

TEMPORARY AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 01-153936

Employee: Richard Johnston

Employer: Hussmann Corporation

Insurer: Ace USA/ESIS

Date of Accident: November 1, 2001

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. We have reviewed the evidence, read the briefs of the parties, and considered the entire record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated May 26, 2006.

I. Preliminary Matters

The stipulations of the parties, issues in dispute and summary of the evidence were accurately recounted in the May 26, 2006, award issued by Administrative Law Judge Kathleen M. Hart and will not be repeated by the Commission unless special emphasis necessitates. That award and decision is attached and incorporated to the extent it is not inconsistent with this temporary award.

The administrative law judge denied employee compensation for his injuries because employee failed to satisfy his burden of proof that his bilateral carpal tunnel syndrome was substantially caused by his work as a material handler. The administrative law judge then concluded that, based on her ruling above, the remaining issues were moot.

Employee filed an Application for Review with the Commission alleging the administrative law judge erred in that the administrative law judge incorrectly applied case law and the statutory law of section 287.020(2) and section 287.067(2), RSMo 2000, concerning whether or not employee had an occupational disease arising out of and in the course of his employment.

The Commission, as discussed below, finds that pursuant to the last exposure rule, employer was the last employer to expose employee to the hazard of the occupational disease of bilateral carpal tunnel syndrome, and therefore, is liable to employee for benefits. Consequently, the administrative law judge's denial of benefits to employee is reversed.

II. Findings of Fact

Employee is a 43 year-old male who worked as a material handler for employer from May 2000 until he was laid off in November 2001. He worked five days a week, in eight-hour shifts, with some occasional overtime. Employee's primary job duty was to fill orders of approximately 100 tickets each night. Each ticket consisted of orders for multiple parts. Employee would retrieve the parts to fill the orders on each ticket. By filling the orders, employee would handle approximately 1000 parts each night. The parts ranged in size from small nuts and bolts to parts that weighed between 50 and 60 pounds. Employee spent about seven-hours of each shift filling orders and one-hour using a forklift.

Prior to working for employer, employee worked as a landscaper for several years. Employee returned to this line of work some time after being laid off by employer and after he filed this claim. During his prior work in landscaping, employee used mowers, chainsaws and occasionally a weed eater.

Employee testified that he had a gradual onset of hand and wrist complaints starting around October 2001. He testified that he experienced numbness in his hands and that they would fall asleep and that he felt his right hand was worse than his left hand. Employee did not miss work during 2000 or 2001 due to hand complaints. Employee had never been treated for the above described hand complaints prior to working for employer.

Employee went to see his family physician, Dr. Ross, for his hand complaints on October 29, 2001. Dr. Ross referred employee to Dr. Albanna, a hand specialist. Dr. Albanna saw employee on November 16, 2001. Dr. Albanna diagnosed employee with bilateral carpal tunnel syndrome and recommended surgery. Employee spoke with his health insurance company about coverage for his injury. The insurance company denied employee's claim and informed him that his injury was a workers' compensation matter, and therefore, not covered by his policy. Employee then approached employer about his injury and his need for surgery. By this time, employee had already been laid off. Employer refused treatment and employee filed this claim.

Employee saw Dr. Schlafly on March 14, 2005. Dr. Schlafly's records indicate that employee performed a significant amount of repetitive work with his hands for employer. Dr. Schlafly diagnosed employee with bilateral carpal tunnel syndrome. Dr. Schlafly opined that since employee's symptoms appeared while he was working for employer, employee's repetitive work as a material handler for employer was the substantial and prevailing factor in causing his bilateral carpal tunnel syndrome. Dr. Schlafly recommended that employee have carpal tunnel release surgery performed to alleviate his bilateral carpal tunnel syndrome.

On May 9, 2005, employer sent employee to see Dr. Sudekum. Dr. Sudekum agreed that employee had bilateral carpal tunnel syndrome, but disagreed that employee's work for employer was a substantial causal factor. In his letter of November 23, 2005, Dr. Sudekum indicated that he felt employee's work for employer was only a minor precipitating or triggering factor in the causation of employee's bilateral carpal tunnel syndrome. He believed that employee's prior landscaping work, in conjunction with employee's history of smoking half a pack of cigarettes every day for the last twenty years, being moderately over weight and having prior injuries to his hands, were all risk factors to the development of employee's bilateral carpal tunnel syndrome. He noted that claimant's prior landscaping work involved the use of vibratory tools and heavy gripping and grasping of equipment.

