

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 00-173226

Employee: Harold Copeland

Employer: 1) Associated Wholesale Grocers Inc.
2) Elite Logistics Inc.

Insurer: 1) One Beacon Insurance Co.
2) Transcontinental Insurance Co.

Date of Accident: January 14, 2000

Place and County of Accident: Springfield, Greene County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 2, 2005, with this supplemental opinion. The award and decision of Administrative Law Judge David L. Zerrer, issued June 2, 2005, is attached and incorporated by this reference.

We offer this supplemental opinion to explain in some detail our agreement with the conclusions of the administrative law judge.

The determinative issue in this case involves what has been referred to as the "last exposure rule," as defined by section 287.063 RSMo.

The administrative law judge determined and concluded that the employer liable for the compensation and in whose employment the employee was last exposed to the hazard of the occupational disease for which claim was made was employer Associated Wholesale Grocers, Inc. The Commission agrees that, as a matter of law, the decision of the administrative law judge is correct.

In reaching its decision, the Commission relies on three decisions rendered by the Supreme Court of the State of Missouri: *King vs. St. Louis Steel Casting Company*, 182 S.W.2d 560 (Mo. 1944), *Johnson vs. Denton Construction Company*, 911 S.W. 2d 286 (Mo. banc 1995) and *Endicott vs. Display Technologies, Inc.*, 77 S.W.3d 612 (Mo. banc 2002); as well as a decision from the Missouri Court of Appeals, Eastern District, *White vs. Scullin Steel Company*, 435 S.W.2d 711 (Mo. App. 1968).

The uncontroverted facts are as follows: in January, 2000, employee was employed by Associated Wholesale Grocers, Inc. (Associated); employee reported complaints of left hand pain to the employer; employee reported his injury to the employer, after being diagnosed with carpal tunnel syndrome of the left upper extremity; Associated denied employee's request for workers' compensation benefits in March, 2000, and would not voluntarily provide workers' compensation benefits; employee underwent a left carpal tunnel release on April 5, 2000, and employee was unable to work and was incapacitated for work for eight weeks post surgery; employee was released from care by the treating physician on May 19, 2000, as he had achieved maximum medical improvement.

Subsequently, on June 1, 2000, employee became employed with Elite Logistics, Inc. (Elite); employee filed a claim for compensation on June 21, 2001, alleging the employer to be Associated; and subsequently an amended claim for compensation was filed August 2, 2002, adding Elite as an alleged employer along with Associated.

Based on the stipulated facts and applying the pertinent statutory provisions and case law referenced above, the Commission agrees that the administrative law judge correctly found the responsible employer liable for compensation due to this occupational disease to be Associated.

It is indisputable that while employee was employed with Associated, employee was exposed to the hazard of the occupational disease contracted, carpal tunnel syndrome. Due to this deleterious exposure, the employee became disabled and incapacitated for work. In fact, the employee underwent a left carpal tunnel release on April 5, 2000, and post surgery, was disabled and incapacitated for work for eight weeks. Although employee had reported the injury to Associated, Associated refused to voluntarily provide workers' compensation benefits.

Subsequently, on May 19, 2000, the employee achieved MMI, and was released to return to employment without restrictions. No additional treatment was rendered. Employee had fully recovered from his occupational injury. Subsequently, he became employed with Elite June 1, 2000.

To the knowledge of the Commission, employee has not undergone additional treatment, nor experienced any additional disability or incapacitation from the employment with Elite. The Commission is unaware of any additional injurious exposure while employee has been employed with Elite, but if so, in the opinion of the Commission, any injurious exposure with Elite would constitute a new occupational injury and/or occupational disease separate and distinct from the occupational injury occurred while employed with Associated.

