

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

Injury No.: 02-125539

Employee: Craig Dexter
Employer: Mehlville Fire Protection District
Insurer: Self-Insured
Date of Accident: June 11, 2002
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 9, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued May 9, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two

members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

William F. Ringer, Chairman

AWARD

Employee:	Craig Dexter	Injury No. 02-125539
Dependents:	N/A	Before the
Employer:	Mehlville Fire Protection District	Division of Workers'
Additional Party:	None	Compensation
Insurer:	Self-insured	Department of Labor and Industrial
Hearing Date:	February 9, 10, 21 and 24, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

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? No
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
N/A
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Craig Dexter

Injury No. 02-125539

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$1,300.00
- 19. Weekly compensation rate: \$628.90 TTD/ \$329.42 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

22. Second Injury Fund liability: N/A None

TOTAL: None

23. Future requirements awarded: None

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Craig Dexter

Injury No. 02-125539

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Mehlville Fire Protection District

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: None

Insurer: Self-Insured

Checked by: JHP

A hearing in this proceeding was held on February 9, 10, 21 and 24, 2006. All parties submitted proposed awards on March 27, 2006.

STIPULATIONS

The parties stipulated that on or about June 11, 2002:

- 1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
- 2. the employer's liability, if any, was self-insured;
- 3. the employee's average weekly wage was \$1,300.00;

4. the rate of compensation for temporary total disability was \$628.90 and the rate of compensation for permanent partial disability was 329.42; and
5. the employee incurred \$4000.52 in bills for reasonable and necessary medical treatment for his left elbow, which charges were fair and reasonable.

The parties further stipulated that:

1. the employer had notice of the alleged occupational disease and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer has not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant was exposed to an occupational disease due to repetitive trauma affecting his left elbow which arose out of and in the course of claimant's employment in June of 2002
2. if the employee was exposed to an occupational disease by his work-related activities, whether he sustained an injury as a result of the occupational disease exposure;
3. whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which he may have incurred in obtaining treatment for his alleged occupational disease; and
4. if the employee sustained a compensable injury, whether and to what extent employee sustained any permanent partial disability which would entitle him to an award of compensation.

OCCUPATIONAL DISEASE

There is no dispute that claimant developed cubital tunnel syndrome in his left elbow in June of 2002. Employee claims that he developed that condition as a result of the use of his left elbow in performing his duties as a firefighter for the Mehlville Fire Protection District. Employer denies that employee's firefighter/paramedic duties at the Mehlville Fire Protection District were a substantial factor in causing his left cubital tunnel syndrome

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It defines occupational disease as:

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. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability."^[1]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section

287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance. In repetitive motion cases,^[21] as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally induced diseases also sometimes occur in the public at large, the courts have focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (2000). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Brufat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Work Activities at Mehlville Fire Protection District

Craig Dexter, claimant herein, was employed by the Mehlville Fire Protection District on April 16, 1997. After completing his probationary period, he was promoted to the rank of swing fire private. As a swing fire private, claimant worked on a rotating basis at all of the seven fire stations in the Mehlville Fire Protection District. Claimant worked as a swing fire private until 2001, when he again earned a promotion.

Employee averaged ten days of work per month for the Mehlville Fire Protection District. He followed a schedule of one 24 hour day on duty, one 24 hour day off duty, one 24 hour day on duty, two 24 hour days off duty, one 24 hour day on duty, one 24 hour day off duty, one 24 hour day on duty and four 24 hour days off duty.

From 1999 through 2004 claimant also worked as a paramedic for Abbott Ambulance. He worked four 8 to 10 hour days per month. At Abbott Ambulance claimant washed the ambulances, responded to emergency calls and transported patients.

Mr. Dexter's duties for the Mehlville Fire Protection District fell into three categories: (1) household chores, (2) equipment maintenance and training, and (3) responding to emergency medical service and fire suppression calls.