III. Principles of Law

"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." Section 287.067 RSMo 2000. The employee must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. 1994). The employee bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999).

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The 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.

Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999) (citations omitted).

The Last Exposure Rule is applicable to this case. "Th[e] last exposure rule is not a rule of causation." *Endicott v. Display Technologies, Inc.*, 77 S.W.2d 612, 615 (Mo. banc 2002). "Rather, as the starting point, the last employer before the date of the claim is liable if that employer exposed the employee to the hazard of the occupational disease." *Id.*

The Last Exposure Rule is set forth in section 287.063 RSMo. as follows:

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 is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as set forth in subsection 7 of section 287.067, RSMo. ^[1]
2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.

Subsection 7 of section 287.067 RSMo. sets forth that:

7. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

IV. Conclusions of Law

The first issue is whether or not employee has a compensable occupational disease. There is competent and substantial evidence to show that employee's job duties as a material handler for employer, and his prior work as a landscaper, exposed him to the hazard of the occupational disease of bilateral carpal tunnel syndrome.

As a material handler, claimant was constantly using his hands to pick-up and grasp parts and pieces of varying sizes and weights for seven hours each night. The expert medical evidence proffered by employee, through the testimony of Dr. Schlafly, indicates that the repetitive work employee performed as a material handler was the substantial factor in causing his occupational disease. Additionally, in his November 23, 2005, report, Dr. Sudekum set forth his belief that employee's work as a material handler was a minor precipitating or triggering factor in the causation of employee's occupational disease. Based on these reports, it is clear that employee's and employer's doctors both believe that employee's work as a material handler exposed employee to the hazard of bilateral carpal tunnel syndrome.

As a landscaper, employee used tools and machinery that required heavy gripping and grasping with his hands. In his May 9, 2005, report, Dr. Sudekum set forth that he believed that employee's work as a landscaper, along with non-work related risk factors, were the primary and substantial causal factors of employee's occupational disease.

Based on both doctors' reports, it is reasonable to infer that employee was exposed to the hazard of bilateral carpal tunnel disease at both jobs and that his exposure to that hazard was greater than the exposure to the general public. Furthermore, it is apparent that there is a recognizable link between employee's work as a landscaper and material handler and his carpal tunnel syndrome. Therefore, employee has a compensable occupational disease.

Since employee's work as a material handler and prior work as landscaper both exposed him to the hazard of his occupational disease, we must next apply the last exposure rule to his claim. In applying the last exposure rule to this matter, it is employer's expert medical evidence that is of the greatest interest to the Commission. As set forth above, Dr. Sudekum's medical report clearly sets forth that employee's work for employer was a minor precipitating or triggering factor of the disease. His opinion supports a finding that employer exposed employee to the hazard of bilateral carpal tunnel syndrome. Since employer was the last employer to expose employee to the hazard of the occupational disease of bilateral carpal tunnel syndrome, it is presumptively liable for employee's compensation and causation is not an issue. *Jaycox v. General American Life Insurance Co.*, 992 S.W.2d 240, 245 (Mo.App. 1999). The 90-day rule, which could place liability on the prior employer, is not applicable here because employee worked for employer for approximately eighteen months prior to filing his claim.

Finally, the fact that employee no longer worked for employer at the time he filed his claim is not an issue. Employee had not begun working for another employer prior to filing this claim, and as such, liability did not shift from employer.

V. Conclusion

The competent and substantial evidence shows that employee worked for employer for approximately eighteen months and was laid off in November of 2001. Claimant filed this claim on January 10, 2002, before beginning employment with another employer. During both his prior work as a landscaper and last work as a material handler, employee was exposed to the hazard of bilateral carpal tunnel syndrome. Furthermore, there is a recognizable link between employee's repetitive use of his hands as a material handler and his bilateral carpal tunnel syndrome. Employee has shown by competent and substantial evidence that he has contracted an occupationally induced disease. Under the last exposure rule, employer is liable to employee for workers' compensation benefits for the occupational disease of bilateral carpal tunnel syndrome.

