

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

Injury No.: 07-030986

Employee: Teresa Kitchen
Employer: Mid-America Hotels Corporation
Insurer: Self-Insured c/o Claim Management Inc.
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 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 July 22, 2009.

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 Maureen Tilley, issued July 22, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: Teresa Kitchen
030986

Injury No. 07-

Dependents: N/A

Employer: Mid America Hotels Corporation

Additional Party: Second Injury Fund (left open)

Insurer: Self Insured. Third Party Administrator: Claim Management Inc.

Checked by: MT/kh

SUMMARY OF FINDINGS

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? March 22, 2007
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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: The employee developed carpal tunnel syndrome because of the hand intensive work she performed at Burger King.

Employee: Teresa Kitchen
030986

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12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right hand
14. Compensation paid-to date for temporary total disability: None
15. Value necessary medical aid paid to date by employer-insurer? \$2,045.84
16. Value necessary medical aid not furnished by employer-insurer? None
17. Employee's average weekly wage: \$439.95
18. Weekly compensation rate: \$293.30
19. Method wages computation: By agreement
20. Amount of compensation payable:

Unpaid medical expenses: N/A

Additional Medical Aid: See findings

This award is only temporary and partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

FINDINGS OF FACT AND RULINGS OF LAW

On May 6, 2009, the employee, Teresa Kitchen appeared in person and by her attorney, Timothy Ruddy, for a temporary or partial award. The employer-insurer was represented at the hearing by their attorney, Kenneth McManaman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Covered Employer: Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and the employer was self insured. The third party administrator is Claim Management Inc.
2. Covered employee: On or about the date of the alleged accident or occupational disease the employee was an employee of Mid America Hotels Corporation.
3. Notice: Employer had notice of employee's accident.
4. Average weekly wage and rate:
 - A. Average weekly wage: \$439.95
 - B. Rate for temporary total disability and permanent partial disability: \$293.30
5. Medical aid furnished by employer-insurer: \$2,045.84
6. Temporary disability paid by employer-insurer: None

ISSUES:

1. Occupational disease: Whether on or about March 22, 2007 the employee sustained an occupational disease arising out of and in the course of her employment.
2. Medical causation: Whether employee's injury was medically causally related to accident or occupational disease.
3. The employee is claiming additional or future medical aid.
4. Statute of Limitations: Whether employee's claim was filed within the time allowed by law.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of Dr. Bruce Schlafly

Employer-Insurer's Exhibits

1. Deposition of Teresa Kitchen, Employee
2. Deposition of Lisa M. Howe, OTR/L, who performed functional job analysis
3. Deposition of Dr. R. Evan Crandall, M.D.
4. Deposition of Dr. Bruce Schlafly, M.D.
5. Partial medical records of Med Stop One
6. DVD of Ergonomic Functional Job Analysis created by Lisa Howe, OTR/L

FINDINGS OF FACT:

Employee's testimony

- The employee stated that she has worked for Mid America Hotels (Burger King) for 25 years. She stated that in 2004-2005 she did not work for Mid America Hotels for 4-6 weeks. During that time she worked for the Lutheran Home 35 hours a week. She then worked at Rhodes 101 and took care of drive through traffic. She did this for four nights a week. She then went back to work at Burger King.
- The employee stated that she is now the breakfast manager and the assistant manager.
- The employee stated that she also does some house work on the side. She stated that for a year she did eight hours a week of house work on the side. However, since January of 2009, she has done four hours of housework on the side.
- The employee also currently cleans at Southeast Fabrication and Eagle Oil Company. She stated that when she cleans these places she is only there for 45 minutes. She stated that she dusts and vacuums with her left hand because her right hand hurts.
- The employee also stated that in 2004 she worked at Hyundai five nights a week. She stated that in 2005 she worked at Capaha Bank three nights a week. She stated that she had symptoms in her right hand back then but her daughter helped her clean.
- In the employee's deposition she stated that in 1995, when the symptoms began she thought she had arthritis in her right hand. At the hearing, the employee stated that in 2000, she thought she had arthritis in her hands. The employee also stated that in March 22, 2007, when she went to Med Stop One, she also thought she had arthritis in her right hand.
- The employee stated that she did not mention the problems with her right hand to her employer until 2007.
- The employee stated that her activities at Burger King before March 22, 2007 included: her going in at 5 A.M., turning the lights on, counting all of the drawers (six drawers with \$100 in each), making sure everything was entered properly in the books, making sure the restroom was clean, working at the food counter (99% of the time), taking orders, typing in amount of money given to her by customers and giving change back, taking trays to customers, and making an afternoon deposit after counting the drawers. The employee stated that she now takes orders on a touch screen and does not have to punch in orders like she previously had to.

- The employee stated that in 1995 she began experiencing difficulty when she was counting money. She stated that as time went on her hands got worse. She stated that she has constant pain down her right thumb to her palm and forefinger. She stated that her left hand hurts periodically.
- The employee stated that in 2000 she went to Med Stop One and was seen by Dr. Cova.
- The employee stated that in 2007 her employer's insurance carrier then had her go to Dr. Crandall.
- The employee stated that she eventually saw Dr. Schlafly. She stated that he diagnosed her with carpal tunnel syndrome. She stated that she is asking for treatment for her right hand.

Dr. Evan Crandall

- On April 4, 2007 the employee was examined by Dr. Evan Crandall, a plastic surgeon. The employee gave a verbal history of her job description.
- Dr. Crandall stated that the employee is a 46 year old female. He stated that she is 5'4" tall and weighs 206 pounds.
- Dr. Crandall stated that the on physical of the employee's upper right extremity, the employee has a negative ulnar Tinel's sign, a negative median Tinel's sign, a positive Phalen's test and a positive arm raise test. He stated that the employee has a positive provocative test and a negative Finkelstein test. He stated that the employee has no evidence of ganglions, trigger fingering or thenar muscle atrophy. He stated that the left upper extremity examination is unremarkable.
- Dr. Crandall stated that on April 4, 2007, the employee underwent a right nerve conduction study which demonstrated severe carpal tunnel syndrome.
- Dr. Crandall stated that the level of carpal tunnel syndrome is consistent with a five year history of carpal tunnel syndrome. He stated that the employee will need surgery in order to get better. He stated that the surgery can be done with the scope or the classic open technique with an anticipated good result. He stated that the employee could work light duty three days following surgery, full duty work at twenty-eight days, and final evaluation at six months.
- Dr. Crandall stated that based on the information he has received, he does not believe the employee's case is work-related. He stated that in order for work to be considered hand intensive and an ergonomic risk factor for carpal tunnel syndrome it needs to exceed OSHA guidelines for hand intensive activity. He stated that this would be the equivalent of repetitive movement every two to three seconds for over four hours per day. For keyboardists it takes over four hours of continuous typing per day which is around 60,000 keystrokes, or for lifting it takes over 10,000 pounds per day to satisfy OSHA and NIOSH criteria. He stated for carrying trays, the employee would need to carry approximately 1,000 to 2,000 trays per day to be considered an ergonomic lifting risk. He stated that counting the cash and reconciling the numbers for that would not take four hours of continuous typing or repetitive movement.
- Dr. Crandall stated that the employee's job does not appear to fit the criteria to be considered a risk factor for the cause of her carpal tunnel syndrome. He stated that the employee's medical risk factors would be the prevailing factor and not the work factors.

- Dr. Crandall stated that the employee has medical risk factors of high body mass index, age and female gender.
- Dr. Crandall stated that he wrote a secondary report on October 9, 2007. He stated that the employer ordered a functional job analysis to assess the ergonomic issues of the employee's position. He stated that the employer ordered an ergonomic specialist, Lisa Howe, to the job and they prepared a seven page report outlining the job's position, its functions, and the movements that are required in performing the job.
- Dr. Crandall stated that the functional job analysis was consistent with what the employee had described. He stated that the analysis described a light job that does not exceed safety levels that he previously described by OSHA or NIOSH. He stated that the analysis described a light duty position that he does not believe can damage the muscles, tendons or nerve of the arm.

Function Job Analysis

- On September 7, 2007, Lisa Howe, an occupational therapist, performed a functional job analysis of a restaurant assistant manager at the Burger King at 495 S. Mount Auburn Road in Cape Girardeau, Missouri.
- Ms. Howe observed an assistant manager named "Katrina" from 11:00 A.M. to 2:00 P.M.
- Ms. Howe concluded the physical demand level of a Restaurant Assistant Manager at Burger King most accurately reflects the light work level. The functional job analysis is contained in Employer-Insurer Exhibit 2.
- The employer-insurer also admitted a video of the job analysis. This is marked as Employer-Insurer's Exhibit 6. Upon reviewing the , I observed the employee wrapping sandwiches, preparing sandwiches, putting French fries in grease, counting money, and lifting bread trays. Although the employee did not have one specific task for a prolonged period of time, it appeared that the employee was constantly using her hands.

Dr. Bruce Schlafly

- On August 17, 2007, the employee was examined by Dr. Bruce Schlafly, an orthopedic surgeon. He reviewed the employee's medical records, took an oral history from the employee, and examined the employee.
- Dr. Schlafly stated that the employee told him that her job at Burger King requires a lot of use of her hands. She told him that she counts out all of the money by hand, takes orders from customers and enter the orders on the computer terminal, and carries trays to customers. He stated that she told him that she uses her right hand more than her left. He also stated that over the past two years the employee has had cleaning jobs where she works three to six hours a week.
- Dr. Schlafly stated that the employee does not recall any fractures at her wrists.
- Dr. Schlafly stated that the physical exam revealed that the employee is five feet four inches tall and weighs 202 pounds. He stated that she has good range of motion in both hands. He stated that there is no obvious swelling or deformity in her hands, although there is a suggestion of some decreased bulk of the right thenar muscles. He stated that the employee has good circulation to the fingers and good radial artery pulse at each wrist, in addition to

good flexion and extension of the digits of her hands, and good range of motion at her wrists, forearms, and elbows. He stated that deep tendon reflexes measure 3+ and equal the biceps, triceps, and brachioradialis. He stated that she does demonstrate good thenar and first dorsal interossei muscle function in both hands.

- Dr. Schlafly stated that the employee's grip strength measures 56 pounds in the right hand compared to 42 pounds in the left hand, with repeat testing giving 51 pounds in the right hand compared to 50 pounds in the left hand, and a third trial of testing giving 43 pounds in the right hand compared to 40 pounds in the left hand. He also stated that the employee has a positive Phalen's test for carpal tunnel syndrome at the right wrist, but the test is negative at the left wrist. He stated that the employee has a markedly positive Tinel's sign at the median nerve of the right wrist, and there is a mildly positive Tinel's sign at the median nerve at the left wrist.
- Dr. Schlafly stated that the employee described a pinwheel sensation that is equivalent in the left index and small fingers. He stated that in the right hand, the employee describes sensitivity to the pinwheel in the right index finger.
- Dr. Schlafly stated that his primary diagnosis for the employee is right carpal tunnel syndrome. He stated that he recommend right carpal tunnel release. He stated that the employee may have a mild left carpal tunnel syndrome. He stated that after a right carpal tunnel release, the employee can be evaluated for the need for treatment for the left hand.
- Dr. Schlafly stated that it is his opinion that the employee's repetitive work with her right hand at the Burger King restaurant is the substantial and prevailing factor in the cause of her right carpal tunnel syndrome, and in the need for right carpal tunnel release. He stated by her history, her work duties at Burger King are considerably more hand intensive for her right hand than her left hand at this time. He stated that he is withholding judgment concerning the cause of her left carpal tunnel syndrome, which appeared to be mild. He stated that as the employee continues employment with severe right carpal tunnel syndrome, it is probable that there is an increased demand placed upon her left hand, as she compensates for decreased function in the right hand. He stated that increased usage of the left hand will probably aggravate what appears to be a mild left carpal tunnel syndrome.

APPLICABLE LAW:

- The burden is on the employee to prove all material elements of the employee's claim. *Melvis v Morris*, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only the employee sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and the injuries and the medical treatment for which the employee is seeking compensation. *Griggs v A.B. Chance Company*, 503 S.W.2d 697(Mo.App.1973).
- Under Mo. Rev. Stat. §287.140.1 "the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."
- An employee carries the burden to show that there is "reasonable probability" that she will require additional medical treatment related to the work injury for future or additional

- medical care to be awarded. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). “Probable means that it is founded on reason and experience which inclines the mind to believe but leaves room for doubt.” *Id.*
- Future medical treatment may include treatment that gives comfort or relieves symptoms even though a cure is beyond avail. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003). If a work injury requires a claimant to live with pain and discomfort, it follows that additional and future medical treatment may be required to relieve those symptoms. *Williams v. City of Ava*, 982 S.W.2d 307, 312 (Mo. App. S.D. 1998).
 - The employer waives the right to select the treating physician by failing or neglecting to provide necessary medical aid. See *Herring v. Yellow Freight System*, 914 S.W.2d 816 (Mo. App. 1995) and *Banks v. Springfield Park Care Center*, 981 S.W.2d 161 (Mo. App. 1998).
 - §287.067.1 defines “occupational disease” 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 diseases 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.
 - §287.067.2 states that an injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The “prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.
 - §287.063.3 states that the statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent than an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

RULINGS OF LAW:

Issue 1. Occupational disease and Issue 2. Medical causation

On March 22, 2007, the employee went to Med Stop One because of the pain in her right hand. The employee stated that she has constant pain down her right thumb to her palm and forefinger. The employee stated that her activities at Burger King before March 22, 2007 included: her going in at 5 A.M., turning the lights on, counting all of the drawers (six drawers with \$100 in each), making sure everything was entered properly in the books, making sure the restroom was clean, working at the food counter (99% of the time), taking orders, typing in amount of money given to her by customers and giving change back, taking trays to customers, and making an afternoon deposit after counting the drawers. The employee stated that she now takes orders on a touch screen and does not have to punch in orders like she previously had to.

Lisa Howe, an occupational therapist, performed a functional job analysis of a restaurant assistant manager at the Burger King where the employee works. Ms. Howe found that the physical demand of this job reflects a light work level. However, upon review of Employer-Insurer's Exhibit 6, a DVD of the job analysis, I found that the job was hand intensive. Katrina, the restaurant assistant manager that was filmed, appeared to be constantly moving her hands. This included making and wrapping sandwiches and counting money.

Dr. Crandall and Dr. Schlafly both examined the employee and gave opinion regarding the causation of the employee's right carpal tunnel syndrome.

Dr. Crandall stated that the employee's job does not appear to fit the criteria to be considered a risk factor for the cause of her carpal tunnel syndrome. He stated that the employee's medical risk factors would be the prevailing factor and not the work factors. Dr. Crandall stated that the employee has medical risk factors of high body mass index, age and female gender. Dr. Crandall also stated that the functional job analysis was consistent with what the employee had described. He stated that the analysis described a light duty position that he does not believe can damage the muscles, tendons or nerve of the arm.

Dr. Schlafly stated that it is his opinion that the employee's repetitive work with her right hand at the Burger King restaurant is the substantial and prevailing factor in the cause of her right carpal tunnel syndrome, and in the need for right carpal tunnel release. He stated by her history, her work duties at Burger King are considerably more hand intensive for her right hand than her left hand at this time.

After reviewing all of the evidence, I find that Dr. Schlafly's opinion regarding causation of the employee's right carpal tunnel syndrome is more credible than Dr. Crandall's opinion. I find that the employee sustained an occupational disease that arose out of and in the course of her employment at Burger King (Midamerica Hotels Corporation). I find that the employee's occupational disease of right carpal tunnel syndrome "flowed" from the source of her employment at Burger King as "rational consequence" of her employment. The employee's job at Burger King was hand intensive and required repetitive work with the employee's hands. I further find that the employee's job at Burger King was the prevailing factor in the employee's carpal tunnel syndrome. The employee had some minor jobs other than Burger King; however the employee worked over 40 hours a week at Burger King in a hand intensive job. From viewing the DVD of the job analysis, it is obvious that the employee was constantly moving her hands while she was working. Therefore I find that the employee's job at Burger King was medically causally related to her right carpal tunnel syndrome.

Issue 3. Claim for additional or future medical aid

Both Dr. Schlafly and Dr. Crandall believe that the employee has right carpal tunnel syndrome and is in need of a right carpal tunnel release. I find that additional or future medical aid in the form of a right carpal tunnel release is necessary in order to "cure and relieve" the employee from the effects of her right carpal tunnel syndrome.

The employer-insurer denied the employee treatment of her right carpal tunnel syndrome; therefore the employer-insurer has waived the right to select the treating physician. Therefore, the employer-insurer is ordered to furnish the additional medical aid under the direction and control of Dr. Schlafly. The treatment includes but is not limited to a right carpal tunnel release.

Issue 4. Statute of limitations

After reviewing all of the evidence, I found the employee to be a credible witness. The employee stated that in 1995, when the symptoms began she thought she had arthritis in her right hand. At the hearing, the employee stated that in 2000, she thought she had arthritis in her hands. The employee also stated that in March 22, 2007, when she went to Med Stop One, she also thought she had arthritis in her right hand.

After the employee went to Med Stop One, her employer sent her to Dr. Crandall. On April 4, 2007, Dr. Crandall diagnosed the employee with right carpal tunnel syndrome.

Missouri Revised Statute Section 287.063.3 states that the statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

The employee does not have any medical training and therefore did not have the knowledge to determine that her problems were more than arthritis. It was not reasonably discoverable and apparent that the employee sustained right carpal tunnel syndrome related to her job at Burger King until she was diagnosed with right carpal tunnel syndrome on April 4, 2007. The employee filed a report of injury on April 13, 2007. She filed a claim for compensation on June 5, 2007. Based on all of the evidence presented, I find that the employee's claim was filed within the time allowed by law.

ATTORNEY'S FEE:

Timothy Ruddy, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Teresa Kitchen
030986

Injury No.: 07-

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Date: _____ Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Employee: Teresa Kitchen
030986

Injury No.: 07-