

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

Injury No.: 01-020819

Employee: Josef Czuppon

Employers: 1) Midwest Woodworking & Fixture
2) Thoms Contracting
3) Wise Installations
4) National Installers (dismissed before hearing by claimant)

Insurers: 1) Missouri Employers Mutual
2) Royal Insurance/Frank Gates
3) American International Group

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (dismissed before hearing by claimant)

Date of Accident: last exposure prior to filing claim

Place and County of Accident: St. Louis, 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 (ALJ) 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 December 8, 2004, and awards no compensation in the above-captioned case.

The Commission finds that the ALJ correctly weighed and evaluated the testimony and the law in reaching his conclusions as to compensability. *Reese v. Gary and 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. 2002), *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003).

The award and decision of Administrative Law Judge William L. Newcomb, issued December 8, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Josef Czuppon

Injury No: 01-020819

Dependents: N/A
Employer: Midwest Woodworking
Thoms Constrution
Wise Installations
National Installers (dismissed before hearing) By Claimant

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

Additional Party: Second Injury Fund (dismissed before hearing)
By Claimant

Insurer: Missouri Employers Mutual (Midwest)
Royal Insurance / Frank Gates USA (Thoms)
AIG (Wise)

Hearing Date: October 1, 2004
Checked by: WLN

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: last exposure prior to filing claim
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employers at time of alleged accident or occupational disease? Yes
7. Did employers receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employments? Yes, but liable employer was dismissed.
9. Was claim for compensation filed within time required by Law? Yes
10. Was claim for compensation filed within time required by Law? Yes
11. Were employers insured by the above insurers? Yes
12. Describe work employee was doing and how accident occurred or occupational disease contracted: repetitive work with hands and arms as carpenter over a number of years for different employers.
13. Did accident or occupational disease cause death? No Date of death? N/A
14. Part(s) of body injured by accident or occupational disease: wrists
15. Nature and extent of any permanent disability: N/A
16. Compensation paid to date for temporary disability: None
17. Value necessary medical aid paid to date by employer/insurer? None
18. Value necessary medical aid not furnished by employer/insurer? N/A
19. Employee's average weekly wages: Unknown
20. Weekly compensation rate: PPD = 314.26
21. Method wage computation: Agreement among remaining parties

COMPENSATION PAYABLE

22. Amount of compensation payable: N/A

insurer Missouri Employers Mutual Insurance were represented by Patrick N. McHugh. Employer National Installers, Inc. and insurer The Hartford were dismissed by the employee on October 1, 2004, prior to trial. The date of Hearing was October 1, 2004. Mr. Falvey sought a fee of 25% of claimant's award.

STIPULATIONS

The parties stipulated to the following:

ISSUES:

1. Did the employee sustain an occupational disease arising out of and in the course of his employment?
2. If the employee sustained an occupational disease, which employer is liable pursuant to Section 287.063, i.e. the last exposure rule?
3. Is an employer liable for permanent partial disability and, if so, what is the nature and extent of that liability?
4. Is an employer liable for medical expenses incurred to date and, if so, the extent of that liability?

RATES OF COMPENSATION:

It was stipulated that claimant's rate of compensation for permanent partial disability is \$314.26. Rate of compensation for temporary total disability benefits was not addressed as any claim for past due benefits was not sought.

COMPENSATION PAID:

No temporary total disability or medical benefits had been paid by or on behalf of any employer.

EXHIBITS:

The claimant offered the following exhibits:

CLAIMANT'S EXHIBIT A: Medical records from HealthSouth surgery dated 1/22/01
CLAIMANT'S EXHIBIT B: Employment records of Thoms Contracting
CLAIMANT'S EXHIBIT C: Employment records of Midwest Woodworking & Fixture, Inc.
CLAIMANT'S EXHIBIT D: HealthSouth - physical therapy bill
CLAIMANT'S EXHIBIT E: HealthSouth - physical therapy records dated 1/23/01 through 2/27/01
CLAIMANT'S EXHIBIT F: Amended Claim for Compensation
CLAIMANT'S EXHIBIT G: Records of Carpenters' Health and Welfare Trust Fund of St. Louis
CLAIMANT'S EXHIBIT H: Employment records of Wise Installation, Inc.
CLAIMANT'S EXHIBIT I: Employment records of National Installers, Inc.
CLAIMANT'S EXHIBIT J: Deposition of Robert P. Poetz, D.O.
CLAIMANT'S EXHIBIT K: Medical records of Southwest Medical Center - Douglas Parashak, M.D.
CLAIMANT'S EXHIBIT L: Medical records of Neurological Medicine, Inc. - Glenn M. Sherrod, D.O.

Employers/insurers stipulated to the admission of Exhibits A-F and H-L, subject to objections contained in Exhibit J. Employers/insurers objected to admission of Exhibit G and the court reserved its ruling of the admissibility of same. Exhibit G was admitted.

The employers/insurers offered the following joint exhibits:

EMPLOYERS'/INSURERS' EXHIBIT 1: Deposition of Mitchell B. Rotman, M.D.
EMPLOYERS'/INSURERS' EXHIBIT 2: Original Claim for Compensation filed March 2, 2001
EMPLOYERS'/INSURERS' EXHIBIT 3: Records of Health and Welfare, Pension and Vacation Trust Funds - Member Summary Work History

Claimant stipulated to the admission of Exhibits 1 through 3.

FINDINGS OF FACT

Based on the competent and substantial evidence, I find:

1. Claimant Jozsef Czuppon, a 64 year old male, was born in Hungary and came to America in 1956. He served in the United States military and obtained his GED. He has since worked as a union carpenter and described the type of work he has performed throughout his career as "finish and trim" work. Claimant has, over the years, obtained his jobs both through direct contact with contractors and through his local union hall.
2. Claimant's work has primarily involved cabinet installation, installation of trim, crown molding and baseboards. He retired in 2002. His last two or three years of employment involved commercial installation of cabinets requiring the use of hammer drills and impact wrenches to secure cabinetry to concrete floors, drills and other hand tools.
3. Claimant recalled experiencing pain in his wrist associated with constant throbbing or numbness in the latter part of 1999.
4. Medical records of Dr. Parashak indicate claimant was seen on 1/21/99 with symptoms of left hand numbness and tingling affecting his thumb, index, third and fourth fingers. These symptoms had been increasing in severity and were worse at night. Dr. Parashak diagnosed early carpal tunnel syndrome, prescribed Motrin and a wrist brace to be worn at night. [Exhibit K].
5. Claimant next returned to Dr. Parashak on 3/30/02 with similar left hand symptoms. Dr. Parashak noted a negative Tinel's sign, no pain with flexion of the wrist and felt biceps tendonitis was responsible for his symptomatology. He recommended an orthopedic evaluation with consideration of nerve conduction studies. [Exhibit K].
6. Claimant was seen by Dr. Glenn Sherrod on April 13, 2003 and an Electromyogram and Nerve Conduction Study was performed. Dr. Sherrod noted this study was consistent with bilateral median nerve compression at the wrists. [Exhibit L].
7. Claimant returned to Dr. Parashak on 6/1/00 for a physical exam because of increase of fatigue and tiredness. Dr. Parashak also noted claimant was having increasing pain from his carpal tunnel and gave him several names of physicians to see for this condition. [Exhibit K].
8. Claimant testified he made arrangements to see Dr. David Caplin in December of 2000. Dr. Caplin performed bilateral endoscopic carpal tunnel decompression on 1/22/01 at HealthSouth Outpatient Surgery Center. [Exhibit A]. Dr. Caplin then referred him to HealthSouth where he received therapy through 2/15/01. [Exhibit E]. Claimant testified he returned to Dr. Caplin on 2/15/01 and 3/9/01 and has not received medical treatment for this condition since that date.
9. Claimant filed a Claim for Compensation on March 2, 2001 alleging bilateral carpal tunnel syndrome from constant repetitive use of his hands. He alleged a date of accident/occupational disease as "1/22/01 Date of Surgery" and "3/00 Date of Diagnosis." The employers named in this claim were "Thomas Contracting" and "Midwest Woodworking." [Exhibit 2].
10. Claimant filed an Amended Claim for Compensation in October of 2002 naming Wise Installations, Out-of-Town Contractors and Woodworkers of Denver as additional employers. All other allegations were unchanged. [Exhibit F].
11. Prior to filing his Claim for Compensation, claimant last worked for National Installers, Inc. This employment consisted of 27 hours of work from 2/12/01 through 2/15/01. [Exhibit I]. This was claimant's first job after surgery and involved installation of cabinets and fixtures at an Office Max. His job duties required him to use a hammer drill and a rubber mallet. Claimant testified that he thought it was too early for him to return to work and his job duties "definitely" caused his symptoms of his bilateral carpal tunnel symptoms to increase. During this time, claimant was still receiving physical therapy and had yet to be released from Dr. Caplin's care.