The Commission cannot more astutely and poignantly express the applicable principles of law pertinent to this case than as stated by Judge Hyde, of the Supreme Court of Missouri, in the case of *King vs. St. Louis Steel Casting Co.*, 182 S.W.2d 560 (Mo. 1944), as set forth below from page 562 of the opinion:

“[3] We approve and adopt the reasoning of the Textileleather case, which we hold is applicable to the provisions of our own Act and the proper construction thereof, as follows [108 N.J.L. 121, 156, A. 841]: “It is a well-known fact that industrial diseases are gradual in development—the first and early steps are not always perceptible. The rate of progress may vary. Sometimes a patient makes a complete recovery; sometimes it is only an apparent one. Sometimes the disease is quiescent and latent; sometimes the fatal course is swift. Medical science cannot always detect and describe the progress of disease. Employees exposed to occupational diseases frequently work for different employers. It is unthinkable that the Legislature should have contemplated that in such instance the recovery of compensation should be defeated. * * * The disability from occupational disease, for which compensation is payable, must necessarily occur when the employee is incapacitated for work. Any other view would make every other provision of the act, and particularly those respecting the time within which the employer must have knowledge of the disease, an absolute nullity. * * * There is no more reason to search for the time when the poisoning first occurred than to search for the second, or third, or fourth exposure. It is disability after exposure in the employer's business that creates the obligation to compensation. * * * The employer's liability was fixed as of that time and so also the insurance carrier's obligation was assumed as of that date.”

This erudite opinion of Judge Hyde remains the applicable law in the State of Missouri. Disability from an occupational disease, for which compensation is payable, must necessarily occur when the employee is incapacitated for work and it is disability after exposure in the employer's business that creates the obligation to compensation. The employer's liability is fixed as of that time.

In the instant case, employee, while employed with Associated, was exposed to the occupational disease contracted, carpal tunnel syndrome; the injury was timely reported to the employer; employee became disabled and incapacitated for work as of April 5, 2000; at that time the disability for the occupational disease for which compensation is payable attached and Associated's liability was fixed as of that date and the exposure in the business of Associated created the obligation for workers' compensation benefits for the occupational disease contracted, i.e., carpal tunnel syndrome of the left upper extremity.

Associated was notified of the injury in timely fashion, but refused to accept liability. Employee obtained reasonable and necessary treatment on his own; was disabled or incapacitated for work for eight weeks; attained

maximum medical improvement by May 19, 2000; and subsequently obtained new employment June 1, 2005.

The subsequent Supreme Court cases of *Johnson vs. Denton Construction, supra*, as well as *Endicott vs. Display Technologies, Inc., supra*, are consistent with the *King* case, *supra*, and with the facts of the instant case. The principles enunciated in the appellate court case of *White vs. Scullin Steel Company*, 435 S.W.2d 711 (Mo. App. 1968) are also in accord and further make it clear that there is no conceivable difference that would require any court to draw a distinction between the clear principles of law espoused in *King* and those to be applied in a workers' compensation case based upon an alleged difference between employer liability on one hand and carrier liability on the other. As stated in *White vs. Scullin Steel Company, supra*, at page 715:

“... full liability for permanent disability [fastens] upon that insurer which was on a risk at the time the employee ceased work, absolving any prior insurers regardless of the extremity of progression of the disease, short of cessation of work, ...”

It is clear in the instant case that employee, while employed by Associated, was exposed to an occupational disease, which he contracted, i.e., carpal tunnel syndrome of the left upper extremity; and employee became disabled and incapacitated for work and liability attached. Associated, although admittedly notified of the occupational injury, refused to voluntarily provide workers' compensation benefits for the occupational disease contracted. Consequently, this refusal to voluntarily provide benefits required the employee to obtain treatment on his own which the employee did; subsequently, the treatment ceased as employee achieved maximum medical improvement, and was released to return to work without any restrictions.

Employee did seek additional employment with a second employer, and any alleged subsequent injury due to either an accident or occupational disease would be the subject of a separate and distinct injury unrelated to the occupational disease sustained while an employee of Associated.

The facts in the case of *Johnson vs. Denton Construction Company, supra*, are almost identical. In *Johnson*, the employee reported an injury to the employer, i.e., bilateral carpal tunnel syndrome, and the employer refused to voluntarily accept the injury or provide workers' compensation benefits; in fact, the employee was separated from employment; the employee during his tenure of unemployment, filed a claim for compensation against the employer and subsequently, after filing the claim for compensation, sought additional employment in the interim until his workers' compensation case was determined. As held by the Supreme Court of the State of Missouri, the employee's claim in the *Johnson* case was clearly for the disease incurred while working for the initial employer.

