

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying the Award of the Administrative Law Judge)

Injury No.: 06-004801

Employee: BillieJo Christy

Employer: Missouri Department of Higher Education/  
Southwest Missouri State University

Insurer: C A R O

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

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record. We find 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 Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Permanent Total Disability and Return to Work**

We agree with the administrative law judge's ruling that employee is not permanently and totally disabled but we wish to clarify that employee's return to work for employer is but one factor to consider in a permanent total disability analysis. The administrative law judge reasoned:

[Employee]'s continued work after her 2006 surgeries is evidence of her ability to be employed, even with the permanent effects of the work injury...Employee returned to her regular employment, competing in the open labor market with an employer in the State of Missouri. Her employer had reasonable expectations she could do the job, and she did, in fact, satisfactorily perform her job for more than a year.

Award p. 15.

We disagree with the characterization of employee's job as "in the open labor market." Employee's position was not in the open labor market – employee occupied the job. Certainly employee's return to her job is evidence of employee's ability to perform some services in employment, but her return is not proof that employee could then *compete* in the open labor market. "Compete," means, "to seek or strive for something (as a position, possession, reward) for which others are also contending." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 463 (2002). Employee last *competed* for her position in 1995 when she was hired.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

Employee: BillieJo Christy

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An employer deciding whether to bring its injured worker back to work may be motivated by different factors than an employer filling a vacant position in the open labor market, such as to reward past loyalty or to avoid training costs.<sup>2</sup> Thus, employee's return to work for employer does not necessarily mean that employee is not permanently and totally disabled or that employer would have hired her after she recovered from her injury given her then-existing physical condition.<sup>3</sup>

With that explanation, we affirm the administrative law judge's conclusion that employee is not permanently and totally disabled.

### **Future Medical Care**

The administrative law judge found employee is not entitled to future medical care to cure and relieve her of the effects of her injuries. We disagree.

The Missouri Workers' Compensation Law includes an allowance for future medical treatment for injured workers, "as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Section 287.140.1. In order to receive future medical benefits, an employee need not present "conclusive evidence" that future medical treatment is needed. Instead, the employee needs only to show a reasonable probability that the future treatment is necessary because of his work-related injury. The employee is not required to present evidence of the specific medical care that will be needed, but must establish through competent medical evidence that the care requested flows from the accident.<sup>4</sup>

Employee presented the credible testimony of Dr. Lennard that employee has residual symptoms due to her work-related flexor tendonitis, including well-documented sensory changes in her wrists. Dr. Lennard explained that a wrist splint helps alleviate such symptoms because the splint holds the wrist in a neutral position and increases the diameter of the carpal tunnel. Dr. Lennard opined that employee needs ongoing medical care for her wrists in the form of ibuprofen and splints. Dr. Bennoch also believed employee would benefit from the ongoing use of splints. Dr. Meystrik prescribed wrap-around type neoprene splints for employee's bilateral wrists/thumbs and recommended to employee a "neoprene splint-wearing program." Based upon the foregoing, we find that employee has shown a reasonable probability that wrist splints and anti-inflammatory medications will relieve her of the effects of her work injuries. An award of such future medical care is appropriate even if the splints and medications also relieve employee of symptoms related to other conditions such as her degenerative joint disease which is not work-related.<sup>5</sup>

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<sup>2</sup> *Brashers v. Treasurer*, No. SD32872 (Mo. App. S.D., July 22, 2014).

<sup>3</sup> *Id.*, at \*16.

<sup>4</sup> *Null v. New Haven Care Ctr., Inc.*, 425 S.W.3d 172, 180 (Mo. App. 2014)(citations omitted).

<sup>5</sup> *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 268 (Mo. App. 2004).

Employee: BillieJo Christy

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**Award**

We reverse the administrative law judge's conclusion regarding employee's entitlement to future medical care. We award from employer to employee future medical care to cure and relieve employee of the effects of her work injury, including anti-inflammatory medication and wrist splints.

In all other respects, and as clarified herein, we affirm the administrative law judge's award.

We further approve and affirm 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.

The October 18, 2013, award and decision of Administrative Law Judge Victorine R. Mahon is attached and incorporated by this reference except as modified herein.

Given at Jefferson City, State of Missouri, this 31<sup>st</sup> day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: BillieJo Christy

Injury No. 06-004801

Dependents: N/A

Employer: Missouri Department of Higher Education

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

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

Insurer: Self/Central Accident Reporting Office

Hearing Date: August 30, 2013 & September 24, 2013

Checked by: VRM/db

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 14, 2006.
5. State location where accident occurred or occupational disease was contracted: Springfield, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was sorting large amounts of mail after the Christmas break.
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: Bilateral upper extremities.