12. Prior to National Installers, Inc., claimant worked for Wise Installation, Inc. for a total of 28 hours from 1/4/01 through 1/9/01. [Exhibit H]. He was assigned to install cabinets at Anheuser-Busch. This work required him to use a hammer drill. Claimant admitted he had symptoms of pain, numbness and loss of grip strength before starting this job but that this job caused an aggravation of his symptoms and intensified his pain. This was claimant's last employment before his surgery of 1/22/01.
13. Prior Wise Installation, Inc., claimant worked for Midwest Woodworking & Fixtures, Inc. for 17 hours during the weekly pay period ending 12/26/00. [Exhibit C]. Claimant did not testify as to the location or type of work performed during this period of time.
14. Prior to Midwest Woodworking & Fixture, Inc. claimant again worked for Wise Installation, Inc. for a total of 44 hours from 12/14/00 through 12/22/00. [Exhibit H]. This work again involved the installation of cabinets at Anheuser-Busch. Claimant's testimony regarding the type of work performed and increase in symptoms related to both periods of employment with Wise Installation, Inc.
15. Prior to this work for Wise Installation, Inc., claimant worked for Thoms Contracting (sometimes referred to as "Thomas Construction") for a total of 74½ hours from 11/30/00 through 12/7/00. [Exhibit B]. Claimant testified that during this 8 days of employment, he worked 10 hours a day and his job required constant use of a hammer drill and impact wrench. Claimant testified his pain increased "tremendously" during this period of employment. He also noticed an increase in numbness, tingling and a decrease in his grip strength. Claimant said he could hardly work after this period of employment and said he had a hard time working at the Anheuser-Busch job because of his increase in symptoms after this job. It was at this point he decided to seek additional medical treatment and went to see Dr. Caplin.
16. Prior to this employment, claimant worked 152 hours for Granger Construction Company in the months of October and November of 2000. He described this work as fixture installation which did not require the use of hammer drills or impact wrenches. He also worked 40 hours for Walgreens in October of 2002 performing fixture installation that did not require hammer drills or impact wrenches. [Exhibit 3].
17. Prior to these employments, claimant worked 35 days from 9/1/00 through 10/13/00 for Thoms Contracting. Claimant testified he told this employer of his carpal tunnel symptoms before beginning the job and asked to be placed on lighter type work. He testified his symptoms did increase during this period of employment.
18. Records from claimant's union indicate claimant worked 164 hours for "OUT-OF-TOWN CONTRS" during the month of August 2000. [Exhibit 3]. Claimant also worked 177 hours for Midwest Woodworking & Fixture, Inc. for the weekly pay periods ending 7/18/00 through 8/8/00. [Exhibit C; Exhibit 3].
19. Claimant worked for Granger Construction Company in the months of May and June of 2002. [Exhibit 3]. He again worked for Midwest Woodworking & Fixture, Inc. for the weekly pay periods ending 3/28/00 through 4/25/00 for a total of 140 hours. Claimant worked 104 hours in March of 2000 for Ross Reliable Construction. [Exhibit 3]. Finally, claimant testified that he worked continuously for Midwest Woodworking & Fixture, Inc. beginning in July of 1999 through January 20, 2000. He also stated he had worked for Midwest Woodworking & Fixture, Inc. on and off since 1966.
20. Claimant testified that he never missed work because of his carpal tunnel complaints during his employment with Midwest Woodworking & Fixture, Inc. He said he tried to be selective about the type of work that he did because of his hand symptoms. However, he said he took the job with Thoms Contracting in November/December 2000 that involved extensive use of a hammer drill and impact wrench because it was the only work available. Claimant testified that at that point he decided he could no longer continue to work with his hands in that condition and sought additional medical treatment.
21. Claimant obtained medical treatment on his own and did not make a request of any of the named employers to provide medical treatment.
22. Since his retirement in 2002, claimant said he continues to experience symptoms of numbness and tingling in his hands and notices a reduce in grip strength. He said he now has difficulty using tools to work on his car.
23. Claimant was examined by Dr. Poetz at his attorney's request on 11/8/01 and again seen by Dr. Poetz on 6/15/04. Dr. Poetz explained that the purpose of his second examination was to attempt to determine which of 4 different employers (National Installers, Wise Installations, Midwest Woodworking, Thoms Contracting)