At the Mehlville Fire Protection District, claimant performed household chores each day he worked. He swept the floors and cleaned the bathrooms. He picked up litter from the household areas and took out the trash. He also washed the fire-trucks and hosed down the engine bays as needed. Performing the household chores usually required two to three hours. He usually spent 30 minutes cleaning the bathroom, 15 to 20 minutes cleaning the dayroom, 15 minutes cleaning the kitchen, and 15 minutes picking up trash around the firehouse. No one watched Mr. Dexter perform these duties. Claimant took his time to perform each task correctly. When claimant was off duty, a different fireman performed these daily chores.

Routine maintenance at the stationhouses followed a prescribed schedule. On Monday the components under the truck were checked and maintained and all fluids were filled. On Tuesday all self-contained breathing apparatuses for fire fighters and EMS personnel were inspected. Wednesday was ladder day; all ground ladders were removed from the trucks, cleaned, and inspected for wear. On Thursday the grass was cut and the lawn was trimmed and the hoses were removed from the hose tower. On Friday firehouse windows were washed. On Saturday an inventory was taken of equipment (saws and fans) on the trucks, the fluid levels were checked and all equipment was run. No duties were scheduled on Sunday.

In connection with his job claimant used the Jaws of Life which weighed 65 pounds, a fan which weighed between 45 and 50 pounds, and chain saws which weighed 15 and 25 pounds. To start the motors on these pieces of equipment, claimant pulled the starter cord with his right hand and held the particular tool with his left hand. In checking the tools he let the chain saws run for two or three minutes with his left arm in a flexed position and held the Jaws of Life that way for three to five minutes. Claimant used the Jaws of Life on about one emergency call per month.

Training usually occurred daily, covering one aspect of the skills necessary for the job, such as using ladders or hoses. The type of training changed each day and was usually not repeated for a week.

Once a week claimant practiced using the firehouse. This exercise which lasted by an hour entailed grabbing the nozzle of a fire hose, at times consisting of two sections or "pre-connects" totaling 350 feet, and pulling it off a fire-truck, then clamping the hose under the right arm and holding the nozzle in the left, while bracing for water to spray forth. In pulling the hose off the truck, employee placed the hose over his right shoulder and pulled with his left arm with his left elbow in a flexed position.

On returning to the fire station from a fire call, wet hoses were hung up on a hose tower to dry so they did not mildew. In hanging the hose claimant used both hands and arms equally.

Claimant wore firefighting gear for fire alarm calls and a motor vehicle accidents when there was a risk of fire or the presence of hazardous materials. His pants weighed 15 to 20 pounds, his coat weighed 15 pounds, his helmet weighed 6 pounds, and his boots weighed 3 pounds each. The breathing apparatus weighed thirty pounds. Claimant used both hands equally in putting his firefighting gear on. On the vast majority of the emergency calls claimant wore his street clothes.

The Abbott Ambulance's stretchers weighed 70 pounds and ran on four wheels. Two Abbott Ambulance personnel responded to each emergency call. Claimant and his partner carried a stretcher when presented with obstacles, over uneven terrain or when faced with entrances that were not handicapped accessible. In a situation where an exceptionally large patient

needed transport, a third person, from a hospital or nursing home, would assist. When carrying a stretcher whether for Abbott Ambulance or the Mehlville Fire Protection District, claimant used both hands with both elbows in a flexed position.

Between May 2001 and July 2002, a period of 15 months, claimant responded to a total of 228 emergency calls for the Mehlville Fire Protection District, 117 of which were emergency medical service calls and 25 of which were for car or structural fires. (Employer's Exhibit 2) During that same period, claimant went on 135 runs for Abbott Ambulance Service, 15 of which the patient either did not require or refused transport. (Employer's Exhibit 1)

Medical Treatment

Claimant first noticed tingling and numbness in the fourth and fifth fingers of his left hand and on the bottom of the palm on that hand, on a Thursday in May of 2002, after cutting, edging and blowing the grass, while on his way to get fuel from the Six House Fire Station in the Mehlville Fire Protection District. Claimant distinctly recalled the onset of his symptoms because he described them to his friend, Tom White, who told him he knew a friend with identical symptoms who later was diagnosed with ALS.

Dr. James Compton examined claimant on June 7 and ordered an EMG and nerve conduction study. (Claimant's Exhibit A, Page 1) Dr. Ling Xu performed the electrodiagnostic studies on June 13, 2002. The study results were abnormal due to ulnar motor demyelinating neuropathy across the left elbow and mild median neuropathy at or distal to the left wrist. (Claimant's Exhibit A, Pages 2-3) Dr. Compton referred claimant to Dr. Paul Young, a neurosurgeon.