- 14. Nature and extent of any permanent disability: 17.5 percent permanent partial disability to each arm at the 200-week level, plus 10 percent enhancement due to the bilateral nature of the injuries.
- 15. Compensation paid to-date for temporary disability: \$3,398.90; with a \$1,132.53 underpayment.
- 16. Value necessary medical aid paid to date by employer/insurer? \$19,942.59.
- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Average weekly wage: \$580.31.
- 19. Weekly compensation rate: \$386.83 (PTD) / \$365.08 (PPD).
- 20. Method wages computation: Stipulation.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

17.5 percent of each arm at the 200-week level  $(200 \times 17.5\% \times 2) = 70$  weeks  
 10 percent multiplicity due to the bilateral injuries  $(70 \text{ weeks} \times 10\%) = 7$  weeks  
 $70 \text{ weeks} + 7 \text{ weeks} = 77$  weeks at the rate of \$365.08 =

**TOTAL: \$28,111.16.**

- 22. Second Injury Fund liability: N/A.
- 23. Future requirements awarded: None.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Paul F. Reichert.

**FINDINGS OF FACT AND RULINGS OF LAW:**

Employee: BillieJo Christy

Injury No. 06-004801

Dependents: N/A

Employer: Missouri Department of Higher Education/  
Missouri State University

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

The undersigned Administrative Law Judge conducted a final hearing in this case which began on August 30, 2013, in Springfield, Missouri. BillieJo Christy (Claimant) appeared in person and with her attorney, Paul F. Reichert. Claimant's employer, the Missouri Department of Higher Education/Missouri State University, is a self-insured entity using the Central Accident Reporting Office for the administration of claims. Employer appeared by Assistant Attorney General Cara Harris. Claimant dismissed the Second Injury Fund.

After the hearing closed, but within 30 days, Claimant moved to reopen the record for the receipt of additional evidence. Claimant argued that portions of her personnel file were relevant on the issue of notice. Employer voiced no objection. Claimant's motion was sustained. The additional evidence, marked as Exhibit S, was received in a short proceeding on September 24, 2013. The record again closed. Claimant and Employer stipulated to the following:

**STIPULATIONS**

1. Claimant suffered an injury that arose out of and in the course of her employment at Missouri State University on or about January 14, 2006.
2. Claimant's employer, the Missouri Department of Higher Education/Missouri State University, is fully self-insured. Both Claimant and Employer were subject to the Missouri Workers' Compensation Law on the date of the injury.
3. Claimant developed carpal tunnel syndrome and trigger finger within the scope and course of her employment. Employer disputes the cause of any other injuries.
4. Venue and jurisdiction is proper in Springfield, Missouri with the Missouri Division of Workers' Compensation.

5. The Claim for Compensation is timely.
6. Claimant's average weekly wage was \$580.31, yielding a temporary total and permanent total disability rate of \$386.83, and a permanent partial disability rate of \$365.08.
7. Employer paid 11 and 5/7 weeks of temporary total disability from May 31, 2006 through July 10, 2006, and from July 26, 2006 through September 4, 2006, totaling \$3,398.90, at the rate of \$290.15, resulting in an underpayment of \$96.68 per week for a total of \$1,132.53. Employer has agreed to pay the underpayment without an Order from the Division.
8. Employer paid medical bills totaling \$19,942.59.
9. Claimant reached maximum medical improvement on April 19, 2007.
10. The parties agreed that the following are the sole issues for the hearing:

### **ISSUES**

- Did Claimant sustain an accident or an occupational disease culminating on January 14, 2006?
- If Claimant sustained an occupational disease, did she provide proper notice?
- What conditions/disabilities are medically and causally related to Claimant's work?
- What is the nature and extent of any permanent disability?
- Is Claimant entitled to future medical treatment?

### **EXHIBITS**

Claimant offered the following exhibits, which were admitted:

- A. Shane Bennoch, M.D. – Complete Medical Report
- B. Ted Lennard, M.D. – CV
- C. Medical Records Exhibit
- D. 1-9-12 Request Letter, Dr. Lennard
- E. 1-26-12 Ted Lennard, M.D. – Records Review
- F. Ted Lennard, M.D. – IME Report & All Addendums
- G. 2-21-12, 4-12-12, 6-6-12, 10-2-12, 1-14-13 & 2-27-13 Request Letters, Dr. Lennard
- H. 1-17-06 Left Hand X-Ray
- I. 1-17-06 Left Hand X-Ray
- J. 5-8-12 Left Hand X-Ray
- K. 5-8-12 Left Hand X-Ray
- L. 5-8-12 Right Hand X-Ray
- M. 5-8-12 Right Hand X-Ray
- N. Wilbur Swearingin, CRC – CV
- O. Wilbur Swearingin, Vocational Report
- P. 8-21-13 Wilbur Swearingin, CRC – Addendum Report
- Q. 8-28-13 Wilbur Swearingin, CRC – Addendum Report
- R. Occupation List – Security

S. Employment Records

Employer offered the following exhibits, which were admitted:

1. Deposition – Dr. David M. Brown
2. Deposition – James Engalnd
3. Medical Records – Taylor Health Clinic
4. Medical Records – Dr. Wyrsh
5. Medical Records – Dr. Meystrik
6. Employment Appraisal and Development Plan - December 2007
7. Employee Evaluation Report
8. Deposition – BillieJo Christy

In addition to the above exhibits, The Administrative Law Judge created a legal file consisting of the Claim for Compensation and the Answer to the Claim for Compensation.

**FINDINGS OF FACT**

Claimant is 71 years old, having been born in 1942. She began her employment at Missouri State University in a temporary job in 1995. She soon became a full-time employee and continued working until her retirement in January 2008. She seeks permanent total disability benefits and future medical treatment because of a repetitive injury she sustained while working for Employer.

Claimant previously suffered carpal tunnel syndrome in 1997. She vaguely recalled going to Taylor Health on the University's campus in 1997 with complaints of upper extremity problems. She was given splints and told to take ibuprofen and ice her hands. She testified her condition resolved when she changed jobs within the University. Although she occasionally wore her splints if the symptoms flared, she had no further treatment until January 2006.

Claimant's last job at the University was as a resident hall receptionist. Her duties included handling mail and packages for students who lived in the dorm. FedEx (usually two to three times a day), received packages from UPS (usually once a day), and mail from the United States Postal Service (once a day, usually between 11:00 and 2:00). Claimant also was responsible for distributing cleaning supplies and sports equipment to the students, answering phones, completing work orders, and doing some computer keyboarding.

About six months to a year before January 2006, Claimant again had some upper extremity complaints, particularly at night. These symptoms subsided with rest and ibuprofen. Claimant did not initially seek medical care because the symptoms were not interfering with her work and subsided when she was off work. Claimant wanted to continue working until she was 75 years old.

**The Injury**

In January 2006, Claimant returned to work after the Christmas break of December 2005. As is usually the case after a holiday break, there is a buildup of mail and packages. Claimant spent three days working only

on the mail, after which she had swelling in her hands and pain going down her wrists and into her thumb. These symptoms were new and not present prior to January 2006.

Claimant reported her injury to her supervisor on January 14, 2006. Employer sent her to Taylor Health and Wellness Center, which is a clinic on the University campus. The health care provider at the clinic prescribed splints and physical therapy, but Claimant continued to work. When Claimant's symptoms did not resolve, she was referred to Dr. Rosellen Meystrik who performed carpal tunnel and trigger finger releases in May 2006 and again in July 2006. For the most part, the surgeries and recovery did not interfere with Claimant's job duties as she was usually off work during the summer months.

When Claimant returned to work in September 2006, she did not feel her best. She enlisted help from students during certain times of the day. She said in deposition that the only modification she made in her job was allowing students to handle all of the packages that arrived around noon (Exhibit 8, p. 62). This is the only accommodation Dr. Ted Lennard recorded when he performed an Independent Medical Examination on February 16, 2012 (Exhibit F). But at the hearing, Claimant related a different story. She said in addition to allowing students to come into the mailroom to retrieve their own packages, she said her disabled husband came to the dorm each day to assist her in lifting and completing her tasks. Even with these accommodations, Claimant stated that the job was very hand intensive. Still, Claimant worked through the fall and winter. She drove herself to work daily. Given the difference in her testimonies and the history recorded by Dr. Lennard, I find that Claimant did have some help at work, but she exaggerated the extent of these accommodations.

Following the 2006 Christmas break, Claimant returned to work in January 2007, again facing a buildup of mail. She enlisted the help of other persons to move the accumulated mail, write forwarding addresses, and retrieve packages. She continued wearing her splints and working throughout the rest of the school year. On April 19, 2007, Dr. Meystrik released Claimant from her care with no restrictions. As detailed below, the physician's medical records entry indicates that Claimant's symptoms had resolved, although she reported some burning pain. According to Claimant, Dr. Meystrik recommended that she quit her position. Claimant applied, but was not selected for, other jobs within the University system that Claimant believed would be less hand intensive.

In the summer of 2007, when Claimant was not working, her hands improved. She did housekeeping and went to Silver Dollar City. She returned to work for the fall session of 2007, took Christmas break, and returned to work in January 2008. After processing the post Christmas mail, Claimant quit, taking retirement, as she believed the pain was too great. Claimant continues to wear splints to help relieve her current symptoms.

### **Work Performance Evaluations**

Claimant contends that her job performance ratings, prior to the work injury and surgeries, uniformly were in the "excellent" category. She contends that her performance ratings deteriorated afterwards. An examination of her evaluations indicates that Claimant has exaggerated the extent to which the work injury and treatment affected her work performance.

Employer offered Claimant's performance appraisal forms from 1995 through December 2007. The appraisal forms show that Claimant consistently maintained high marks on her performance reviews, but on

no one appraisal did Claimant receive the highest marks in each category. The closest to that outcome is the appraisal dated June 17, 2003, in which she has all “outstanding” and one “above average.” Several appraisals early in her career rate Claimant’s performance as “average.” The evaluations in 1997, 1998, 1999, 2000, 2001, 2002, and 2004, all have some ratings of “outstanding,” “above average,” and “average.” In only one of those years was her overall rating “outstanding.”

It is clear that in 2007, Employer used a different rating criteria and form. This could account for Claimant’s belief that her appraisals deteriorated. The appraisal form used in December 2007, allowed for ratings of “exceptional,” “commendable,” and “competent.” Claimant’s ratings in December 2007 were all either “commendable” or “competent.” Her overall rating was 3.175, which is between “commendable” and “competent.” Most telling, however, were the individual comments that Claimant was “very dependable,” “completes her job assignments without being asked,” and “makes sure that all hours are covered at the desk when she will not be able to work.” (Exhibit 6). This certainly demonstrates that Claimant’s work remained satisfactory to Employer. There is no evidence of any disciplinary action or demotions.