would have more or less involvement in the development of his carpal tunnel syndrome. He concluded that the type of work claimant performed with each employer would be the type of hand intensive work that could cause carpal tunnel syndrome. After taking a history of the approximate time periods claimant worked for each employer and his symptomatology during each employment, Dr. Poetz concluded that claimant's injuries were a direct result of his employment with [Thoms] Contracting as this was the point at which claimant's symptoms became intolerable and necessitated surgery. [Exhibit J, pg. 13-14, 22].

Dr. Poetz also commented on the relative affect of the exposure to repetitive trauma while working for Wise Installation and Midwest Woodworking. Regarding the 8 days of work at Wise Installation, Dr. Poetz concluded, "if I were asked to selectively judge this according to the time spent, it would be less, but I can't say it had no affect." [Exhibit J, pg. 29]. Dr. Poetz's comment with respect to Midwest Woodworking was that this exposure was not a substantial factor in the cause of claimant's bilateral carpal tunnel syndrome. [Exhibit J, pg. 23]. Dr. Poetz was not asked to comment on the relative affect of exposure while working for National Installers, other than the comment that the exposure to repetitive trauma at this employer, like the other, was the type that could cause carpal tunnel syndrome.

Dr. Poetz's disability evaluation was performed at the 11/8/01 examination. He noted claimant had complaints of a tingling sensation in his left hand with decreased strength. He specifically noted claimant told him "I have no pain in either wrist and I don't have any problems with my right hand. My left hand is worse than my right." He noted claimant's symptoms were better when he was off work and increased when working. On examination he noted claimant exhibited decreased grip strength bilaterally, left worse than right, decreased pinprick sensation over the median nerve bilaterally and the presence of bilateral volar wrist scars. He assessed 35% permanent partial disability at the level of each wrist and recommended he avoid excessive and repetitive use of his upper extremities.

24. Dr. Rotman testified on behalf of employer Thoms Contracting. Dr. Rotman did not conduct a physical examination of claimant and his opinions were based upon his review of various treatment records and claimant's deposition testimony. Dr. Rotman concluded claimant's symptoms developed while working Ross Reliable Construction and that this employer would be responsible for triggering the symptoms that lead to the diagnosis of bilateral carpal tunnel syndrome. [Exhibit 1 - attached medical report, pg. 4]. He noted that work at Ross Reliable Construction did not cause claimant's carpal tunnel syndrome and felt the cause of the carpal tunnel was idiopathic. In his opinion, most in his medical field consider carpal tunnel syndrome an idiopathic condition. However, he recognized that heavy use of the hands may expose a worker to an aggravation of a pre-existing carpal tunnel condition that triggers symptoms and a need for surgery. [Exhibit 1, pg. 30-31].

