

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 05-132631

Employee: Peggy King
Employer: Dierberg's Markets, Inc.
Insurer: Self Insured c/o CCMO
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the entire record. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 13, 2009, by issuing a separate opinion allowing compensation in the above-captioned case.

The findings of fact were accurately recounted in the award of the administrative law judge and are adopted by the Commission.

The administrative law judge concluded that employee's work with employer for over ten years was the prevailing factor in the cause of her right wrist, hand, and forearm conditions. Thus, the administrative law judge awarded employee temporary total disability benefits, past medical expenses, permanent partial disability benefits, and disfigurement. We agree with the administrative law judge's conclusions, however, we disagree with the administrative law judge's disparaging comments directed at the employer's expert witness, Victor J. Zuccarello.

Mr. Zuccarello is an Ergonomics Specialist and testified on behalf of employer. The administrative law judge indicated in the award that Mr. Zuccarello's "opinion is worthless." The administrative law judge went on to state that Mr. Zuccarello's opinions "have no weight or authority and are a waste of time and money." The administrative law judge finally suggests that the mere "[u]se of [Mr. Zuccarello's] 'opinion' comes very close to, if in fact it does not actually constitute, fraud under § 287.128(6) and (7)."

These comments directed at Mr. Zuccarello are completely unnecessary and have no place in an administrative law judge's award. The administrative law judge's ultimate conclusion is that he finds Dr. Volarich's opinion more credible than the opinions of Dr. Ollinger and Mr. Zuccarello. We find, based on the entirety of the evidence, that this is an accurate conclusion and, therefore, affirm the award and decision of the administrative law judge. However, as stated above, we do not adopt the comments directed at Mr. Zuccarello and, therefore, deem it necessary to issue this separate opinion.

Employee: Peggy King

- 2 -

The Commission affirms and incorporates by reference the administrative law judge's award of benefits as stated in the Award issued November 13, 2009.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued November 13, 2009, is affirmed, and is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 5th day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Peggy King

CONCURRING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed without modification. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

John J. Hickey, Member

AWARD

Employee:	Peggy King	Injury No.: 05-132631
Dependents:	N/A	Before the
Employer:	Dierberg's Markets Inc.	Division of Workers'
Additional Party:	Second Injury Fund (open)	Compensation
Insurer:	Self Insured c/o CCMO	Department of Labor and Industrial
Hearing Date:	July 15, 2009	Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDV:cw

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: December 27, 2005
5. State location where accident occurred or occupational disease was 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 occurred or occupational disease contracted:
Developed right carpal tunnel syndrome working as a checker.
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: Right upper extremity
14. Nature and extent of any permanent disability: 17 1/2 % of right wrist
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

Employee: Peggy King

Injury No.: 05-132631

- 17. Employee's average weekly wages: \$523.85
- 18. Weekly compensation rate: \$349.25/\$349.25
- 19. Method wages computation: Agreed

COMPENSATION PAYABLE

- 20. Amount of compensation payable:

Unpaid medical expenses:	\$7,166.62
10 weeks of temporary total disability (or temporary partial disability)	\$3,492.50
30.625 weeks of permanent partial disability from Employer	\$10,695.78
Including 2 weeks for scarring	\$698.50

- 21. Second Injury Fund liability: Open

TOTAL: \$22,053.40

- 22. 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Ann Dalton

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Peggy King	Injury No: 05-132631
Dependents:	N/A	Before the
Employer:	Dierberg's Markets Inc.	Division of Workers'
Additional Party: Second Injury fund (open)		Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self Insured c/o CCMO	Checked by: MDV:cw

ISSUES PRESENTED

The issues presented for resolution are:

1. Occupational disease arising out of and in the course and scope of employment;
2. Liability for medical expense;
3. Liability for temporary total disability benefits from February 4, 2006 to February 25, 2006 and May 27, 2006 to June 24, 2006; and
4. The nature and extent of any permanent partial disability and disfigurement.