On June 31, 2002, Dr. Young examined claimant and reviewed the EMG and nerve conduction study. He noted a positive Tinel's sign at the left elbow and recommended a steroid injection and therapy. (Claimant's Exhibit A, Page 4)

Dr. Susan MacKinnon, a hand surgeon at Washington University School of Medicine, examined claimant on October 22, 2002. She diagnosed a significant left cubital tunnel syndrome and scheduled him for surgery. (Claimant's Exhibit D, Page 2) On October 28, 2002 Dr. MacKinnon performed an anterior submuscular transposition of the ulnar nerve at the left elbow. (Claimant's Exhibit d, Pages 7-8) She noted "marked hyperemia over the medial epicondyle and pseudoneuroma on the ulnar nerve and marked compression of the ulnar nerve." (Claimant's Exhibit D, Page 3)

Claimant attended postoperative physical therapy at SSM Rehabilitation Services from October 28, 2002 through January 13, 2003. (Claimant's Exhibit E) At the conclusion of treatment the therapist found normal range of motion of the left elbow and almost normal strength. She noted that his grip strength improved over the course of treatment. (Claimant's Exhibit E, Page 21) Dr. MacKinnon discharged claimant from treatment on January 16, 2003. She noted that his pinch and grip strength were 27 lbs. and 115 lbs. on the right side and 20 lbs. and 84 lbs. on the left side. (Claimant's Exhibit D, Page 6)

Medical Opinions

Dr. Bruce Schlafly testified by deposition on behalf of claimant on December 8, 2005. He examined claimant on June 15, 2005 and reviewed the medical treatment records. Claimant told Dr. Schlafly that he worked as a fulltime paramedic and firefighter for the Mehlville Fire Protection District for eight of nine years. He averaged ten 24-hour shifts per month. Claimant told Dr. Schlafly that he spent much of his time making emergency calls as a paramedic. His job required him to lift and move patients by stretcher. Mr. Dexter indicated that this was difficult because he had to maneuver patients on steps and lift and carrier them through awkward spots. He described performing routine duties such as keeping and maintaining the equipment hoses and tools in good working order and cutting the grass. He told Dr. Schlafly that he noticed pain, numbness, and tingling along the left hand and elbow while holding the "Jaws of Life", which weighed 70 to 80 pounds, with his left arm and operating the trigger with the right hand. He told Dr. Schlafly that in the summer of 2002, he began to notice a lot of numbness along the ulnar side of his left hand while cutting grass at work. (Claimant's Exhibits F, Pages 1-2 and H, Pages 24-26, 31-32, & 74)

Dr. Schlafly opined, based upon the information he had concerning Mr. Dexter's work and the development of his cubital tunnel syndrome, that claimant's work as a fireman for the Mehlville Fire Protection District was the substantial factor in causing claimant's left cubital tunnel syndrome. (Claimant's Exhibit H, Page 23) Dr. Schlafly testified that this ulnar nerve injury can result from a combination of a stretch to the nerve as well as repetitive muscle activity in the area of the nerve at the elbow, which generates swelling, or fibrosis or mild adhesions that gradually lead to loss of the normal gliding of the nerve at the elbow as the elbow moves back and forth. (Claimant's Exhibit H, Page 33) He testified that a single incident can cause the beginning of cubital tunnel syndrome that does not heal on its own. (Claimant's Exhibit H, Page 34) Dr. Schlafly indicated that whether or how far this condition develops can be a function of the physical characteristics of the

individual patient, whether there are adequate periods of rest, or whether there is periodic trauma or friction that “keeps the problem going.” (Claimant's Exhibit H, Pages 34-35) Dr. Schlafly indicated that cubital tunnel syndrome can begin with a single stressful incident to the tissues of the elbow. He agreed that various stresses and vibration exposure to the upper extremity can aggravate cubital tunnel syndrome. (Claimant's Exhibit H, Page 82) Gripping can cause cubital tunnel syndrome. He indicated that claimant described gripping activities with his employment as a firefighter. (Claimant's Exhibit H, Pages 83-84)