In the instant claim, the claim for compensation that was initially filed was filed subsequent to the employee's employment with Elite, however, there was no injurious exposure incurred, to the knowledge of the Commission, while employed with Elite. The claim for compensation filed in the instant case is clearly for the occupational disease that arose out of and in the course of employment while employee was an employee of Associated.

The holding in the *Endicott* case, *supra*, is also consistent with the determination made by the administrative law judge in the instant claim. In *Endicott*, there was no disability or incapacitation for work until after the claim was filed. The employee was employed by the last employer to expose the employee to the occupational disease contracted at the time the claim was filed.

In simple terms, the employee in the instant case contracted an occupational disease arising out of and in the course of his employment with Associated; although Associated was timely notified of the injury, it chose to ignore it; the injury had been treated and the injury had resolved completely prior to employee's subsequent employment with Elite. At the time the claim was filed, even though employee was employed with Elite, there was no injurious exposure while employed with Elite at least from the record presented. If in fact there were an injurious exposure with Elite, it would be the subject of an additional, separate and distinct injury.

At the time the claim was filed in this case, employee had been disabled and incapacitated for work due to his occupational exposure while employed with Associated; had been treated; had been released from treatment; and attained maximum medical improvement. Accordingly the liability of Associated was fixed as of the date the claim was filed.

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 16th day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Harold Copeland

Injury No. 00-173226

Dependents:

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

Employer: Associated Wholesale Grocers/Elite Logistics

Additional Party:

Insurer: One Beacon Ins./Transcontinental Ins. Co.

Hearing Date:

August 25, 2004 Checked by: DLZ

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, 2000
5. State location where accident occurred or occupational disease was contracted: Springfield, Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant suffered bilateral carpal tunnel syndrome
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: Left wrist
14. Nature and extent of any permanent disability: 20% of left wrist at the 175 week level
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? \$4,013.78
18. Employee's average weekly wages:
19. Weekly compensation rate: \$578.48/\$303.01
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$4,013.78

8 weeks of temporary total disability (or temporary partial disability): \$4,627.84

35 weeks of permanent partial disability from Employer: \$10,605.35

-0- weeks of disfigurement from Employer

22. Second Injury Fund liability: Yes No Open X

TOTAL: \$ 19,246.97

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Harold Copeland

Injury No: 00-173226

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

Dependents:

Employer: Associated Wholesale Grocers/Elite Logistics

Additional Party

Insurer: One Beacon Ins./Transcontinental Ins. Co.

Checked by: DLZ

On the 25th day of August, 2004, the parties appeared before the undersigned Associate Administrative Law Judge for final hearing. The Claimant appeared in person and by his attorney, William W. Francis. The Employer, Associated Wholesale Grocers, (hereinafter referred to "Associated"), appeared by its attorney, Patrick J. Platter. The Employer, Elite Logistics Inc., (hereinafter referred to as "Elite"), appeared by its attorney, Jerry Harmison. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is a party to this claim but does not appear at this hearing by agreement of the parties.

ISSUES

Which Employer is liable to Claimant for the payment of medical expenses and permanent partial disability benefits.

DISCUSSION

The parties identified and placed into evidence a joint exhibit titled Stipulation of Facts. The Stipulation of Facts recites, among other things, that Associated employed Claimant in January 2000 when Claimant reported complaints of hand pain to the Employer. Claimant's report of injury to the then current employer took place after he was diagnosed with bilateral carpal tunnel syndrome, left hand worse than right. Associated denied Claimant's claim for benefits in March 2000. Claimant received carpal tunnel release surgery on April 5, 2000, and Claimant was unable to work for eight weeks following the surgery. Claimant was released from care from his treating physician May 19, 2000. Claimant incurred medical expenses totaling \$4,013.78 for medical treatment.

Elite on June 1, 2000, employed claimant. Claimant filed his Claim for Compensation on June 21, 2001, against Associated, and an Amended Claim for Compensation was filed August 2, 2002, naming Elite as an employer along with Associated.

The parties agree that Claimant has suffered a 20% permanent partial disability at the 175-week level at the left wrist.

The Stipulation of Facts makes no mention of what treatment, if any, was administered for the right wrist complaints.

Claimant testified on his own behalf. Claimant testified that he was involved in a labor dispute with Associated in the first six months of the year 2000, and that he received treatment on his left wrist during a period of time he was not working due to the labor dispute. Claimant testified that when the labor dispute was resolved, he went back to work at the same job task but as an employee of Elite. Claimant further testified that he continued to drive a truck for the new employer, the same job task he performed when employed by Associated. Claimant testified that he was continually exposed to repetitive tasks after June 1, 2000, and continued to have right hand complaints after the date of his initial employment by Elite.

On cross-examination, Claimant admitted that the vibration of driving a truck and the posture of his hands was the same for both employers and that the only interruption in his job duties was during the labor dispute, which ended with Claimant's employment by Elite Logistics. Claimant further admitted that the labor dispute took place during April and May 2000 and that he was released from treatment on his left hand before becoming employed by Elite.

Claimant submitted medical records that support his testimony and the facts agreed to in the Stipulation of Facts, which was entered into evidence.

FINDINGS OF FACT AND RULINGS OF LAW

Which Employer is liable to Claimant for benefits.

Associated has denied Claimant's claim from its initial reporting by the Claimant. The fact that Associated's denial of Claimant's claim came at a time just before a labor dispute is not relevant to establish the facts as to which employer is responsible for benefits due the Claimant. The facts are that Claimant was diagnosed with carpal tunnel, reported that diagnosis to the then current Associated, received treatment for his condition, and was released from treatment at maximum medical improvement prior to ever being employed by Elite. The fact that Claimant performed repetitive tasks for both employers does not aid in determining who is responsible for benefits. Associated would urge that the case of *Endicott v. Display Technologies, Inc*, 77 S.W.3d 612, determines liability in claims of repetitive motion overuse when there is more than one employer who exposes an employee to the risk of repetitive injury. In the instant claim, Claimant was treated and his medical condition resolved prior to his employment by Elite exposing Claimant to any repetitive task. Therefore, the cases which address liability of employers when there is more than one employer who has exposed an employee to the risk of repetitive motion injury do not apply. This question was addressed in the case of *Maynard v. Lester E. Cox Medical Center/Oxford Healthcare* 111 S.W.3d 487.

In the Maynard case, the Court indicated that if there is no substantial evidence that the employment actually caused or substantially contributed to the cause the injuries then that employment could not give rise to liability for benefits under Chapter 287. Since Claimant's exposure by Elite was after the date the treatment was administered and the injury resolved, then Elite could not have caused or substantially contributed to cause the injury for which Claimant was treated.

After a review of the evidence adduced at the hearing, and based on the record as a whole, I find that the questions of law and the issues raised by the Endicott case do not apply to the facts of this case. I further find that Claimant's job duties and his exposure to repetitive motion at Associated caused or substantially contributed to cause the need for medical treatment which Associated refused to provide, thereby causing Claimant to provide such treatment on his own.

I further find that Associated should have paid Claimant's medical expenses for treatment for this injury in the amount of \$4,013.78. Associated is hereby ordered to pay to Claimant the sum of \$4,013.78, as and for reimbursement for medical expenses incurred by Claimant as reasonable and necessary expenses in order to cure and relieve the effects of Claimant's injuries.

I further find that Claimant is entitled to temporary total disability benefits for a period of eight weeks following surgery to his left wrist at a compensation rate of \$578.48 per week. Associated is hereby ordered to pay to Claimant the sum of \$4,627.84, as and for temporary total disability benefits.

I further find that Claimant has suffered a permanent partial disability of 20% of the left wrist at the 175-week level at a compensation rate of \$303.01. Associated is hereby ordered to pay to Claimant the sum of

\$10,605.35, as and for permanent partial disability benefit.

Claimant's attorney has requested approval of an attorney fee of 25% of the amount of any award.

Claimant's attorney is hereby granted a lien on the proceeds of this award to the extent of 25% of the amount thereof, unless and until the attorney shall have been paid in full.

Date: June 8, 2005

Made by: /s/ David L. Zerrer
David L. Zerrer
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy:

Attest:

/s/ Patricia "Pat" Secrest
Patricia "Pat" Secrest
Director
Division of Workers' Compensation