Dr. Rotman testified that claimant's work for National Installers in February of 2001 was not a substantial factor in his need for the carpal tunnel surgeries and that an employee would need to work for an employer prior to undergoing carpal tunnel releases for the surgery to be causally related to the work for that employer. [Exhibit 1, pg. 13].

Dr. Rotman testified that assuming claimant worked for Wise Installation for a total of 54 hours in February of 2001 performing the general type of work he had done for the other employers, this work would have nothing to do with his carpal tunnel syndrome. [Exhibit 1, pg. 14].

Dr. Rotman conceded that the type of work claimant performed at Midwest Woodworking & Fixture, Inc. could not be the type of work that would aggravate pre-existing carpal tunnel syndrome. [Exhibit 1, pg. 15, 36].

Dr. Rotman testified that claimant's work for Thoms Contracting was not a substantial cause of claimant's carpal tunnel syndrome or need for bilateral carpal tunnel releases. He did admit that in analyzing the different exposures of each employer, the exposure he had while working for Thoms Contracting in December of 2000 was the most significant exposure to repetitive trauma that he saw. He also specifically compared exposure at Thoms Contracting in December of 2000 to exposure at Midwest Woodworking & Fixture, Inc. in December of 2000 and concluded that both the type and duration of exposure at Thoms Contracting was more significant. [Exhibit 1, pg. 16-18].

RULINGS OF LAW

Based upon the Findings of Fact, I find:

Occupational Disease

Claimant worked as a finish and trim carpenter for approximately 35 years. His work involved mainly installation of commercial cabinetry. This required him to use various hand and power tools. He used hammer drills and impact wrenches to anchor cabinetry to concrete flooring. He used various other hand tools, power saws and screw guns for the installation of trim, crown molding, baseboards and cabinet assembly and installation. Dr. Parashak indicated in January of 1999 that claimant had been experiencing a gradual increase of numbness and tingling in his left hand with severe pain at night. He was again seen by Dr. Parashak in March of 2000 for symptoms of numbness in his left hand and electrodiagnostic studies performed in April of 2000 were consistent with bilateral median nerve compression of the wrist. He continued to work for various employers and his symptoms became progressively worse. They reached the point of becoming intolerable after performing a job for Thoms Contracting in December of 2000 that involved constant use of a hammer drill and impact wrench throughout the majority of his 10 hour days for 7 consecutive days. He sought additional treatment at that point and eventually underwent bilateral carpal tunnel releases in January of 2001. He returned to this same type of work in February of 2001 which, again, aggravated his symptoms.

Based on substantial and competent evidence, including the nature of claimant's employment duties throughout his career as a carpenter, claimant's work history in the year and a half prior to the filing of this Claim for Compensation, the progression of his symptoms, the findings on electrodiagnostic testing, the bilateral endoscopic carpal tunnel decompression performed by Dr. Caplin, the opinions of Dr. Poetz and Dr. Rotman, and the credibility of claimant's testimony, I find that claimant's bilateral carpal tunnel syndrome was caused as a result of exposure to repetitive trauma throughout the years of his work as a carpenter.

Employer Liability

The original Claim for Compensation was filed on March 2, 2001 naming [Thoms] Contracting and Midwest Woodworking & Fixture, Inc. The Claim was amended in October of 2002 adding Wise Installations, Out-of-Town Contracting and Woodworkers of Denver as additional employers. National Installers, Inc. filed an Answer in response to this Amended Claim. Claimant eventually dismissed Woodworkers of Denver and National Installers, Inc. prior to hearing.

Section 287.063 R.S.Mo. 1993, commonly known as the last exposure provision of the Workers' Compensation Act, addresses employer liability in occupational disease cases and states:

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he was employed in an occupational process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in Subsection 7 of Section 287.067 R.S.Mo.
2. The employer liable for the compensation in this section shall be the employer in whose employment the employee was last exposed to the hazard of occupational disease for which claim is made regardless of the length of time of such last exposure.

The interpretation and application of this last exposure rule, as it relates to occupational disease due to repetitive motion, has been recently addressed by our Supreme Court. In *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo.banc 2002). The court stated the last exposure rule is not a rule of causation. It held that, "as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease." (my emphasis) *Id.* (citing *Johnson v. Denton*, 911 S.W.2d 286 (Mo.banc 1995); *Maxon v. Leggett & Platt*, 9 S.W.3d 725 (Mo.App. 2000)). This analysis must be applied in assessing liability involving successive employers.

The Claim for Compensation was filed on March 2, 2001. The evidence supports claimant last worked for National Installers, Inc. prior to the filing of the claim. This employment consisted of 4 days of work from 2/12/01 through 2/15/01. Claimant performed the same type of work for National Installers as he had for his previous employers, including Wise Installations, Midwest Woodworking & Fixture, Inc. and Thoms Contracting, Inc. This included installation of commercial cabinetry and involved his use of a hammer drill and various hand tools. Claimant said his work for National Installers "definitely" aggravated his bilateral carpal tunnel symptoms. Dr. Poetz testified that the type of work performed by claimant for all of his employers, including National Installers, Inc., was the type of hand intensive duties that could cause carpal

tunnel syndrome. Therefore, I find that claimant was exposed to the hazard of this occupational disease, repetitive trauma, while employed by National Installers, Inc. I also find that National Installers, Inc. was the last employer to expose claimant to the hazard of this occupational disease prior to the filing of the claim on March 2, 2001.

Claimant had undergone bilateral carpal tunnel releases approximately 3 weeks before beginning work for National Installers, Inc. He was also continuing to receive post-operative physical therapy and had yet to be released from Dr. Caplin's medical care during the time he worked for National Installers, Inc. However, the fact that this condition had already been diagnosed and he had received treatment is irrelevant to the assessment of liability under the last exposure rule, especially if the claimant is not cured and continues to suffer from the occupational disease and continues to be exposed. It is important to determine the presumptively liable last employer. This is not an issue of actual causation or "fairness". In *Walker v. Klaric Masonry, Inc.*, 937 S.W.2d 219 (Mo.App. E.D.1996), employer Klaric contended issues of causation and fairness should be considered since claimant's repetitive trauma injury had been diagnosed and treated prior to its hiring of the employee. The court held that regardless of the "fairness of that approach, the legislature has determined that a bright line conclusive presumption is to be utilized in establishing liability for occupational diseases." *Walker at 220*. The court further stated, "Only if the exception found in Section 287.067(7) (three month window) is applicable if the Commission or this court authorize to make a determination of causation."

Based on the above analysis, I find National Installers, Inc. to be the presumptively liable employer under the last exposure rule. Since claimant was only employed by National Installers, Inc. for 4 days, it would have had the opportunity to shift liability to the immediate prior employer pursuant to Section 287.067.7. This section provides an exception to the last exposure rule where exposure to the repetitive motion with the last employer is for a period of less than 3 months **and** the evidence demonstrates that the exposure to repetitive motion with a prior employer was **the** substantial contributing factor to the injury. However, this exception to the last exposure rule is a defense that the presumptively liable employer must raise in order to shift liability to the prior employer. In *Crabhill v. Hannicon*, 963 S.W.2d 400 (Mo.App. E.D. 1998), the employee developed bilateral carpal tunnel syndrome and filed a claim for compensation against two potentially liable employers. The court noted that one employer, Reading Tube, asserted at oral argument and in its brief that this exception for the last exposure rule precluded a finding of liability. However, in finding that this argument was not persuasive, the court specifically stated, "A review of the record before the ALJ reveals Reading failed to raise such a defense." *Crabhill at 444*. The Supreme Court in *Endicott* also repeatedly refers to the last employer's attempt to "invoke the exception of subsection 287.067.7." This language is wholly consistent with the requirement set forth in *Crabhill* that the last employer must raise or "invoke" this defense in order to avail itself of this exception. However, National Installers, Inc. was dismissed before hearing and, as such, this defense was not raised or litigated.

Even assuming that this defense was litigated, there is insufficient evidence to support a finding that claimant's work for his prior employer was "**the**" substantial contributing factor to his injury. The exceptions to the last exposure rule specifically requires a determination of causation with respect to claimant's last employer and his previous employer, i.e. which of the last two employers is the more responsible of the two potential contributing factors. *Mayfield v. Brown Shoe Co.*, 941 S.W.2d 31, 34 (Mo.App. 1997). In *Mayfield*, the court held that it is mandatory that the party who seeks to invoke this exception adduce expert medical testimony to support its defense. *Mayfield at 34-35*. Implicit in this requirement is the necessity of having medical expert analyze factors such as the nature, duration and affect of the competing exposures and provide an opinion as to which of the employments is the more responsible of the two contributing factors. *Mayfield at 36*. Claimant did have Dr. Poetz analyze and compare the affects of claimant's exposure with each of the employers. He concluded that exposure at Thoms Contracting involving constant hammer drilling while installing shelving at Lowe's in December of 2000 was the most substantial exposure. He specifically stated that claimant's employment at Midwest Woodworking & Fixture, Inc. was not a substantial factor in the cause of his bilateral carpal tunnel syndrome. [Exhibit J, pg. 23]. He also stated claimant's work at Wise Installations for 8 days would have less of an affect on his condition. [Exhibit J, pg. 29]. Dr. Rotman also compared exposure with these 4 employers and concluded that exposure while working for Thoms Contracting in December of 2000 was the most significant exposure to repetitive trauma that claimant received. [Exhibit 1, pg. 16].

However, Section 287.067.7 does not allow the ALJ or Commission to look to **all** prior employers in determining the substantial contributing factor when the last employer exposed the employee to the hazards of the repetitive trauma for less than 3 months. *Owens v. Norb Hackmann, Inc.*, 979 S.W.2d 941 (Mo.App. E.D. 1998). In *Owens*, the claimant, a drywall worker, worked for the last employer for less than 3 months before filing his claim for compensation. The Commission found claimant's immediate prior employer, Wies Drywall & Construction, to be the liable employer pursuant to the application of Section 287.067.7. Wies attempted to argue on appeal that the statutory language "a prior employer" compels the ALJ to look to all prior employers in determining the substantial contributing factor issue. The appellate court held that the employer's interpretation of Section 287.067.7 was "neither reasonable nor logical," as it cannot be "assume[d] that the legislature intended to open the issue of causation to all the employers who exposed the claimant to the hazard prior to the

filing a claim when the last exposure was for less than 3 months." *Owens at 944.*

Although the evidence may support a finding that exposure at Thoms Contracting was more substantial than at National Installers, Inc., such evidence is irrelevant according to *Owens v. Norb Hackmann, Inc., supra*. The only relevant analysis is a comparison of the exposures at National Installers, Inc. and the immediate prior employer, Wise Installation, Inc. There is nothing in the record to support a finding that exposure at Wise Installation, Inc. was more substantial or the more responsible of the two potential contributing factors. Both employments involve the same type of work over a short period of time. Additionally, there is no medical opinion suggesting exposure at National Installers, Inc was more substantial.

Based on substantial and competent evidence and the application of the last exposure rule, I find claimant was last exposed to the hazard of this occupational disease prior to the filing of the Claim for Compensation while working for National Installers, Inc. National Installers, Inc. was dismissed as a party to this claim at the time of Hearing. Even though this exposure occurred after claimant's surgery, the last exposure rule is a "bright line test" and relative causation is not a factor. National Installers was not present at hearing to raise a defense under Section 287.067.7 in order to shift liability to the immediate prior employer. Even so, there was no evidence presented at hearing to support such a defense. According to the statutory construction, the three remaining employers have no liability for claimant's injuries since they are not a "prior employer" under the exception to the last exposure rule for purposes of shifting liability from the last employer to a "prior employer" in repetitive trauma cases.

Date: _____

Made by: _____

William L. Newcomb
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary Estenson
Acting Director
Division of Workers' Compensation