It was agreed that if the claim were determined to be compensable, the employer/insurer would pay \$7,166.62 in medical expense and \$2571.36 in temporary total disability benefits.

FINDINGS OF FACT

1. Claimant was born on July 21, 1948. She is 5'7" tall and weighs 165 pounds. She is right-hand dominant. Claimant worked for Dierberg's Markets, Inc. for ten years, 40 hours a week, beginning in September 1998. Her schedule varied from week to week, but she always worked Sunday and at least five days a week, with occasional overtime. She is not currently employed.
2. Claimant has smoked on and off for the past 40 years, smoking up to a pack and a half a day. She last smoked in January 2009.
3. Until the end of 2005, Claimant worked as a cashier, checking groceries about 42% of the time, at the courtesy counter about 49% of the time and monitored the U-scan about 9% of the time. Beginning in late 2005, the Claimant worked solely as a checker.
4. As a checker, the Claimant lifted items from the bottom of grocery carts and placed them on the belt using both hands. She picked up groceries from the conveyor belt with her right hand, transferring them over the scanner to her left hand. This required constant grabbing, flexion and twisting with her hands. Items such as fruits and

- vegetables required entry of a code using a ten key touch screen. The screen was heat or touch sensitive. Claimant used her right index finger to “punch” or tap the screen, which was sometimes difficult to use and often required multiple attempts. The screen sometimes had to be cleaned off so it would register heat or touch. In addition, while checking, Claimant sometimes also bagged the same groceries. As a checker, Claimant had to lift items off the bottom of the cart and place them onto the conveyor belt. She explained that she knew the codes for some heavier items and therefore did not have to lift all items from the bottom of the cart; however, it was mandatory to lift alcohol and charcoal. For regular items she would pick them up and slide them from her right hand to her left hand over the scanner. Ninety percent of the time she had a bagger bagging the groceries.
5. Almost every job duty as a checker required constant and repetitive use of the Claimant’s hands.
 6. At the courtesy counter, Claimant filled cashiers’ tills, which required gripping and counting money with her hands. With her hands, she also counted coupons, took payments for utility bills, sold lottery tickets, and processed returned milk bottles. Almost every job duty at the courtesy counter required constant and repetitive use of the Claimant’s hands.
 7. At the U-scan, Claimant helped customers if there was a problem scanning. She had to pull the bags out and “fluff” them. During any down time, the Claimant cleaned the stations using a spray bottle, which she squeezed with her right hand.
 8. As a trainer, the Claimant testified her job duties included showing the employee how to work the touch screen computer system and tapping all keys with the right index or middle finger. When in charge of the U-scan, the Claimant’s job duties included helping customers with the touch screen, cleaning the scanner with a spray bottle, fluffing the bags, punching numbers in for codes, all while watching a total of eight U-scanners.
 9. In December of 2005, the Claimant started having problems dropping things. She noticed numbness and tingling in her right hand, which radiated into her forearm. These symptoms increased after the Claimant started working solely as a checker. She went to her primary care physician, Dr. Nagel, for a cold and mentioned her hand. Her doctor diagnosed right carpal tunnel syndrome and gave her a brace.
 10. After reporting her condition to the employer, the Claimant was directed to Dr. Henry Ollinger regarding the numbness and tingling on the right side in the thumb, long, and ring finger of the right wrist. Dr. Ollinger diagnosed right carpal tunnel syndrome and deQuervain’s tenosynovitis, but opined that work was not the prevailing factor in the cause of the conditions. Instead, he cited Claimant’s gender and smoking history as “risk” factors. Subsequently, the employer denied workers’ compensation benefits therefore the Claimant sought treatment on her own.
 11. Claimant first saw Dr. Dysarz. He provided injections. The injections did not provide relief so she went to Dr. Koo. Dr. Koo performed a right endoscopic carpal tunnel