On cross examination Dr. Schlafly stated that the only activity which claimant described of using his nondominant left hand more than his dominant right hand was holding the “jaws of life”. He described holding the equipment with his left arm while operating the trigger with the right hand. (Claimant's Exhibit H, Pages 39-41)

Dr. Schlafly admitted that he was unaware of and did not consider the effect of any employment other than with Mehlville Fire Protection District in reaching his opinion on the cause of claimant’s cubital tunnel syndrome. (Claimant's Exhibit H, Pages 42 & 50-51)

Dr. Schlafly agreed that cubital tunnel syndrome is not always work related. He did not know the percentage of cases of idiopathic cubital tunnel syndrome. (Claimant's Exhibit H, Page 52)

Dr. Schlafly agreed that cubital tunnel syndrome can be caused by forceful flexion of the elbows. He did not ask employee about the extent to which his work for the Mehlville Fire Protection District required him to forcefully flex his elbows. Nor did he ask employee about forceful flexion activities in other employments. (Claimant's Exhibit H, Pages 53-54)

Dr. Schlafly agreed that one of the causes of cubital tunnel syndrome was leaning on the elbows. He did not ask employee whether he had a habit of leaning on his elbows. (Claimant's Exhibit H, Page 55)

Claimant told Dr. Schlafly that he spent much of his time working as a paramedic making emergency calls and that he made more calls per month as a paramedic than as a fire fighter. Dr. Schlafly did not recall asking Mr. Dexter how many calls he responded to per day as a paramedic or how much time he would spent on calls requiring a paramedic. (Claimant's Exhibit H, Pages 57-58)

Dr. Schlafly testified that Mr. Dexter did not correlate any particular activity while suppressing fires as the cause of his cubital tunnel syndrome. (Claimant's Exhibit H, Page 59)

Mr. Dexter told Dr. Schlafly that lifting and moving the patients was sometimes difficult and sometimes put a lot of stress on both of his arms. He did not tell Dr. Schlafly how often his work in transporting patients on a stretcher was difficult, whether once every ten days or once a month. (Claimant's Exhibit H, Pages 61-64) Dr. Schlafly acknowledged that he did not know how many times per months claimant carrier a patient on a stretcher. He assumed that the average carry would be no more than 15 minutes. (Claimant's Exhibit H, Pages 65-66)

Though Dr. Schlafly stated that cubital tunnel syndrome could be caused by a single awkward maneuver while carrying a patient on a stretcher, he acknowledged that claimant did not describe any particular instance of carrying a patient which he felt caused his left elbow problems. (Claimant's Exhibit H, Pages 66-67)

Dr. Schlafly did not know why claimant developed cubital tunnel syndrome in his nondominant arm instead of in his dominant arm. (Claimant's Exhibit H, Pages 67-68)

Dr. Schlafly knew that claimant performed equipment maintenance at the Mehlville Fire Protection District, but not how much time he spent per day or exactly what he did to maintain equipment. Dr. Schlafly also did not know whether claimant used his dominant or nondominant hand to maintain the equipment. Dr. Schlafly testified that Mr. Dexter did not correlate any particular aspect of his job as the cause of his cubital tunnel syndrome. (Claimant's Exhibit H, Pages 68-69)

Dr. Schlafly acknowledged that he did not have enough information to compare claimant’s risk of developing cubital tunnel syndrome from cutting the grass at Mehlville Fire Protection District with the risk of developing cubital tunnel syndrome from cutting his own lawn. (Claimant's Exhibit H, Page 71)

Dr. Schlafly testified that he could not attribute Mr. Dexter’s cubital tunnel syndrome to any one specific incident in using the “jaws of life”. He acknowledged that he did not know how often or how long Mr. Dexter used the “jaws of life”. (Claimant's Exhibit H, Page 75)

