

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-137613

Employee: Theresa Garner
Employer: Friendship Village of South County
Insurer: American Home Assurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: November 11, 2004
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated December 11, 2006.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge John Howard Percy, issued December 11, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee:	Theresa Garner	Injury No.	04-137613
Dependents:	N/A	Before the	
Employer:	Friendship Village of South County	Division of Workers'	
Additional Party:	Second Injury Fund (left open)	Compensation	
Insurer:	American Home Assurance Company	Department of Labor and Industrial	
Hearing Date:	August 30, 2006	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JHP

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes – medical treatment
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: November 11, 2004
5. State location where accident occurred or occupational disease contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Repetitive use of hands as a housekeeper
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: both wrists
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? None
16. Value necessary medical aid not furnished by employer/insurer? None claimed

Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Friendship Village of South County	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund (left open)	Jefferson City, Missouri
Insurer:	American Home Assurance Company	Checked by: JHP

A hearing in this proceeding was held on August 30, 2006 pursuant to Employee's request for a temporary award as provided in Section 287.510 Mo. Rev. Stat. (2000). The hearing date was advanced on the docket pursuant to Employee's request made under the provisions of Section 287.450. Employee requested additional medical treatment. Both parties submitted proposed awards, the latter of which was received on September 29, 2006.

STIPULATIONS

The parties stipulated that on or about November 11, 2004:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by American Home Assurance Company;
3. the employee's average weekly wage was \$328.47; and
4. the rate of compensation for temporary total disability was \$218.98 and the rate of compensation for permanent partial disability was \$218.98.

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/insurer have not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant was exposed to carpal tunnel syndrome, an occupational disease due to repetitive trauma, affecting her both wrists which arose out of and in the course of claimant's employment in May of 2001;
2. if the employee was exposed to an occupational disease by her work-related activities, whether she developed bilateral carpal tunnel syndrome as a result of the occupational disease exposure; and
3. if the employee sustained a compensable injury, whether she should be provided with any further medical treatment.

OCCUPATIONAL DISEASE

Theresa Garner, employee herein, claims that she developed bilateral carpal tunnel syndrome, an occupational disease, as a result of the repetitive use of her hands in performing her duties as a housekeeper for Friendship Village of South County during the preceding seven years of her employment.

There is no dispute that Ms. Garner developed bilateral carpal tunnel syndrome, right greater than the left on or about November 11, 2004. Employee claims that she developed that condition as a result of the use of her hands in performing her activities at work. Employer/insurer deny that her carpal tunnel syndrome is a work-related condition.

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,^[2] 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*. [3]

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); Bruflat 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 her testimony, I find that she is a credible witness and that her testimony is generally credible. Based on the credible testimony of claimant, I make the following findings of fact.

Description of Employment

Employer operates a residential retirement community in the metropolitan south St. Louis County area. Theresa Garner has worked 40 hours per week as a member of the housekeeping staff for Employer since 1999. She remained employed on a full time basis with Employer as of the date of the Hearing.

Prior to working in her current position claimant worked as a housekeeper for a local hotel and in the dietician department for a local hospital.

Claimant cleans 30 residential living units per day. Her daily tasks include vacuuming, carpet cleaning, mopping and sweeping floors, dusting and wiping surfaces with disinfectant, emptying small trash containers, cleaning bathrooms and spray-cleaning windows. She squeezes disinfectant out of a bottle.

She spends one hour per day sweeping, 30-45 minutes per day vacuuming, and two hours per day mopping. She uses an upright vacuum which is not self-propelled. She pushes and pulls the vacuum mainly with her right hand. She mops mostly with her right hand, but also uses her left hand. She rinses the mop by putting it in a ringer which she closes by pushing down on a handle. She rinses the mop 3 times per room. She pushes a wheeled cart containing her cleaning supplies from room to room.