Accordingly, employee is entitled to workers' compensation benefits as provided by law including medical treatment necessary to cure and relieve him of the effects of his injury. The case is remanded to the Division of Workers' Compensation with the employer being responsible to provide workers' compensation benefits as appropriate pursuant to the provisions of the Workers' Compensation Act due to this compensable occupational disease.

Richard Fox, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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.

Given at Jefferson City, State of Missouri, this 15th day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Richard Johnston

Injury No.: 01-153936

Dependents: N/A

Before the

Division of Workers'

Employer: Hussmann Corporation

Compensation

Department of Labor and Industrial

Additional Party:

N/A Relations of Missouri

Jefferson City, Missouri

Insurer: Ace USA

Hearing Date: March 28, 2006

Checked by: KMH/tr

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: Alleged November 1, 2001
5. State location where accident occurred or occupational disease was contracted: Alleged St. Louis County
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? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant worked as a material handler.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged right and left wrists
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

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17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$506.80
19. Weekly compensation rate: \$337.88/329.42
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: NONE

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard Johnston

Injury No.: 01-153936

Dependents: N/A

Before the
Division of Workers'

Employer: Hussmann Corporation

Compensation

Department of Labor and Industrial

Additional Party: N/A

Relations of Missouri

Jefferson City, Missouri

Insurer: Ace USA

Checked by: KMH/tr

A hearing was held in the matter March 28, 2006. Richard Johnston (Claimant) was represented by Attorney Richard Fox. Hussmann Corporation (Employer) was represented by Attorney Todd Hilliker.

STIPLUATIONS

The parties stipulated to the following:

1. Claimant alleged that on or about November 1, 2001, he sustained an occupational disease arising out of and in the course of his employment with Employer.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law. Employer's liability was fully insured by Ace USA.
3. Employer had notice of the alleged injury and a claim for compensation was filed within the time prescribed by law.
4. Claimant's average weekly wage was \$506.80 giving him rates of \$337.88/\$329.42.
5. Employer has paid no benefits to date.

ISSUES

The issues to be resolved are as follows:

1. Whether Claimant sustained an occupational disease.
2. Whether the alleged occupational disease and need for treatment arose out of and in the course of employment.
3. Medical Causation.
4. Liability for future medical care.
5. Liability for future temporary total disability benefits.

FINDINGS OF FACT

Based on the competent and substantial evidence, I find:

1. Claimant is a 43 year-old male who worked as a Material Handler for Employer from May 2000 until he was laid off in November 2001. He worked 8-hour shifts, 5 days a week with occasional overtime.

2. Claimant testified his job was to fill orders for the assembly line. He filled about 100 tickets or orders per night and each ticket consisted of orders for multiple parts. He counted parts as he moved them and typically handled about a thousand parts per shift. Claimant dealt with a wide variety of parts. Some were as small as nuts and bolts and some weighed up to 50 or 60 pounds. He spent 7 hours of his shift separating these parts by hand and placing them on pallets to be delivered to the assembly lines. The other hour of his shift was spent driving these parts to the line by forklift.
3. Claimant and Employer each submitted a Job Summary Analysis for the Material Handler position. This describes the various categories of weights a material handler lifts, carries, pushes or pulls. This Job Summary Analysis was prepared well after Claimant filed his claim for compensation, but it appears consistent with Claimant's testimony regarding his job duties.
4. Prior to his work for Employer, Claimant worked in landscaping for several years and returned to this profession after leaving Employer. Claimant testified he used some mowers and chain saws and occasionally a "weed eater".
5. Claimant testified he had a gradual onset of hand and wrist complaints around October 2001. He had numbness in his hands and they "fell asleep". Claimant never had these problems before working for Employer and had no treatment before his work for Employer.
6. Claimant did not miss any time from work during 2000 or 2001 due to hand complaints.
7. Claimant went to his family doctor, Dr. Kenneth Ross, October 29, 2001. He told the doctor he had numbness and his hands were falling asleep. He felt his right hand was worse than his left. Dr. Ross referred Claimant to Dr. Albanna for tests.
8. Dr. Ross' records reflect a number of office visits prior to October 2001. None of these notes mention any hand complaints.
9. Dr. Albanna saw Claimant November 16, 2001. His records indicate Claimant had hand complaints for the past year. Dr. Albanna found the tests and physical exam were consistent with bilateral carpal tunnel syndrome and recommended surgery.
10. Claimant testified his insurance company denied coverage and said this should be a workers' compensation case.
11. Claimant then reported his injury to his supervisor, Rick Koster. Claimant had already been laid off at this point.
12. The next medical record in evidence is Dr. Schlafly's March 14, 2005 report. He indicated Claimant's work at Hussmann involved a lot of repetitive use of his hands. He repetitively gripped and lifted parts weighing up to 40 pounds. Dr. Schlafly opined Claimant's work at Hussmann was the substantial factor in causing his carpal tunnel syndrome and need for surgery because his symptoms appeared while performing repetitive work at Hussmann. Dr. Schlafly later reviewed Hussmann's job task analysis and reiterated his belief Claimant's work at Hussmann was the substantial and prevailing factor in causing the condition and need for treatment.
13. Employer sent Claimant to Dr. Sudekum who agreed Claimant has bilateral carpal tunnel syndrome and is in need of surgery. Dr. Sudekum opined Claimant's work at Employer was not a substantial causal factor in the development of his carpal tunnel syndrome. He noted Claimant's prior landscaping work involved the use of vibratory tools and heavy gripping and grasping of equipment. He also found Claimant's history of smoking ½ pack of cigarettes daily for the last 20 years, being moderately overweight and having multiple prior injuries to his hands are risk factors to the development of Claimant's disease. He opined Claimant's prior employment combined with his non-work related risk factors predispose him to peripheral neuropathies.
14. Dr. Sudekum later reviewed the job summary analysis and reported his opinion that Claimant's work for Employer was a minor precipitating or triggering factor in the causation of his carpal tunnel syndrome.

RULINGS OF LAW

Based on the competent and substantial evidence, I find:

There is no dispute Claimant has carpal tunnel syndrome and is in need of medical treatment. The experts disagree on whether Claimant's condition was caused by his duties as a material handler.

Chapter 287 provides an occupational disease is compensable if it is clearly work related. It is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. It is not compensable merely because work was a triggering or precipitating factor. §287.067(2) & §287.020(2) RSMo (2000).

Claimant has the burden of proving all essential elements of a claim, including causation. [*Decker v. Square D Co.*, 974 S.W.2d 667, 670 \(Mo.App. W.D.1998\)](#). The question of causation is one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence. [*Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 \(Mo.App. W.D.1999\)](#). The claimant bears the burden of proving a direct causal

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relationship between the conditions of his employment and the occupational disease. [*Id. Grime v. Altec Industries*](#) 83 SW3d 581, 583 Mo.App WD 2002 (overruled on other grounds).

I find Claimant has failed to sustain his burden of proof that his bilateral carpal tunnel syndrome was substantially caused by his work as a material handler. Dr. Schlafly concludes Claimant's condition was caused by his work for Employer simply because Claimant experienced the onset of symptoms during this work. He had little knowledge of Claimant's work conditions or duties and based his conclusion on Claimant's statement that "the work required a lot of repetitive use of his hands". He did not base his causation opinion on any specificity as to the work conditions allegedly causing the carpal tunnel syndrome.

Dr. Sudekum also did not have a copy of the job summary analysis when formulating his initial causation opinion. However, he noted Claimant's duties were to lift and move materials and this activity does not constitute a significant risk factor. He also considered Claimant's non-occupational risk factors in formulating his causation opinion. The job summary analysis and Claimant's testimony further support the conclusion that Claimant's work was sufficiently varied and did not involve the continuous heavy gripping and grasping that Dr. Sudekum finds is necessary to substantially cause Claimant's condition.

While Claimant testified credibly, the issue to be resolved requires expert medical opinions. I find Dr. Sudekum's opinion the most well reasoned and deny compensation.

All other issues raised for resolution are hereby rendered moot.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret

Director

Division of Workers' Compensation

[\[1\]](#) This was the language of the statute prior to the 2005 revision.