- release, right flexor tenosynovectomy, and 1st dorsal compartment release on May 18, 2006.
12. Claimant bumped her right wrist in June or July of 2006 and developed a contusion and relapse of pain. Dr. Koo performed another surgery on February 15, 2007 to release the entrapped dorsal radial sensory nerve.
 13. Outside of work, Claimant bowled for three years on a league playing three games one time a week with a twelve-pound ball. Claimant has not bowled in a league for at least 20 years, but has bowled occasionally over the years. After her right wrist surgery, she gave up all bowling because she cannot grip the ball. Claimant had internet accessibility for three months in 2007 and at that time was subscribed on both Twitter and Facebook websites. Currently when she is on the computer, she is playing Solitaire or puzzles. The Claimant rarely uses the Internet.
 14. Post operatively, the Claimant experienced some improvement with the numbness and tingling in her hand, but she has continued to have pain in her right wrist that shoots from her thumb up into her forearm. She has lost grip strength and has trouble with opening jars and handling small items like buttons and coins. Driving causes the Claimant discomfort when she has to shift gears. She has difficulty pulling a full trash bag out of a trashcan and carrying it. She takes over-the-counter medication as needed for pain. She has discomfort with weather changes.
 15. Prior to 2005, Claimant had no injuries to her right hand, although she did have surgery to her right shoulder. The Claimant has had three right shoulder surgeries, the last after her right wrist surgery. These surgeries to her shoulder related to a prior non work related injury.
 16. The Southside Family Practice records reflect that the Claimant was seen on December 29, 2005, at which time she was experiencing right hand pain. She was given a cockup splint and some medication. An EMG was performed on January 26, 2006, noting right median neuropathy, compatible with carpal tunnel syndrome.
 17. The Claimant was referred to Dr. Dysarz on February 13, 2006. He diagnosed right carpal tunnel syndrome and right DeQuervain's disease and fitted her with a right thumb splint and gave her an injection into the right carpal tunnel.
 18. The Claimant was referred to Dr. Michelle Koo on May 10, 2006. At that time, the doctor recommended surgery and on May 18, 2006 performed right endoscopic carpal tunnel release and right wrist flexor tenosynovectomy. On her follow-up visit on July 31, 2006, Dr. Koo ordered physical therapy. On the Claimant's February 7, 2007 visit with Dr. Koo, she noted that she had a dorsal radial sensory nerve at the volar forearm under her brachioradialis that was entrapped. She underwent surgery for this on February 15, 2007 for release of her dorsal radial sensory nerve. The Claimant's last visit with Dr. Koo on April 18, 2007 notes that she was doing quite well and had no problems and was released on a prn basis.
 19. Dr. Ollinger evaluated Claimant in January of 2006 and March of 2008. He opined