### **Preexisting Injuries**

Claimant testified regarding her prior left shoulder injury and previous right foot injury, including a broken bone. There is no competent evidence indicating that these interfered with Claimant’s job performance.

### **Current Condition**

Claimant currently has some sleeping issues, which she attributes to her hands and arms. Prior to January 2006, Claimant enjoyed motorcycling, going to the lake, and taking vacations. At the hearing, she admitted that she still takes vacations, such as a recent one to Mexico. She continues to ride short distances with her husband on his motorcycle, such as to the American Legion every Wednesday night. They also went to Sturgis, South Dakota in August 2013. They pulled the motorcycle in a trailer and rode in a car; however, once they arrived in Sturgis, they rode their motorcycle. Claimant is guardian for, and helps raise two great-grandchildren who are in fourth and fifth grade. She spends some time on the computer, e-mailing and using Facebook, although not extensively. She reads news on the computer. She said she had difficulty sitting for long periods because resting her arms on an armchair is painful; however, she can play Bingo every Saturday night.

On the day of the trial at approximately 4:20 p.m., Claimant rated her pain at five. She testified that at rest it is usually about a three without tingling. She admitted that she has pain and problems with the thumb, although her symptoms are somewhat improved since she recently received a shot.

### **Medical Treatment Records**

**Taylor Health and Wellness**—Employer offered the records from the Taylor Health and Wellness Center (Taylor clinic), located on the campus of Missouri State University. These records document that Claimant’s injury reported in 2006 was not the first related to her upper extremities.

In November 1996, Claimant presented to Taylor clinic with numbness in her hands (right worse than left), ongoing for four months. In October 1997, Claimant complained of the third finger on each hand locking up, her wrists were hurting, and her hands going to sleep, for which she was wearing braces. She was

diagnosed with carpal tunnel syndrome and told to wear the braces overnight and with activity at home and work. In January 1998, after Claimant fell on her deck at home and had pain in her left elbow, she was diagnosed with a possible radial head fracture. In August 2000, she was diagnosed with right shoulder tendonitis and osteopenia. In September 2003, she had a work related event in which her left shoulder popped. She was referred to an orthopedic specialist, Dr. Crites, for treatment of the shoulder. She was diagnosed with osteolysis in the distal clavicle. Her symptoms eventually resolved without further medical intervention. In April 2005, one of Claimant's "active issues" was listed as "joint pain – low back and hands."

**Dr. Robert B. Wyrsh**—Dr. Wyrsh treated Claimant in September 2008 for a broken finger, which was not work related. He also treated Claimant for complaints to her thumbs. X-rays taken at Dr. Wyrsh's direction on October 30, 2008, revealed "marked arthritic changes of the basilar joint with some subluxation." Dr. Wyrsh injected both of Claimant's thumbs to relieve the symptoms of basilar thumb arthritis. Claimant had some relief of her thumb pain from these injections.

**Dr. Rosellen S. Meystrik**—Dr. Meystrik treated Claimant for her carpal tunnel syndrome and her trigger fingers, including surgical releases. Dr. Meystrik allowed Claimant to return to work in September 2006, following her final surgery in July 2006. In a September 4, 2007 letter, Dr. Meystrik said postoperatively Claimant had no numbness and an excellent range of motion, although she "had ongoing complaints burning pain while she was at work particularly in her left hand" and some "decreased grip strength." (Exhibit 5). Dr. Meystrik assessed a five percent permanent partial disability in each hand. She imposed no specific work restrictions.

### **Expert Medical Opinion Evidence**

**Dr. Ted Lennard**—Dr. Lennard is a board certified physiatrist who testified live at the hearing on Claimant's behalf. Dr. Lennard had reviewed relevant medical records and examined Claimant one time on February 16, 2012, six years after the work injury. Dr. Lennard's initial assessment was that Claimant suffered bilateral carpal tunnel, trigger finger, and chronic flexor tendonitis. His initial assessment did not include a diagnosis of basilar thumb degenerative joint disease. He noted a fourth digit fracture of the right hand, but indicated that it was unrelated to her work.

With the exception of the fracture to the finger, Dr. Lennard understood that Claimant's hand complaints began about a year prior to the diagnosis of carpal tunnel and trigger finger in 2006. He later admitted that Claimant did have a diagnosis of carpal tunnel in approximately 1997, but he did not believe Claimant was having any problems with work prior to the events leading to Claimant's diagnosis that culminated on January 14, 2006. He opined that sorting the large volume of mail over the three days following the Christmas break exacerbated Claimant's occupational disease. Dr. Lennard related Claimant's medical treatment, including right carpal tunnel surgery and right trigger finger release in May 2006, and a left carpal tunnel release and trigger finger release in July 2006. He understood that following the surgeries, Claimant continued to have pain in her hands. He believed the job at the University was the prevailing factor for these complaints. Dr. Lennard testified Claimant also has flexor tendonitis, which is the source of the carpal tunnel caused by work. Dr. Lennard opined that Claimant had reached maximum medical improvement on April 19, 2007, but was not symptom free at that time. He found no preexisting disabilities.

Dr. Lennard imposed restrictions of no prolonged use of the hands or fingers. He recommended that she avoid lifting greater than five pounds with either hand, but could lift up to 10 pounds using both hands. He understood that Claimant continued to work her regular job duties through January 2008. He believed Claimant would have difficulty performing any job outside or her restrictions, but could work within the restrictions. He understood that Claimant was capable of driving herself, and had been driving herself to work until she quit in 2008.

Dr. Lennard assessed permanent partial disability ratings of 20 percent at the 200-week level on the right arm, and a 20 percent at the 200-week level on the left arm. Dr. Lennard did not include the unrelated 2008 finger fracture in his rating. Dr. Lennard said Claimant would continue to need ibuprofen and splints.

When Dr. Lennard first issued his ratings, he took into consideration Claimant's presentation as it existed in February 2012, irrespective of the cause. Dr. Lennard issued a supplemental report on February 19, 2013, after having been provided with the records from Dr. David Brown, dated May 8, 2012, and hand x-rays taken on January 17, 2006 and May 8, 2012. He then concluded:

Ms. Christy does have co-existing bilateral basilar thumb DJD that has progressed radiographically from 1/17/06 through 5/8/12. This progression will likely continue despite her retirement in 1/2008, and is a normal part of aging. Her work is not the prevailing factor in these specific findings. Ms. Christy's residual bilateral hand numbness, tingling, and paresthesias are directly related to her prior diagnosis of carpal tunnel syndrome, trigger fingers, and chronic flexor tendinitis caused by her work. These residual symptoms are unrelated to her basilar thumb DJD and were primarily responsible for her hand and wrist problems at the time of her retirement in 1/2008.

(Exhibit F).

At hearing, Dr. Lennard iterated that the degenerative changes in Claimant's thumbs had worsened between the 2006 and 2012 x-rays, and by May 2012, Claimant had suffered a total collapse of her thumb joints resulting in severe degenerative joint disease of her thumbs. Dr. Lennard said activities such as crocheting can cause arthritic changes, and that arthritic changes in thumbs are common for women of Claimant's age. Dr. Lennard was clear that the carpal tunnel syndrome did not cause the arthritis that developed in the thumbs. He said the nerve pain, including the numbness, tingling, and paresthesias relate to her carpal tunnel, trigger finger, and chronic flexor tendonitis; and not to the degenerative joint disease in her thumb. He agreed, however, that the pain in Claimant's thumbs relates to her degenerative joint disease rather than carpal tunnel, trigger finger, or chronic flexor tendonitis. Dr. Lennard agreed that Claimant was having problems with her thumbs when she saw Dr. Wyrsh in 2008.

Dr. Lennard was aware of a fall Claimant had on her deck in 1998, in which she injured her elbow. He also noted that Taylor Health had a record from April 1995 indicating joint pain and low back and hand pain, but also saw no follow-up visits. Dr. Lennard acknowledged the first visit with Taylor clinic on January 14, 2006 states that Claimant complained of "pain and numbness in both hands, along thumbs, and both wrists, ongoing times x 1 year. On 1-14-06 became worse after multiple use at work." Dr. Lennard also was aware that Claimant has had dizziness, anxiety and depression, a broken elbow, a broken foot and toe, right shoulder tendonitis, a left shoulder injury, and a diagnosis of osteopenia; however, he believed that none of those impacted Claimant in performing her job or caused functional limitations.

Dr. Lennard was aware that Claimant continues to drive, cook, and play Bingo, but he did not know to what extent Claimant did any of those activities. Dr. Lennard did not know why Claimant indicated that she is unable to walk more than one-half mile, unable to sit for more than one-half hour, or unable to stand for more than one-half hour as he placed no restrictions on those activities. Dr. Lennard understood Claimant returned to work following her surgery in July 2006. He believed that her work during these times would have included physical activity outside of his restrictions and would have continued to expose her to the activities that lead to carpal tunnel. He was uncertain as to why Claimant left her employment in January 2008, other than she was having difficulty with her hands. Dr. Lennard believed the surgeries performed by Dr. Meystrik were appropriate.

**Dr. Shane Bennoch**—Dr. Bennoch's reports of May 20, 2008 and December 15, 2011, are in evidence, offered as a Complete Medical Report. Dr. Bennoch opined that Claimant had bilateral carpal tunnel syndrome and three trigger fingers secondary to her job. He opined, "that the repetitive activities with her hands over a period of time leading up to January 14, 2006 were the prevailing cause of the injuries to the three trigger fingers and the bilateral carpal tunnel syndrome and resulting impairment." (Exhibit A, p. 12). He found Claimant to have a 25 percent permanent partial disability to both the right and left wrists, which accounted for both the carpal tunnel and trigger finger releases. He noted that Claimant did well following carpal tunnel releases, but upon returning to her extremely repetitive job, her symptoms started again, but not as severe (Exhibit A, p. 13). He recommended only splints for future medical care.

Dr. Bennoch gave restrictions for Claimant of lifting less than 10 pounds occasionally and no frequent lifting. He found Claimant to have no restrictions on standing, walking or sitting. He limited her to occasional handling, fingering and feeling and noted she is "unlimited" in reaching. In his December 15, 2011 report, Dr. Bennoch added a 10 percent multiplicity factor for the bilateral nature of Claimant's disabilities. He further opined, however, that Claimant was not able to compete in the open labor market due to her age of 69 years and the problems with her wrists and hands. Nothing in Dr. Bennoch's report indicates that he took or reviewed x-rays.

**Dr. David Brown**—Dr. Brown is a board certified plastic and reconstructive surgeon with an added subspecialty board certification in hand surgery, and completed an orthopedic upper extremity fellowship. He examined Claimant, took x-rays of Claimant's hands, and examined Claimant's past films and medical records. He testified by deposition on Employer's behalf.

Dr. Brown opined that Claimant developed carpal tunnel syndrome and trigger finger while working her job at Missouri State University. He found that her condition was appropriately treated by surgery with Dr. Meystrik and she could have returned to her normal job given the outcome of her carpal tunnel and trigger finger surgeries. He rated Claimant's permanent partial disabilities from the work injury as four percent at each wrist, and two percent to the right fourth finger for the trigger finger release, and two percent to her right and left third digits.

Dr. Brown also diagnosed Claimant with advanced severe osteoarthritis in both of her wrists at the base of her thumbs. He noted that clinical findings were consistent with the diagnosis, and that x-rays showed "unequivocal radiographic findings consistent with that diagnosis" (Exhibit 1, p. 14). Dr. Brown said Claimant's osteoarthritis is "severe and advanced" (Exhibit 1, p. 31) and is related to the aging of her joints. He noted that it is a very common condition in women in their late sixties, and the work for Employer was not the prevailing factor of the cause of the severe arthritis in Claimant's thumbs. Dr. Brown testified the

fact that Claimant had pain in her hands while doing work at Missouri State University, or work at home in the form of housekeeping, is consistent with her diagnosis of osteoarthritis. Dr. Brown opined Claimant is in need of no further treatment related to her work injuries, but is in need of treatment for her non-work related basilar thumb degenerative joint disease.

### **Vocational Evidence**

**James England**—Employer offered the deposition of vocational expert James England. Mr. England met with Claimant, reviewed records regarding her past medical treatment, and reviewed the reports of the experts offered by Claimant. Mr. England opined that his review of the medical records showed that Claimant had problems with her upper extremities going back to the 1990's.

Mr. England opined that Claimant's academics were in good shape especially for someone her age. He believed Claimant retained information well. He noted that none of the examining or rating doctors placed any restrictions on Claimant regarding sitting or standing. He said the lack of such limitations on sitting and standing opens the door to jobs in the light exertional category. Overall, Mr. England found Claimant to be of advanced age, with a high school education and stable work history.

Mr. England found that under the restrictions placed by Dr. Brown and Dr. Meystrik, Claimant could perform any of the work she has done in the past. He found that based on Dr. Bennoch and Dr. Lennard's restrictions, Claimant would be unable to perform her past work, but felt that there would be some security positions Claimant would be physically and mentally capable of doing. Mr. England conceded, however, that it would be difficult for Claimant to compete with other candidates for employment given her age and presentation of wearing splints.

**Wilbur Swearingin** – Wilbur Swearingin is a vocational expert who testified live on Claimant's behalf. He performed a vocational assessment of Claimant's ability to work, at the request of her attorney. He said Claimant's past work history was hand intensive, and her last job in the dorm included substantial lifting and carrying. Her most recent job correlated closely with that of a residence supervisor as defined by the Dictionary of Occupational Titles (DOT); however, Claimant performed her job at a higher physical demand level than that described in the DOT. The DOT indicates the job of residence supervisor is sedentary, requiring lifting, carrying, pushing, and pulling of only 10 pounds occasionally. Because Claimant lifted much more than that in her job, the job would have been classified as light, and possibly medium at times.

Mr. Swearingin's major area of concern for Claimant's future employment are with her lack of ability to handle and finger on a routine basis. Using the restrictions of Drs. Brown and Meystrik, the witness said Claimant could return to her regular job at Missouri State University. Using Dr. Bennoch's restrictions on handling, fingering and feeling, alone, eliminated nearly 95 percent of all jobs. Employing Dr. Lennard's restrictions, Mr. Swearingin said a five-pound lifting restriction placed Claimant at a less than sedentary exertional level. Mr. Swearingin did not know that Dr. Lennard had testified live that Claimant was capable of lifting 10 pounds with both hands. Mr. Swearingin said if that was the case, Dr. Lennard's restrictions would not be less than sedentary.

Mr. Swearingin disagreed with the opinion of vocational expert James England that Claimant could perform security work. His own examination of Claimant's skills and restrictions compared against the DOT revealed 32 jobs that corresponded with Claimant's skills, if she was capable of a full line of sedentary

duties. Of those, only nine were closely related to jobs she has held in the past; however, Mr. Swearingin said the “real problem” was placement. He indicated that no one would hire Claimant given her age and constant use of splints. He opined that Claimant was unemployable and permanently and totally disabled.

On cross-examination Mr. Swearingin agreed that the form filled out by Claimant regarding her work duties at Missouri State University indicated she had to stand and/or walk four to six hours, she sat part of the time, lifted 20-50 pounds, and occasionally had to climb, kneel, and crawl, but she never had to stoop nor climb stairs. Mr. Swearingin testified he knew about Claimant’s pre-existing conditions, including a right broken foot, sleep apnea, anxiety and depression, and a broken finger. He indicated that Claimant was capable of employment as of April 19, 2007, when she reached maximum medical improvement. From April 19, 2007, to the date of her retirement in 2008, Mr. Swearingin said Claimant was working in the open labor market, although he described the job as “highly accommodated” after the 2006 surgeries.

### **Employment Records**

Records from Claimant’s personnel file include an Initial Injury Report regarding Claimant’s claim of January 14, 2006, and an On-The-Job Injury Report filed by Candace Derry and signed by Claimant regarding her claim of January 14, 2006. Claimant’s report of injury is well documented.

### **Additional Findings**

I find credible the testimony of the physicians, particularly that of Dr. Brown, that Claimant suffers degenerative joint disease that is wholly unrelated to the work, and that such condition has deteriorated since 2006, and continues to deteriorate. I find credible Dr. Lennard’s opinion that Claimant suffered, in addition to work related carpal tunnel syndrome and trigger fingers, flexor tendonitis which is a source of the carpal tunnel syndrome caused by work. To the extent that the vocational opinions of Mr. England and Mr. Swearingin diverge, I find Mr. England more persuasive. I find Claimant generally credible, although I find she has exaggerated the extent to which she obtained accommodations on the job. This is due to the striking contrast between her deposition and live testimonies, and the accommodations recorded by Dr. Lennard.

## **CONCLUSIONS OF LAW**

Claimant seeks benefits under Chapter 287 for an alleged accident or occupational disease. Claimant bears the burden of proving each element of her claim. *Lawrence v. Joplin R-8 School District*, 834 SW 2d 789, 793 (Mo. App. S.D. 1992).

### **Accident or Occupational Disease**

No medical expert has testified that Claimant suffered anything other than an occupational disease. Section 287.020.2 RSMo,<sup>1</sup> defines “accident,” as follows:

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. An injury is not compensable because work was a triggering or precipitating factor.

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<sup>1</sup> All statutory references are to the law in effect at the time of the work injury in 2006.

Section 287.067 RSMo, defines "occupational disease" as follows:

1. 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. 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.
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.

The medical experts consistently opined that Claimant sustained an occupational disease rather than accident. Claimant's work related conditions fit the statutory definition of "occupational disease." There being no evidence to the contrary, I find and conclude that Claimant suffered an "occupational disease" rather than an accident.

### **Medical Causation**

Sophisticated medical conditions and the issue of medical causation require expert rather than lay opinion. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo. App. 1997). Based on the medical opinions of Drs. Lennard, Brown, and Wyrsh, Claimant does have co-existing bilateral basilar thumb degenerative joint disease that has progressed radiographically from 2006 through 2012, and continues to progress. This progression will likely continue despite her retirement in January 2008, and is a normal part of aging. Her work is not the prevailing factor in these findings.

According to Dr. Lennard, Claimant's residual bilateral hand numbness, tingling, and paresthesias are directly related to her prior diagnosis of carpal tunnel syndrome, trigger fingers, and chronic flexor tendinitis caused by her work. These are the only conditions for which Claimant is entitled to receive benefits for under the Workers' Compensation Act.

### **Notice**

Section 287.420 RSMo, in relevant part states:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. *No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.*

(Emphasis added). This statute requires written notice within 30 days of *diagnosis*. As clearly demonstrated by the documents in Exhibit S, Claimant complied with this legislative mandate.

Employer contends that because Claimant had a diagnosis of carpal tunnel syndrome in 1997, she should have known what was wrong and reported the condition to her supervisor a year earlier, when symptoms again materialized. Claimant's 1997 carpal tunnel syndrome resolved. She had no treatment for a period of eight or nine years. A strict interpretation of the applicable statute requires only that Claimant provide written notice within 30 days of her new diagnosis. She did just that. Whatever symptoms Claimant experienced in the preceding year did not cause interference with her job until the three-day exacerbation that occurred in January 2006. Claimant provided appropriate notice. Employer was not prejudiced in that it immediately was provided the opportunity to investigate and direct medical care.

### **Nature and Extent of Disability**

Claimant asserts that she is permanently and totally disabled. She carries the burden that she is permanently and totally disabled as defined in §287.020.6 RSMo. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992). The statutory definition of "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the Claimant was engaged at the time of the accident. § 287.020.6 RSMo.

Employer is responsible only for any permanent disability caused by the work related condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton*.<sup>2</sup> Claimant has the burden of proving the extent of the disability from her work injury, as opposed to that from any other cause. *Plaster v. Dayco Corp.*, 760 S.W.2d 911,913 (Mo. App. S.D. 1988). Claimant offered evidence from Dr. Lennard and Dr. Bennoch as to the extent of permanent disability and restrictions attributable to her upper extremities. Dr. Lennard's opinions are problematic in that he testified his ratings and restrictions are based on how Claimant presented to him in February 2012, and include restrictions, limitations and disability that included non-work related basilar degenerative joint disease. His ratings are also problematic because they include the worsening of Claimant's condition since the maximum medical improvement date of April 19, 2007. Because Dr. Lennard does not give disability ratings or restrictions based only on the work related conditions, they are of little benefit in determining the nature and extent of Claimant's work related injuries as of the date of maximum medical improvement.

Dr. Bennoch's ratings and restrictions do not appear to include any conditions other than those related to Claimant's employment, but it is not clear whether he was aware of the degenerative joint disease.

Dr. Meystrik released Claimant to work without restrictions following her surgery in July 2006, and Claimant did continue to work in her same capacity for a year and a half, until January 2008. While Claimant testified at the hearing that she was accommodated in several ways, including having her husband appear daily at her place of employment to help her in her tasks, she failed to recall such fact in her deposition, even when repeatedly asked to explain any changes she made in her job after the July 2006 surgery. While it is certainly understandable that Claimant may have forgotten a few details, it is unlikely that she forgot that her disabled husband came to her place of employment daily to assist her in completing her job duties. It also difficult to believe that if she received daily help from a non-employee, such fact would have gone unnoticed by her Employer, yet there is no mention of it in her December 2007 performance appraisal. As noted in the above Findings of Fact, I do not find Claimant wholly credible in this regard. I believe she exaggerated the amount of help she received from others.

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<sup>2</sup> References to *Hampton* are to *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Still, Dr. Meystrik's opinion poses some problems since she released Claimant to work with no restrictions, while documenting that Claimant had ongoing pain.

While Mr. Swearingin, Claimant's vocational expert, testified that as of January 2008 Claimant was permanently and totally disabled, he admitted that on April 19, 2007, the date the parties stipulated Claimant reached maximum medical improvement from her work condition, she was working in the open labor market. The question is not whether Claimant currently is permanently and totally disabled, or even if as of January 2008 Claimant was permanently and totally disabled. The question is whether Claimant is permanently and totally disabled from her work related condition which culminated on January 14, 2006. The answer is no. Claimant's continued work after her 2006 surgeries is evidence of her ability to be employed, even with the permanent effects of the work injury. I disagree with Mr. Swearingin that Claimant's work was "highly accommodated," given Claimant's deposition testimony.

To determine if Claimant is permanently and totally disabled as defined by Chapter 287, case law holds that the following are to be considered: (1) whether, in the ordinary course of business, any employer would reasonably be expected to employ Claimant in her present physical condition and reasonably expect her to perform the duties of the work for which she was hired; and (2) whether the Claimant would be able to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. E.D. 1992) *overruled on the grounds by Hampton*. Using the framework set forth in *Reiner*, there is no evidence that Claimant is permanently and totally disabled from the January 2006 injury alone. Claimant returned to her regular employment, competing in the open labor market with an employer in the State of Missouri. Her employer had reasonable expectations she could do the job, and she did, in fact, satisfactorily perform her job for more than a year. Her December 2007 performance appraisal evaluation includes high marks and glowing comments. Claimant's evaluation ratings in December 2007 were all either "commendable" or "competent." Her overall rating was 3.175, between "commendable" and "competent." Moreover, Employer noted none of Claimant's self-accommodations.

Even if Claimant is now permanently and totally disabled, it appears to be the result of a worsening of her hands since reaching maximum medical improvement and the progression of the non-work related diagnosis of basilar degenerative joint disease. Even if she had some pain on April 19, 2007, which is the date of maximum medical improvement, Dr. Meystrik was clear that Claimant had a full range of motion and no numbness. She was capable of returning to work, and did work. Employer is not liable to Claimant for permanent total disability benefits.

### **Permanent Partial Disability**

The evidence establishes that Claimant did develop the occupational disease of bilateral carpal tunnel and trigger finger in three fingers and flexor tendonitis because of her employment with Employer. She is entitled to permanent partial disability consistent with these diagnoses, surgical treatment, return to work, and some residual symptoms.

Having reviewed all of the records, taking in consideration all of the physicians' ratings and the problems with each, I award Claimant 17.5 percent permanent partial disability for each of the upper right extremities at the 200-week level. I apply a 10 percent loading or enhancement factor due to the bilateral nature of these disabilities. Therefore, Claimant is entitled to 77 weeks of permanent partial disability at the weekly benefit rate of \$365.08 for a total of \$28,111.16.

### **Future Medical**

Dr. Lennard testified Claimant would need ibuprofen and splints in the future to help with her hands. This opinion, however, was based on Claimant appearance in February 2012, and included conditions unrelated to her work disease. Dr. Bennoch gave no recommendation for future medical care other than the possible use of splints. Dr. Brown opined Claimant needs no future medical care related to her work-related diagnosis. Dr. Meystrik opined no further medical care was needed for Claimant. In this regard, I accept the opinion of the physicians with the greatest expertise who would be the orthopedic surgeons – Drs. Brown and Meystrik. I award no future medical treatment.

### **SUMMARY**

Claimant is entitled to 77 weeks of permanent partial disability benefits for a total of \$28,111.16 and no future medical treatment. Employer already has agreed to pay back temporary total disability, so that amount is not included as a part of the Award by the Administrative Law Judge.

Attorney Paul F. Reichert shall have a lien of 25 percent of all amounts awarded as a reasonable fee for necessary legal services rendered to Claimant.

Made by: \_\_\_\_\_

Victorine R. Mahon  
*Administrative Law Judge*  
*Division of Workers' Compensation*