Dr. David Brown testified by deposition on behalf of employer on February 8, 2006. Dr. Brown has become familiar with the work of firefighters as he married into a family of firefighters. His father-in-law is the retired battalion chief for the St. Louis Fire Department and his brother-in-law is a captain in the St. Louis Fire Department. In addition, Dr. Brown has treated many firefighters for injuries over the years. (Employer's Exhibit 3, Page 7) Dr. Brown considers himself as an expert on cubital tunnel syndrome as it is one of the most common conditions which he treats. Dr. Brown testified that he could not recall ever treating another firefighter for cubital tunnel syndrome. He opined that it was not a diagnosis which he associates with the occupation of a firefighter. (Employer's Exhibit 3, Pages 9-10 & 23)

Dr. Brown examined Mr. Dexter on July 30, 2003. Claimant described his job activities. The description was consistent with Mr. Dexter's testimony at the hearing. Employee indicated that, in addition to his daily activities around the firehouse, he went on 2 to 3 EMS calls per day and about one fire suppression call per month. (Employer's Exhibit 3, depo ex. 2, p. 4) Dr. Brown indicated that the description was consistent with Dr. Brown's personal knowledge and the descriptions of firefighting job activities he has received from other firemen. (Employer's Exhibit 3, Page 8) He indicated that claimant worked ten 24 hour shifts per month. During each shift claimant spends eight hours sleeping unless he is called out on a job, one to two hours performing routine activities around the firehouse, and the rest of the time waiting for emergency calls. (Employer's Exhibit 3, Pages 43-44)

Based on Mr. Dexter's description of his job at the Mehlville Fire Protection District, Dr. Brown opined that claimant's job did not involve repetitive type of work or repetitive sustained elbow flexion throughout the day. He stated that the job of a firefighter is not an occupation that is associated with repetitive trauma disorders because it does not require repetitive type of activities. Based on claimant's description of his job as a firefighter and Dr. Brown's own understanding of the occupation, Dr. Brown opined that claimant's job as a firefighter would not be considered a substantial cause of his ulnar neuropathy of the left elbow. (Employer's Exhibit 3, depo. ex. 2, p. 5)

Dr. Brown testified that the recognized causes of cubital tunnel syndrome include traumatic injuries, such as an elbow fracture or a direct traumatic blow to the ulnar nerve, repetitive or sustained elbow flexion, and arthritis in the elbow. Repetitive or sustained elbow flexion puts increased pressure on the ulnar nerve. Osteophytes within the cubital tunnel decrease the space in the tunnel. He indicated that workforce cubital tunnel syndrome has been associated with activities which require sustained repetitive elbow flexion. He testified that holding the elbows in 90 degrees of flexion for a prolonged period of time decreased the space within the cubital tunnel and increases pressure on the ulnar nerve and can result in a compression neuropathy. He noted that the court reporter had her elbows in flexed position. (Employer's Exhibit 3, Pages 10-11) On cross examination Dr. Brown indicated that a severe stretch to the upper extremity could aggravate the ulnar nerve at the cubital tunnel and potentially cause symptoms. (Employer's Exhibit 3, Page 24)

Dr. Brown further opined that if claimant's job were repetitive enough to cause cubital tunnel syndrome, then it should occur in the dominant extremity or in both extremities rather than just in the nondominant extremity. (Employer's Exhibit 3, Pages 12 & 44)

Dr. Brown testified that he sees many patients with work-related cubital tunnel syndrome. They typically perform assembly-line type of work in which they repetitively flex and extend their elbows picking up parts off an assembly line throughout the day. He further stated that transcriptionists who hold their elbows in flexed positions throughout the day also develop work-related cubital tunnel syndrome.^[31] (Employer's Exhibit 3, Pages 12 & 25) He opined that driving an over-the-road truck is not an occupation which carries an increased risk of developing cubital tunnel syndrome. (Employer's Exhibit 3, Page 24) He indicated that tennis players develop epicondylitis rather than cubital tunnel syndrome. (Employer's Exhibit 3, Pages 25-26) He opined that mechanics and carpenters are at risk for developing cubital tunnel syndrome because of repeated, sustained elbow flexion. (Employer's Exhibit 3, Pages 27-28) He further testified that one of the risk factors for cubital tunnel syndrome is repeated or sustained elbow flexion without sufficient rest intervals between those activities. (Employer's Exhibit 3, Page 33) He indicated that epidemiological studies have identified certain occupations as carrying a higher risk of exposure to cubital tunnel syndrome. (Employer's Exhibit 3, Page 35)

Dr. Brown testified that he did not find any activity which claimant performed as a firefighter which would have been a substantial factor in causing his left cubital tunnel syndrome. He stated that he based his opinion on Mr. Dexter's own description of his job, Dr. Brown's experience in treating many firefighters and his personal experience with that occupation. (Employer's Exhibit 3, Pages 13 & 21) On cross examination Dr. Brown opined that the rest intervals for firefighters precludes its categorization as a repetitive type of job. The rest intervals allow the ulnar nerve to recover from the increased pressure which occurs during flexion of the elbow. He indicated that prolonged pressure in the cubital tunnel can result in inflammation and swelling around the nerve which can eventually turn into fibrosis and scarring around the nerve. The rest intervals allow the nerve to recover from the pressure. (Employer's Exhibit 3, Pages 28-30)

On cross examination Dr. Brown testified that he believed that claimant's left cubital tunnel syndrome was not work-related because (1) the occupation of a firefighter is not considered a repetitive type of occupation, (2) the job activities are performed intermittently with sufficient rest intervals between them, (3) the occupation of a firefighter is not an occupation which has been associated with an increased risk of cubital tunnel syndrome, and (4) claimant's cubital tunnel syndrome developed in his nondominant arm rather than in his dominant arm. (Employer's Exhibit 3, Pages 47-48) He indicated that claimant did not describe any unusual or different activities with his left arm. (Employer's Exhibit 3, Page 52) Dr. Brown further stated that claimant did not repeatedly flex his elbow throughout his workday. (Employer's Exhibit 3, Page 49) He testified that where the cause of cubital tunnel syndrome is repetitive or cumulative trauma, the symptoms develop gradually and where the cause is a traumatic injury to the elbow, the symptoms usually develop suddenly. (Employer's Exhibit 3, Page 51)

Dr. Brown acknowledged that he did not know the cause of Mr. Dexter's cubital tunnel syndrome. (Employer's Exhibit 3, Page 49)

Additional Findings

There was no evidence that the profession of firefighter/paramedic is associated with a greater risk of cubital tunnel syndrome compared with the general working population or with the nonworking population. No epidemiological studies were offered into evidence which suggested that certain professions carry a greater risk of cubital tunnel syndrome. Dr. Schlafly did not testify on the question of whether the profession of firefighter/paramedic is associated with an increased risk of cubital tunnel syndrome. Dr. Brown opined that while assembly line workers, mechanics, and carpenters are professions which carry a greater risk of cubital tunnel syndrome, over-the-road truck drivers, tennis players, and firefighters are professions which are not associated with an increased risk of cubital tunnel syndrome. Based on the evidence adduced, I find that firefighters do not have an increased risk of cubital tunnel syndrome.

Dr. Schlafly opined that claimant's employment activities of lifting and moving patients on a stretcher, performing equipment maintenance, cutting grass, and using the "jaws of life" and chain saws were a substantial factor in causing his left cubital tunnel syndrome in June of 2002. I previously found that claimant's actual performance of these activities consumed only two or three hours of a twenty-four hour shift. Claimant spent most of his time waiting in the firehouse for emergency/fire calls or sleeping. Dr. Schlafly was not aware of the frequency of these activities or of the length of time that each activity required.

Dr. Brown, who has treated many firefighters over the years and married into a family of firefighters has a vastly superior knowledge of how firefighter/paramedics spend their shifts. I find his opinions on causation far more persuasive than those of Dr. Schlafly. Dr. Brown testified that the activities were performed intermittently with sufficient rest intervals between them. I find that Dr. Brown had far greater knowledge of claimant's activities at the Mehlville Fire Protection District and that Dr. Brown's characterization of claimant's activities as intermittent with sufficient rest intervals is accurate. I further find that claimant engaged in only a couple of activities (holding the jaws of life and chain saws, lifting and carrying stretchers with patients,^[4] and pulling the fire hose off a fire truck) which placed any stress on the ulnar nerve at his left elbow and that he engaged in these activities infrequently and for short periods of time. I further find that activities which employee performed at the Mehlville Fire Protection District placed only occasional stress on the ulnar nerve at his left elbow. I further find that after engaging in the foregoing activities claimant had substantial periods of time when his left ulnar nerve was not under any stress.

Dr. Brown opined that if claimant's left cubital tunnel syndrome were caused by any repetitive activities which claimant performed at the Mehlville Fire Protection District, Mr. Dexter should have developed that condition in his right (dominant) arm or both arms rather than just in his left (nondominant) arm. I find that the only activities which placed any additional stress on employee's left elbow were holding the "jaws of life", which occurred about one time per month, and pulling the hose off the fire truck, which occurred about two or three times per month. Claimant performed those activities for only short periods of time. Consequently, I find this additional reason given by Dr. Brown in explaining his basis for opining that claimant's left cubital tunnel to not be work-related is persuasive.

While it is true that Dr. Brown did not identify the particular cause for the development of claimant's left cubital tunnel syndrome, that does not lead to the conclusion that this condition is work-related. Medical science does not have an explanation for why many medical conditions develop.

As I have found Dr. Brown's opinions on causation to be far more persuasive than those of Dr. Schlafly, I find that claimant's employment at the Mehlville Fire Protection District was not a substantial factor in causing his left cubital tunnel syndrome. The claim is therefore denied.

Date: _____

Made by: _____
JOHN HOWARD PERCY

Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee failed to meet the burden of proof regarding the contraction of an occupational disease.

The employee must prove by substantial and competent evidence that he has contracted an occupational disease and not an ordinary disease of life. *Kelly v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App. S. D. 1991). This involves showing that there was an exposure to the disease which was greater than or different from that which affects the public generally, and that there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. *Id.*; *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994).

Employee met his burden by establishing that he contracted an occupational disease, left cubital tunnel syndrome, and not an ordinary disease of life. He was able to demonstrate both that his exposure was greater than that which affects the public generally and that his work as a firefighter was linked to the contraction of the disease.

A single expert medical opinion will support a finding of compensability even where the causes of the occupational disease are indeterminate. *Kelley*, 1 S.W.3d at 48; *Dawson*, 885 S.W.2d at 716. Work conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. *Id.*

Through expert testimony, employee was able to establish that his work conditions were a major contributing factor to the disease. Dr. Schafly testified that employee's duties exposed him to the contraction of an occupational disease, specifically cubital tunnel syndrome. Dr. Schafly opined that a single incident can cause the beginning of cubital tunnel syndrome and various stresses can aggravate the condition. Dr. Schafly noted that employee testified to gripping which can cause cubital tunnel syndrome as well as being exposed to vibration to his upper extremities which can aggravate the condition.

Employee was also able to establish a link between the work conditions and the disease through competent expert testimony. Dr. Schafly testified that employee's job activities including lifting and moving patients, lawn care and equipment maintenance as well as using the "jaws of life" and chain saws were a substantial factor in employee's development of left cubital tunnel syndrome.

Additionally, the administrative law judge found that employee did perform a couple of activities (holding the jaws of life and chain saws, lifting and carrying stretchers with patients, and pulling the fire hose off a fire truck) which placed stress on the ulnar nerve at his left elbow. Therefore, the administrative law judge conceded that employee did perform activities as a firefighter that could lead to an increased risk of cubital tunnel syndrome.

Employee satisfied his burden through expert testimony provided by Dr. Schafly establishing work place exposure as well as a link between employee's left cubital tunnel syndrome and his employment. There was sufficient evidence to establish that his employment was a substantial factor in the development of his left cubital tunnel syndrome. Therefore, I find that there was exposure in the workplace sufficient to conclude that his work duties were capable of producing his resultant medical condition, left cubital tunnel syndrome.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

[1] Subsection 2 of Section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

[2] The 1993 addition of section 287.067.7, which modifies the last exposure rule with respect to occupational diseases due to repetitive motion, could be construed as a legislative recognition that injuries caused by repetitive activities may be viewed as due to an occupational disease.

[3] He also has patient with cubital tunnel syndrome who sustained a direct traumatic injury to the elbow at work. (Employer's Exhibit 3, Page 13)

[4] It also appears from the evidence that claimant probably transported more people by stretcher for Abbott Ambulance than he did for Mehlville Fire Protection District.