Claimant occasionally moves furniture as part of the cleaning process. For heavy furniture she obtains the assistance of another worker. Once a month employee spends four hours cleaning carpets with an electric carpet scrubber. She holds and squeezes the handle to operate the machine. Claimant job duties have remained substantially unchanged for the entire period of her employment with Employer. (Claimant's Testimony) ^[4]

Medical Treatment

Claimant began to experience tingling in the ring, long, index fingers and the thumb on her right hand in November 2004. She sought treatment from Dr. Christopher Abercrombie, her primary care physician, who recommended that she be evaluated by a specialist utilizing electrical diagnostic studies. (Claimant's Testimony)

Dr. Gary Myers performed a nerve conduction study on claimant's right upper extremity on November 12, 2004. The findings were consistent with right carpal tunnel syndrome. (Claimant's Exhibit A, depo ex 2)

Medical Opinions

Dr. Shawn Berkin testified by deposition on behalf of claimant on August 14, 2006. He examined claimant on October 5, 2005. He testified that claimant told him that her job involved

cleaning up to 30 rooms a day. She told him that she was constantly mopping floors, sweeping and vacuuming. She stated that she dusted and used cleaning rags to clean and disinfect beds. She constantly twisted her hands to squeeze out dirty fluid from cleaning rags. (Claimant's Exhibit Page 7)

Based on his physical examination, claimant's descriptions of her symptoms and the nerve conduction study, Dr. Berkin opined that claimant has bilateral carpal tunnel syndrome. He further opined that employee's complaints of pain, tenderness and numbness in her arms and hands was the result of the hand intensive activities performed during her employment for the past 7½ years as a housekeeper for Friendship Village. He further opined that this employment was a substantial factor in causing employee's bilateral carpal tunnel syndrome. (Claimant's Exhibit A, Pages 12-13)

On cross examination Dr. Berkin acknowledged that claimant's age of 50, her obesity, and being post-menopausal were risk factors for the development of carpal tunnel syndrome. However, he felt that they were not nearly as significant as her hand-intensive occupation. (Claimant's Exhibit A, Pages 21-22)

Dr. Henry Ollinger testified by deposition on behalf of Employer on June 29, 2006. He examined claimant on March 9, 2006. He testified that claimant told him that at the being of each workday claimant wipes the glass window and doors at the front entrance. She stated that the majority of her day involves cleaning 30 residents' rooms. Dr. Ollinger testified that claimant told him that she probably vacuumed or mopped an hour and a half a day. At 3 minutes per room, I find this statement by claimant to be inaccurate. She also cleans toilets, dusts, cleans mirrors, wipes window sills, and spot clears floor. Each day she spends 20 minutes mopping the dining room. (Employer/Insurer's Exhibit 1, Page 9)

Dr. Ollinger's clinical impressions were that claimant is post-operative menopausal from 1999, is morbidly obese and has bilateral thumb CMC joint primary osteoarthritis. He also concluded that employee suffers from bilateral carpal tunnel syndrome. (Employer/Insurer's Exhibit 1, Pages 12-13)

Dr. Ollinger opined that claimant's work-related activities as a member of Employer's housekeeping staff did

not involve elements of significant force, rapid repetition, awkward posture, contact stress, vibration, or cold temperature extremes so as to be a substantial factor in causing her carpal tunnel syndrome. He did not believe that her job was a substantial factor in her carpal tunnel syndrome. As an alternative explanation for the cause of claimant's condition, Dr. Ollinger identified several risk factors, including her female gender, age, weight, postmenopausal status, and primary osteoarthritis at the base of both of her thumbs as combining to have caused claimant's carpal tunnel syndrome. (Employer/Insurer's Exhibit 1, Pages 13-16 & 18) On cross examination he acknowledged that there was no evidence that claimant had ever received any treatment for her osteoarthritis. (Employer/Insurer's Exhibit 1, Pages 28-29)

On cross examination Dr. Ollinger opined that the task of wiping glass windows and doors was not hand-intensive labor, nor was cleaning toilets. He further opined that vacuuming and mopping for a total of 90 minutes spread throughout the day was also not hand-intensive labor. He stated that the wiping of mirrors and windows sills was not hand-intensive labor. (Employer/Insurer's Exhibit 1, Pages 23-25) Dr. Ollinger explained that the term "hand-intensive" requires more than just the use of one's hands; it involves forces. (Employer/Insurer's Exhibit 1, Pages 26-27)

Additional Findings

Claimant is 5'2" tall and weighs 175 pounds. She was 49 years old in November of 2004 when she experienced the onset of her carpal tunnel syndrome symptoms. (Claimant's Testimony)

In 1999 claimant underwent a hysterectomy and removal of both ovaries. She has not been on hormone replacement therapy. (Employer/Insurer's Exhibit 1, depo ex 2)

Claimant has never had any complaints or treatment for arthritis in her thumbs. (Claimant's Testimony)

While both physicians agreed that claimant had nonwork risk factors for carpal tunnel syndrome, they differed as to the effect which employee's work activities had on the development of her carpal tunnel syndrome. Having carefully reviewed the opinions of the two physicians, I find that the opinion of Dr. Berkin with respect to whether claimant's employment activities were a substantial factor in causing her bilateral carpal tunnel syndrome is more persuasive than the opinion of Dr. Ollinger. Dr. Ollinger conceded that mopping and vacuuming could be hand-intensive activities depending on the amount of such activities. Based on his assumption that claimant only performed 90 minutes of vacuuming and mopping per day, he opined that her vacuuming and mopping is not hand intensive. Based on claimant's credible testimony, I found that she spent 2 hours and 30 to 45 minutes per day vacuuming and mopping and that she spent 1 hour per day sweeping. Those activities require forceful grasping, squeezing, pushing and pulling movements of the hands for a total of 3 hours and 30 to 45 minutes per day. As Dr. Ollinger's conclusion was based on an incorrect assumption of the amount of mopping, vacuuming, and sweeping which claimant performed on a daily basis, I find his opinion as to its lack of hand-intensiveness as not persuasive. ^[5] As Dr. Berkin was not asked about his assumption concerning the amount of vacuuming, sweeping and sweeping which claimant performed on a daily basis, I have no basis on which to conclude that he assumed that they took significantly longer than 3 hours and 30-45 minutes per day.

Based on the credible opinion of Dr. Berkin, I find that claimant was exposed to carpal tunnel syndrome as a result of her duties as a housekeeper for Employer and that the performance of those duties during the 7 years of her employment was a substantial factor in causing her bilateral carpal tunnel syndrome.

ADDITIONAL MEDICAL CARE

Employee is requesting an award of additional medical care for her bilateral carpal tunnel syndrome.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984).

Conclusive evidence is not required. It is sufficient if claimant shows by reasonable probability that he or she is in need of additional medical treatment. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 394 (Mo. App. 1983). The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957).

Claimant's Testimony

Claimant testified that she continues to experience symptoms including pain, numbness and tingling in her both hands, with the right hand worse than the left hand.

Medical Opinions

Dr. Berkin recommended that claimant take anti-inflammatory medications to control her hand and arm pain and that she see a hand surgeon to evaluation her for surgical intervention. He also recommended additional electrical studies to determine if there has been any progression of her condition. (Claimant's Exhibit A, Pages 12-13)

Dr. Ollinger recommended that claimant undergo surgery on her right hand and that she have nerve conduction studies performed on her left hand. (Employer/Insurer's Exhibit 1, Page 21)

Additional Findings

Based on the credible opinions of both physicians, I find that claimant requires surgical treatment for her right carpal tunnel syndrome and that she requires electrodiagnostic studies of her left upper extremity to determine to the severity of her left carpal tunnel syndrome, and anti-inflammatories and other medication to relieve her pain. Employer/insurer are hereby ordered to provide the foregoing treatment and such other medical and surgical treatment as may reasonably be required ... to cure and relieve Ms. Garner from the effects of her work-related bilateral carpal tunnel syndrome.

Date: _____

Made by: _____

JOHN HOWARD PERCY

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret

Director

Division of Workers' Compensation

[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]

Prior to 1993 claimant had to prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 416 (Mo. App. 1988); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Estes v. Noranda Aluminum, Inc., 574 S.W.2d 34, 38 (Mo. App. 1978). However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299 (Mo. App. 1991); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795, 797-8 (Mo. App. 1987).

[4]

The accuracy of claimant's description of her work duties was confirmed by Judith A. Gibbs, the director of Housekeeping for Employer.

[5]

On the other hand, I find based on the opinions of Dr. Ollinger that the activities of dusting, cleaning of toilets, wiping of window, mirrors and other surfaces were not hand intensive.