- that her hand problems were not related to work, but that she has 4% permanent partial disability of the right wrist. He noted that she was a smoker and was on hormone replacement therapy for three years prior to stopping it three to four years ago. Dr. Ollinger noted that she became a full time employee at Dierberg's 6 ½ years prior to her initial appointment. He noted that based on the breakdown of her weekly hours she was on the U-scan about 9% of the time, the courtesy counter 49% of the time, and checking 42% of the time. Dr. Ollinger concluded that it was a combination of her life and medical risk factors, including her age, female gender and smoking that were the causes of her right carpal tunnel syndrome and right DeQuervain's tendonitis. He noted that those conditions may occur simultaneously or in close proximity in time in females in her age group. Dr. Ollinger re-evaluated the Claimant after her treatment was completed and saw her again on March 17, 2008. At that time, his causation opinion remained the same, and he noted that the second surgery performed by Dr. Koo on February 15, 2007 also had nothing to do with her employment.
20. Victor J. Zuccarello performed a job analysis at the request of the employer. During this evaluation, a video was taken of the Claimant on one day for about two hours. Of the two hours, about one hour showed the Claimant at the check-out lane and a little less than an hour was of the Claimant at the U-scan. There was about ten minutes of the Claimant working at the courtesy counter.
 21. Mr. Zuccarello testified that the Claimant's right hand problems were not work-related. However, Claimant reviewed the videotape prior to the hearing. She testified that Mr. Zuccarello based his analysis on observation of her checking, early on a morning, which was not a good representation of her typical work shift as a checker. She also stated that he viewed her on U-scan but did not recall any video at the courtesy counter.
 22. Mr. Zucarello is not an expert and his opinion is worthless. He is an Ergonomics Specialist, not trained in medical causation. Mr. Zuccarello videotaped Claimant and then counted her hand and finger movements. He then opines she did not move them hard enough or enough times to cause these occupational diseases. His observations are hearsay at best and are not the type of information relied upon by experts in the field of hand surgery or in medicine in general. There is no testimony that the studies he cites are generally accepted in the relevant medical community. His standards recite mere thresholds at which point ergonomic steps must be taken to avoid injury, not a threshold at which medical causation is either established or not established. His opinions have no weight or authority and are a waste of time and money. It is outrageous to present this testimony and for Zuccarello to opine Claimant had insufficient exposure to cause the carpal tunnel syndrome and De Quervain's (Ex. 2. P 9-12.) Use of his "opinion" comes very close to, if in fact it does not actually constitute, fraud under 287.128 (6) and (7).
 23. Even Dr. Ollinger's use of Zucarello's numbers is flawed. Neither expert points to any generally accepted scientific theory that mathematically equates keystrokes with carpal tunnel syndrome. This is junk science and has not been proven reliable.

24. Dr. Volarich evaluated the Claimant at her attorney's request. Dr. Volarich relied upon an accurate description of the Claimant's job duties. He opined that the Claimant's work was the prevailing factor in the cause of her hand and forearm problems. Dr. Volarich reported that she sustained 50% permanent partial disability of the right forearm as a result of her work-related conditions.
25. Disfigurement was viewed at the hearing. There were scars totaling about 2.5 inches.
26. Claimant was an extremely credible witness testifying in a direct and straightforward matter of fact manner maintaining eye contact with attorneys asking questions and displaying respect for all persons in the hearing room and for the process itself.
27. Dr. Ollinger's opinion was flawed, merely on hearsay and unproven science. That leaves Dr. Volarich's opinion as the only credible evidence on the issue of causation.

RULINGS OF LAW

1. On or about 12-27-05, Claimant sustained an occupational disease in her right hand, wrist, and forearm, which arose out and in the course of her employment.
2. Claimant's work at Dierberg's over ten years was the prevailing factor in the cause of her right wrist, hand and forearm conditions.
3. Claimant is entitled to temporary total disability benefits from February 4, 2006 to February 25, 2006 and May 27, 2006 to June 24, 2006 in the amount of \$2571.36.
4. Claimant is entitled to medical benefits for the treatment of her right upper extremity with Dr. Dysarz, and Dr. Koo in the amount of \$ 7,166.62.
5. Claimant sustained 17.5% permanent partial disability of the right forearm as a result of her work-related injuries. In addition, she is entitled to 2 weeks of disfigurement as a result of her scars.

DISCUSSION

Claimant spent a majority of her shifts using her hands and wrists in a repetitive manner and did so for ten years. I don't think that Mr. Zuccarello's determination, that the Claimant's work wasn't traumatically repetitive enough, is realistic.

The experts disagree on whether this disease can be caused as Claimant alleges. Dr. Volarich believes it can. Dr. Ollinger and Mr. Zuccarello believe that it cannot. I believe that there are studies going both ways on the issue of causation and that there is no definitive consensus in the medical community as to causation or a work link. I must look at the facts of each case individually. I am advised by the opinions of all experts. In taking into account their opinions, the result of the surgery, the conditions observed by the actual surgeon doing the surgery, Claimant's testimony and the repetitive nature of the job, I think the greater weight of the evidence tilts in Claimant's favor.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest: