger, a board certified plastic surgeon, evaluated the employee on September 3, 2004, and found:

1. She began with the employer on February 14, 1986, working five hours per day.
2. Her job duties as a bookkeeper involved handling payroll, receivables, payables, inventory control, and 401K's.
3. These activities were done by hand journal and typewriter, although since 1997-1998, the job has been more focused to the personal computer.
4. She also swept, mopped, cleaned, answered phones, filed, did general clerical work, and worked with invoices and bills.
5. In 1994-1995, her time increased to 30-35 hours per week. Close to this time, her title changed to include office manager.
6. In 1998, she began to work 40 hours per week.
7. She is 5', 6" tall and weighs 182 lbs., her high weight being 195 lbs., and that she lost 15 lbs. this year. Her average weight over the years has been 185 lbs.
8. She reported that her bilateral hand tingling and numbness started 8-12 years ago, and that she had worn splints since the 1990s.
9. Dr. Strege's records indicate the onset to be 1988.
10. Dr. Strege's records indicate she had been wearing splints since 1990-1992.
11. She told Dr. Wendt in September 1993 that she had bilateral hand numbness, and sought medical care for her symptoms while working only five hours per day and performing varied tasks in varying durations. See Dr. Ollinger deposition, pages 23-24.
12. The claimant reported to Dr. Ryan that she was having nighttime hand numbness and had been wearing splints for years.
13. Dr. Strege performed a right carpal tunnel release in November 2000.
14. The surgery on the left was scheduled for late December 2000, then February 2001, then rescheduled and canceled again.
15. Her left hand continues with numbness and tingling each night, and in the daytime, particularly with driving. The symptoms are not constant. The Phalen's test on the left was positive. See Dr. Ollinger deposition, pages 6-11, 60-62; exhibit 2.

Dr. Ollinger concluded that several factors including life and medical risk factors (age and gender), physical

exam, and work duties performed (including durations of work, the duties, repetitions, forces, postures, contact stresses, vibrations, temperatures, rest cycles) contributed to her carpal tunnel syndrome. See Dr. Ollinger deposition, pages 13-14. He opined that the claimant's weight was one factor. Obese patients have three to four times greater risk of developing carpal tunnel syndrome due to fluid retention, which puts pressure on the carpal tunnel that does not expand. The median nerve then gets pinched, causing the condition. See Dr. Ollinger deposition, pages 15-16. Looking to age and gender, Dr. Ollinger opined that the likelihood of carpal tunnel syndrome increases in women over forty due to hormonal fluctuations. See Dr. Ollinger deposition, pages 28-29. He also opined that nicotine from three to four cigarettes per day will cause enough vasoconstriction to be a microcirculation issue, thereby making it a factor. See Dr. Ollinger deposition, page 36.

Dr. Ollinger opined that the claimant did not have to exert significant force in her job, e.g. significant weights or high-powered activities. She did not describe any awkward posturing, such as full wrist flexion or extension, with applied duration factors; she would have needed to be in full wrist flexion or extension for two to four hours per day for the work to become a factor from this perspective. There was no contact stress, such as having to hold a tool. Dr. Ollinger noted that the employee did not perform one single task requiring prolonged periods of hand use. He explained there is a point at which the work becomes a factor, but that the claimant's work did not come close to that mark due to the multiple activities and varying durations. He opined that the claimant had one continuous period of symptoms, since 1988. See Dr. Ollinger deposition, pages 17-21, 26, 50-55, 66.

Dr. Ollinger found: (1) The claimant is currently 56 years old, and was 40 at the time of the onset of symptoms; (2) She is obese with a body mass index of 30; (3) She was a smoker; (4) She was status post decompression of the right carpal tunnel with resolved symptoms; (5) She has left carpal tunnel syndrome; (6) She did not have epicondylitis or other tendonitis in her extremities. See Dr. Ollinger deposition, pages 11-12; deposition exhibit 2. The body mass index is a proportion of height and weight, calculated by taking the height in meters squared divided by the weight in kilograms. See Dr. Ollinger deposition, page 13. Dr. Ollinger concluded that factors numbered one through three (age/gender, obesity, smoking) were the risk factors that led to the claimant's carpal tunnel syndrome. See Dr. Ollinger deposition, pages 21-22.

Dr. Ollinger opined that the claimant's carpal tunnel syndrome existed since 1988 because she did not experience relief of the symptoms from the conservative treatment of medication and splinting. See Dr. Ollinger deposition, pages 24-25. The condition became operative between the start of the splinting (1990-1992) and the change in work hours (1994-1995), because by the time of the latter, she had not responded to treatment. See Dr. Ollinger deposition, page 27. He opined that once symptoms appear for two to three years (or six years, in this case), s/he has an established carpal tunnel syndrome, and is at an operative level. See Dr. Ollinger deposition, pages 42-43, 58. Dr. Ollinger opined that the claimant has ongoing carpal tunnel syndrome on the left (and had it in the right, which has now resolved), but that her work was not the proximate cause, substantial factor, or triggering/precipitating factor in the development of the carpal tunnel syndrome and in the need for treatment for her left hand. See Dr. Ollinger deposition, pages 30-31; deposition exhibit 2.

COMPENSABILITY

An occupational disease is 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. Section 287.067.2, RSMo. 2000. An occupational disease is not compensable merely because work was a triggering or precipitating factor. An injury is compensable if ... work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor. ... Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment. An injury shall be deemed to arise out of and in the course of employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. Mo. Rev. Stat. Sec. 287.020.2,3 RSMo 1994.

Although the Workers' Compensation Law must be liberally construed in favor of the claimant, the burden is still on the claimant to prove all material elements of his claim. Melvies v. Morris, 422 S.W.2d 335 (Mo.App. 1968), and Marcus v. Steel Constructors, Inc., 434 S.W.2d

475 (Mo.App. 1968). Therefore, the claimant has the burden of proving not only that he sustained an accident, which arose out of and in the course of his employment, but also that there is a medical causal relationship between his alleged accident and the injuries and the medical treatment for which he is seeking compensation. Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo.App. 1973).

Employee must show a causal connection between the injury and the job in order to recover compensation. 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. Williams v. DePaul Health Center, 996 S.W.2d 619, 631 (Mo.App. E.D.1999). A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence. Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

Each party to this case offered expert testimony to prove compensability or lack of compensability. Dr. Berkin testified that the claimant's work caused her carpal tunnel syndrome, but did not testify regarding the nuances of our statute, such as whether the work was a substantial factor causing the condition, whether it was clearly work related, whether the work was a proximate cause of the injury, or whether the disease was a natural incident of the work. Further, he has no specialized expertise in hand surgery or orthopedics. On the other hand, Dr. Ollinger, a board certified plastic surgeon that provides treatment for hand injuries, such as carpal tunnel syndrome, testified in detail about the causes of carpal tunnel syndrome and identified several factors (age, gender, obesity, and smoking) that he opined cause the condition without any exposure at work. He contended that these factors caused the claimant's carpal tunnel syndrome without any impact from her work. However, the claimant testified that she does not smoke. This reduces the defense expert's credibility in two respects. First, he didn't testify whether the impact of the claimant's age, gender, and obesity would be just as effective in causing carpal tunnel syndrome as it is when combined with nicotine exposure. Second, one could conclude that Dr. Ollinger may have had a bit of bias, because he assumed that the claimant smoked. The result is that each party has a weak expert that presents some very good points. Even without smoking, the other factors that Dr. Ollinger presented appear to be quite powerful, assuming that he is correct. Dr. Berkin's finding that her work caused the condition fits the facts, because the claimant's condition became more symptomatic as her hours and her exposure to keyboarding increased. The condition appears to have hit a medical crisis at that time. Our law at this time does not require evidence that the work was the sole condition, the prevailing factor causing the injury, or even the substantial factor causing the injury. The only requirement is that the work is one of the substantial factors causing the injury.

Although the claimant has proven every essential requirement of her case, the defense has also proven an equally valid case on the merits. In those rare instances wherein both parties submit equally valid evidence on compensability, our statutes compel a finding for the claimant.

The workers' compensation statutes are to be "liberally construed with a view to the public welfare. . . ." § 287.800, RSMo 2000. They are "intended to extend its benefits to the largest possible class." The purpose of the workers' compensation law is "to place the losses sustained by employees as a result of their employment on the industry." Any "doubt as to the right of [an employee to] compensation [should] be resolved in favor of the [injured worker]." Rupard v. Kiesendahl, 114 S.W.3d 389, 397 (Mo. App. 2003).

For this reason, the claimant prevails on this issue.

NOTICE

Section 287.420, RSMo 1994, requires that written notice be given to the employer as soon as practical but not later than 30 days after the accident. The purpose underlying the notice requirement is twofold. Saylor v. Spiritas Industrial, 974 S.W.2d 536 (Mo.App. E.D. 1998). First, the notice requirement is designed to ensure that the employer will be able to conduct an accurate and thorough investigation of the facts surrounding the injury. Id. The second purpose of the notice requirement is to ensure that the employer has the opportunity to minimize the employee's injury by providing prompt medical treatment. Id. Thus, in cases where the employer does not have actual notice of the accident, courts have examined whether the claimant has proffered evidence on both the employer's ability to investigate the accident and the minimization of the employee's injury in determining whether the employer was prejudiced by the claimant's failure to provide written notice. See Id.; Klopstein v. Schroll House Moving Co., 425 S.W.2d 498, 504-05 (Mo. App. 1968).

The written notice may be circumvented if the claimant makes a showing of good cause or the employer is not prejudiced by the lack of such notice. Dunn v. Hussman Corporation, et al., 892 S.W.2d 676, 681 (Mo. App. E.D. 1994). Claimant has the burden of showing that the employer was not prejudiced. Hannick v. Kelly Temporary Services, 855 S.W.2d 497, 499 (Mo.App. E.D. 1993). One way a claimant may meet claimant's *prima facie* burden of showing that an employer was not prejudiced by the failure to give written notice within thirty days is to demonstrate that the employer had actual notice of the accident. Saylor, Id. Missouri Courts have held that no prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact finder. Id.

The claimant testified in her deposition that she thought the carpal tunnel syndrome was work-related in January 2000. The claimant did not notify her employer that her symptoms being work-related. She only told him about the surgery. The employer's first notice of the injury was the filing of the claim for compensation on May 7, 2003. See Exhibit 3. This is more than thirty days after the alleged injury. The employee has not proven good cause for the late reporting or that the employer was not prejudiced by the late reporting. However, under current law, the notice statute does not apply to occupational diseases. The claimant prevails on this issue.

STATUTE OF LIMITATIONS

The statute of limitations for occupational disease cases in workers' compensation cases provides:

No proceedings for compensation ... shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death except that if the report of the injury or the death is not filed by the employer... the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. Section 287.430 RSMo 1994. 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 a compensable injury has been sustained. Section 287.063.3 RSMo 1994.

The claimant first thought her condition was work-related in 1999 or January 2000. The first notice to the employer was the claim filed on May 7, 2003. This was more than three years after the time when the employee testified she knew the condition was work-related. However, mere awareness on the part of the employee of the presence of a work-related occupational disease is not, in and of itself, sufficient knowledge of a compensable injury. Wiele v. National Super Markets, Inc., 948 S.W.2d 142, 146 (Mo.App. 1997). The question as to when a compensable injury becomes reasonably discoverable and apparent is a question of fact to be determined by the Commission like any other fact. Id.

The statute of limitations in an occupational disease case begins running when: (1) an employee is no longer able to work due to the occupational disease; (2) an employee must seek medical advice and is advised that she can no longer work in the suspected employment; or (3) an employee experiences some type of disability that is compensable. Rupard v. Kiesendahl, DDS, 114 S.W.3d 389, 394 (Mo.App. W.D. 2003). In the Rupard case, the claimant received advise from medical providers by 1996 that her neck injury was work related. She did not miss any time from work or require any invasive medical care until October 2000, and she immediately filed a claim. The Court held:

In this case, Ms. Rupard's condition did not hinder her earning capacity until 2000 when she experienced intolerable pain that began to interfere with her job duties and her ability to perform household duties. To deny Ms. Rupard workers' compensation benefits because she continued to work despite her condition would punish her diligence as an employee and generate the outcome that the Feltrop court feared. Not only did Ms. Rupard's condition not rise to the level of a disability until 2000, she was also never medically advised that she could no longer work in the "suspected employment." Although Ms. Rupard sought medical attention for her condition for several years and was advised by her doctor that her condition was related to her employment, she was never medically advised that she could no longer work as a dental assistant. See Wiele, 948 S.W.2d at 142 (ruling that the statute of limitations did not commence until claimant's disease began interfering with her job and causing her to miss work even though the claimant was apprised of a work-related disease three years prior to that date). Even after she was advised that she would need surgery, neither Dr. Coufal, the neurosurgeon, nor Dr. Glass, the primary care physician, advised Ms. Rupard that she could no longer work as a dental assistant for Employer. Ms. Rupard was able to continue working as a dental assistant despite her condition. Not until August or September 2000 did her condition worsen to the point of being characterized as a disability. Rupard v. Kiesendahl, 114 S.W.3d 389, 396 (Mo.App. W.D. 2003).

Here, Ms. Rupard's disease never manifested itself to the point where she experienced a disability until 2000 when she began experiencing intolerable pain and was told that she needed surgery. The fact that she saw an expert in the field and was advised by him that she needed surgery is evidence that she had a disability sufficient to constitute a compensable injury. It does not, however, constitute a disability solely because she went to see an expert who diagnosed her condition as requiring surgery. Rather, it is the combination of the neurosurgeon's diagnosis, the intolerable pain that she experienced, and the fact that the pain began interfering with her job duties in 2000 that resulted in her disability. Id.

In Nicholson v. Xerox Corp., 2005 WL 19200 (Mo.Lab.Ind.Rel.Com. January 3, 2005), The Commission followed the standard set forth in Rupard, Id. It noted that to trigger the running of the statute, there must be a disability or injury, which is compensable. Id. Ms. Nicholson first believed her back condition was related to her work duties in 1996. The first time a doctor told her the back problems were related was in 1996. She also began to miss work in 1996 but did not file a claim on May 23, 2001, five years after she began losing time from work. The Commission determined that the compensable injury occurred in 1996, thereby barring the claim. Id.

Compensation in a worker's compensation case includes reimbursement for time missed from work and medical treatment. Rupard demonstrates that the injury may be deemed compensable (thereby triggering the statute of limitations) when a surgeon advises an employee that s/he needs surgery for the alleged work exposure. Nicholson demonstrates that the injury may be deemed compensable (thereby triggering the statute) when an employee has missed work as the result of the alleged exposure. This case falls under the category of Rupard. The claimant knew that her condition was work-related in January 2000. In that same month, she saw Dr. Ryan, who ordered conservative treatment, medication and splints, and a nerve conduction study. See Exhibit B. She learned that she would require surgery on October 28, 2000, and did not lose time from work until her surgery in November 2000. See Exhibit C. The claimant did not file her claim until May 7, 2003. Under Rupard, the statute of limitations began to run on October 28, 2000, and the claim was filed two and one half years later. The statute provides a three year statute of limitations if the employer does not report the claim. Therefore, her claim is not barred pursuant to Sections 287.430 and 287.063.3, RSMo 2000.

The claimant could argue that the defense waived the affirmative defense by not asserting the defense in its original answer to the claim. After timely filing an original answer on June 4, 2003, the employer filed an amended answer, asserting the affirmative defense that the claim is barred by the statute of limitations on May 13, 2004. An answer may be amended to include a statute of limitations defense at any time prior to the start of the trial. Nicholson v. Xerox Corp., 2005 WL 19200, (Mo.Lab.Ind.Rel.Com.); Patel v. Pate, 128 S.W.3d 873 (Mo.App. 2004). The defense in this case filed its amended answer nine months before the hearing in this case and the claimant did not file an objection or a motion for a continuance. Therefore, the employer never waived the

defense, and it would be viable for this case.

FUTURE MEDICAL CARE

Awards may and often do include an allowance for the expense of reasonable future medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). Future medical care and treatment are provided for in Section 287.140.1, which states:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

This statute has been interpreted to mean that a claimant is entitled to compensation for care and treatment "which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." Id. Of course, the appellant bears the burden to prove an entitlement to benefits for such care and treatment. Id. To prove an entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Id. However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. Id. Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a "reasonable probability." Id. "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." Id. "In determining whether this standard has been met, the court should resolve all doubt in favor of the employee." Id. "[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care." Id. Such a requirement could "put an impossible and unrealistic burden" upon the claimant. Id. The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. Id.

The claimant requires a carpal tunnel release on her other wrist, and would appear to be related to her work according to all of the medical evidence. The claimant is awarded a carpal tunnel release on her left wrist together with appropriate therapy and surgical services to cure and relieve the condition to be provided by medical provider selected by the employer.

TEMPORARY DISABILITY

Compensation must be paid to the injured employee during the continuance of temporary disability but not more than 400 weeks. Section 287.170, RSMo 1994. Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. Id.

According to a stipulation at the beginning of the hearing, the claimant was off work for two and one half weeks after the surgery and would be entitled to two and one half weeks of temporary total disability benefits, and the claimant is awarded the same.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id. In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629.

Dr. Berkin opined that the claimant suffered a forty percent permanent partial disability to her right wrist and a thirty percent permanent partial disability to her left wrist and that the overall disability was greater than the simple sum of the individual disabilities. See Dr. Berkin deposition, pages 17, 18. Dr. Ollinger opined that the claimant suffered a two percent permanent partial disability to her right wrist from her carpal tunnel syndrome. See Dr. Ollinger deposition, page 31. The claimant had a good recovery from her carpal tunnel release on her right wrist. Based on the evidence, the claimant suffered a fifteen percent permanent partial disability to her right wrist. However, the disability to her left wrist is not permanent, because surgery is indicated.

Date: _____

Made by: _____

Edwin J. Kohner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation