

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

Injury No.: 03-141467

Employee: Dale Lane

Employer: AmerenUE
a/k/a Union Electric

Insurer: Self-Insured

Date of Accident: Continuing through January 2004

Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 19, 2006. The award and decision of Administrative Law Judge Suzette Carlisle, issued September 19, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein 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 March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Dale Lane

Injury No.: 03-141467

Unpaid medical expenses:	\$ 7,026.85
4 weeks of temporary total disability (or temporary partial disability)	\$ 2,597.28
61.25 weeks of permanent partial disability	\$20,832.35
6.125 weeks of multiplicity	\$ 2,083.24
3 weeks of disfigurement from Employer	\$ 1,020.36

22. Second Injury Fund liability: No

TOTAL: \$33,560.08

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Philip M. Hess.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Dale Lane	Injury No.:	03-141467
Dependents:	N/A	Before the	
Employer:	Ameren UE a/k/a Union Electric	Division of Workers'	
Additional Party:	N/A	Compensation	
Insurer:	Self-Insured	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	SC:tr

PRELIMINARIES

A hearing was held on June 2, 2006, at the Missouri Division of Workers' Compensation St. Louis City office. Attorney Philip M. Hess represented the Claimant, Dale Lane. The Employer, Ameren UE a/k/a Union Electric, is self-insured, and was represented by Attorney John P. Kafoury. The Second Injury Fund is not a party to the case. The record closed after presentation of the evidence. The parties submitted post-hearing briefs by June 20, 2006. Hearing venue is correct and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

The parties have stipulated to the following:

1. The Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on or about January 30, 2003;

2. The Employer's liability was fully insured through Corporate Claims Management;
3. The Employer had notice of the injury;
4. The Claim for Compensation was filed within the time prescribed by law;
5. Claimant has not received any medical treatment paid for by the Employer and no temporary disability (TTD) payments have been made by the Employer; and
6. In the event that Claimant is found to be a statutory employee, Claimant's last day of work has been stipulated to be on or about the last day of January 2004.

ISSUES

1. Did the Employer employ Claimant, or was he an independent contractor, after he retired?
2. Did Claimant sustain an occupational disease, which arose out of and in the course of employment?
3. Is the Employer liable for past medical expenses totaling \$7,026.85?
4. Is the Employer liable for temporary total disability (TTD) totaling \$2,597.28 from February 17, 2004 to March 16, 2004?
5. Did Claimant sustain permanent partial disability (PPD), and if so, to what extent?
6. Did Claimant sustain disfigurement?

EXHIBITS

Claimant offered Exhibits A through G, which were admitted without objection and Employer offered Exhibits 1 and 2, which were admitted without objection.

SUMMARY OF EVIDENCE

Only evidence supporting this award will be summarized. Any objections not expressly ruled upon are overruled.

Live Testimony

Claimant, a 56-year-old retired widower, resides in Collinsville, Illinois. He graduated from high school in 1967 and attended college for eighteen months before he was drafted into the Vietnam War. He received numerous awards including a Purple Heart and a Badge of Honor during his military service between 1968 and 1970.

He worked a variety of jobs for Employer between June 1970 and January 2003 including janitor, ash handler, laborer, machinist, welder, repairman and supervisor.

In 1987 he became a maintenance supervisor. He supervised up to twenty-six employees, including repairmen, machinists, and electricians. Twenty-five to fifty percent of his time each week was spent on the computer and approximately 10 percent was spent demonstrating the proper use of equipment to employees. Claimant demonstrated pneumatic impact and vibratory tools, electrical hand tools, wrenches, ratchets, hand grinders, drill motors, and slays. The computer and keyboard sat on a metal desk. There was no pad for the keyboard. The mouse pad sat on a pullout tray from the desk. Claimant completed forms in longhand.

Claimant first noticed carpal tunnel type problems about nine years before he retired in January 2003. He did not recall talking with Dr. Malench, his primary care physician, in 1996 about tingling in his hands. However, he did not dispute the medical record. Prior to retirement, tingling in his hands awakened him. His hands fell asleep while driving. He felt a "funny bone" sensation from his elbows to his fingers, and stiffness in both hands. He often shook his hands to wake them when working with hand tools. Claimant did not report the condition to his Employer before he retired and did not ask for any medical treatment.

In July 2003, he complained to Dr. Malench of elbow pain after painting. His hand complaints remained the same after he retired. He mentioned the carpal tunnel type hand complaints. The doctor prescribed anti-inflammatories. The elbow problems resolved and he is not seeking benefits for his elbows.

Claimant worked for Employer (Ameren) as a consultant from October 2003 to the end of January 2004. He collected data from motors located in St. Louis power plants and input data into the computer. Companies used the data to solicit repair bids. He was hired through the purchasing department. He was not supervised, and Ameren relied on his expertise. Ameren offered him the position because his primary responsibility before retirement was maintaining the equipment. The length of his consulting services was fixed.

Ameren set an hourly salary based on his pre-retirement income. Claimant had no benefits and the parties signed no written agreement. The Employer instructed Claimant where to go, what to do, and how to enter the information into a spreadsheet, which they provided. He input data about 80 percent of the time, and 20 percent of the time he wrote information. The Employer paid him to work approximately 35 hours per week. Claimant worked four months and only consulted for Ameren. During this time his hand complaints remained consistent.

The wrist complaints continued, and in November 2003, Dr. Malench ordered a nerve conduction study at Anderson Hospital which revealed severe bilateral carpal tunnel syndrome. Claimant reported the condition to the Employer in December 2003. He received a denial letter from the Employer in January of 2004, suggesting he should use his group insurance to cover treatment. His care was transferred to Dr. McKee, who recommended bilateral carpal tunnel surgery. Surgery was performed on both hands on February 17, 2004. Dr. McKee released Claimant from treatment on March 16, 2004.

Claimant identified the nerve conduction bill and surgeon's charges. Surgery resolved the numbness and tingling in his hands, however decreased grip strength and limited finger dexterity remain. His golf game has declined. He does very little gardening. Claimant has two scars from surgery. He stands 5 feet, 10 ½ inches tall and has weighed 245 pounds for approximately six years. It is his belief that the carpal tunnel syndrome is related to his work because of intensive use of his hands and no other possible sources. He denied a history of diabetes, arthritis, or thyroid conditions.

Dr. Ollinger examined Claimant June of 2005 but did not ask Claimant about the Employer's essential job function survey. The survey described Claimant's duties as a full-time employee with the Employer. Dr. Ollinger did not ask about Claimant's use of vibratory tools, which was contained in the survey.

As a supervisor, his main task was to direct employees. He acknowledged this was a less demanding use of his hands than other jobs. He lost no time from work for his hands while employed full time. He worked for Energy Electric Company as a consultant for four days in January 2004. He attended meetings and discovered the company already had a system in place.

Claimant had surgery two weeks after completing Ameren's consulting project. After surgery he complained of loss of finger dexterity and stiffness. Ameren is in the business of producing electricity, but maintaining equipment is important to eliminating outages.

Medical Records Review

On November 5, 1996, Dr. Anthony E. Malench examined Claimant with complaints of numbness at night from his elbows down, and occasionally his hands when driving. Claimant denied doing any repetitive activities. Dr. Malench diagnosed early carpal tunnel syndrome and recommended Claimant wear splints.

In July 2003, Claimant complained of bilateral extensor tendonitis of the forearm and left hand carpal tunnel symptoms after performing projects at home.

Claimant continued to have carpal tunnel complaints by November 5, 2003. During the day he had numbness in his hands when driving. The forearm tendonitis had resolved. On November 19, 2003, the nerve conduction study revealed severe bilateral carpal tunnel syndrome. Claimant's medical care was transferred to Dr. McKee.

Dr. McKee performed bilateral carpal tunnel surgery at Anderson Hospital on February 17, 2004 and Dr. McKee released him from medical care on March 16, 2004 without restrictions.

Claimant received bills from the following medical providers: 1. Anderson Hospital - nerve conduction study totaling \$456.00, 2. February 17, 2004 surgery expenses totaling \$3,145.85 (Exhibit F), and 3. Doctor McKee's surgical bills totaling \$3,425.00 (Exhibit G).

Deposition Testimony

Dr. Bruce Schlafly, a board certified physician in hand and orthopedic surgery, testified on behalf of Claimant. Dr. Schlafly diagnosed bilateral carpal tunnel syndrome, and opined the treatment was appropriate, reasonable and necessary. He opined that Claimant's repetitive work with his hands with Employer was the substantial factor in the development of bilateral carpal tunnel syndrome and the need for surgery. He conceded a supervisor's work is less hand intensive than a machinist or a welder. Dr. Schlafly based his causation opinion on Claimant's demonstrated use of power tools for approximately 15 percent of the week; computer input 30 percent of the week, and writing 20 percent of the time. Dr. Schlafly rated Claimant 25% permanently partially disabled for each hand with a multiplicity factor, and opined that four weeks off work after surgery was reasonable and appropriate.

The parties stipulated that the essential job function survey was not available to Dr. Schlafly until after Claimant's examination. The survey revealed vibrating tools were used up to 20 percent of the time. Dr. Schlafly also opined that a correlation between obesity and carpal tunnel syndrome does not mean that obesity causes carpal syndrome.

Dr. Henry Ollinger, a board certified plastic and reconstructive surgeon, reviewed the essential job function survey prior to examining Claimant on June 15, 2005 at the Employer's request. He concluded Claimant was obese which escalated his risk of developing carpal tunnel three to four times that of a non-obese person. He opined the carpal tunnel syndrome

was idiopathic due to Claimant's obesity. Also, Claimant's work as a supervisor lacked significant force, repetition, awkward position, contact stressors, or vibration considering duration factors and based on Claimant's reported duties. Claimant reported supervising staff, attending meetings, and ordering parts as his job duties. Dr. Ollinger opined Claimant's medical treatment was reasonable and necessary. He rated Claimant 2% permanent partial disability at the level of each wrist and returned him to work without restrictions.

Dr. Ollinger conceded Claimant had no known history of prior injury to his bilateral upper extremities, diabetes, or thyroid conditions. Dr. Ollinger agreed that body positioning over an extended period of time may be a consideration in the development of carpal tunnel syndrome. However, he had no knowledge of the amount of time Claimant spent typing each day or the computer set up. Claimant did not mention typing or writing or any other activities. Dr. Ollinger did not inquire about duties listed in the job survey although he possessed it during the examination. He was not aware of any tools demonstrated by Claimant but he acknowledged that vibratory tools may be a risk factor for developing carpal tunnel syndrome.

He admitted his opinion regarding obesity was based on two articles that do not address a causal connection between obesity and carpal tunnel syndrome. Dr. Ollinger admitted the scientific studies he relied on do not address the mechanism of injury. The articles reflected correlation and not medical causation. Dr. Ollinger opined that severe carpal tunnel may indicate a condition present for more than four months.

FINDINGS OF FACTS AND RULINGS OF LAW

Having given careful consideration to the entire record and based upon the testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues Relating to Occupational Disease/ Arising Out of and in the Course of Employment/Causation

Claimant alleges an occupational disease, which produced bilateral carpal tunnel syndrome. Section 287.067 RSMo defines occupational disease as, "an identifiable disease arising with or without fault out of and in the course of employment. Ordinary diseases of life to which the general public is exposed out side 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." "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..." §287.063.1 RSMo. "The employer liable for the compensation... shall be the employer in whose employment the employee was last exposed to the hazards of the occupational disease for which claim is made, regardless of the length of time of such last exposure..." §287.063.2 RSMo.

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. 1999) (overruled on other grounds). A direct causal relationship must be established. *Id.* 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).

Employer contends the great weight of the evidence shows that the carpal tunnel syndrome was idiopathic based upon his lack of repetitive activities as a supervisor. The Employer contends in post hearing briefs the symptoms would have arisen during the first twenty-nine years if his job had been hand intensive or repetitive enough to cause carpal tunnel syndrome. The evidence shows that a carpal tunnel diagnosis was made during the first twenty-nine years. Dr. Malench suggested that Claimant had carpal tunnel in 1996 and recommended splints and medication despite Claimant's denial that he performed repetitive work. Claimant's hand intensive career as a repairman, laborer and welder was followed by fifteen years of hand intensive work as a supervisor. This is consistent with both Doctors Ollinger and Schlafly's opinions that the carpal tunnel syndrome may have existed more than four months prior to diagnosis in November 2003.

I find Dr. Schlafly's opinion more credible than Dr. Ollinger's. Dr. Schlafly asked follow-up questions in an effort to understand the nature and extent of Claimant's work although he did not have the essential job function survey available during examination. He identified the percentage of time spent on the computer, paperwork, and assisting staff with welding. Dr. Schlafly opined the requirements of the essential job survey may create a risk factor for the development of carpal tunnel syndrome. Dr. Ollinger did not ask about the job duties listed in the survey, which he possessed during examination. He did not explore Claimant's work activities. He did not know Claimant's ergonomic set up. He did not inquire about his time spent writing or using vibratory tools and pneumatic devices.

Dr. Ollinger contends work was not a significant factor due to the correlation between carpal tunnel syndrome and obesity. Dr. Ollinger's opinion is not persuasive. He relied on studies that did not make a causal connection between obesity and carpal tunnel. Both Drs. Schlafly and Ollinger opined that correlation is not the same as cause and effect.

Based upon these facts, I find Claimant's hand intensive work for Employer, including supervisory duties, to be a

substantial factor in the development of bilateral carpal tunnel syndrome.

Issues Related to Statutory vs. Independent Contract Employment

The alleged Employer contends that Claimant was an independent contractor and not an employee after retirement. Claimant asserts he was a statutory employee.

Section 287.040.1 states that, “Any person who has work under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor or his subcontractor, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.”

Statutory employment exists when three elements coexist: 1) the work is performed pursuant to a contract; 2) the injury occurs on or about the premises of the alleged statutory employer; and 3) the work is in the usual course of business of the alleged statutory employer. *Bass National Supermarkets, Inc.*, 911 S.W.2d 617, 620 (Mo.banc 1995). Claimant and Employer entered into an oral agreement for Claimant to provide data collection services for Employer. Claimant visited local power plants in the St. Louis area. The question is whether the data collection services provided by Claimant were within the usual course of Employer’s business of providing electrical products to the community. Ameren contends it is not.

A recent line of cases focus on the routine and frequent nature of the independent contractors’ activities to determine whether the work is within the usual business of the punitive employer. *Id.* at 620. The court has defined the punitive employer’s “usual business” referred to in §287.040 as those activities which are: 1) routinely done; 2) on a regular and frequent schedule; 3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time; and 4) the performance of which would require the statutory employer to hire the employee absent the agreement. *Id.* at 621. The Court found the legislature’s intent was to prevent employers from avoiding their duties...by contracting out work their employees would normally do. *Id.*

I find Claimant to be credible. Collection of data is a routine part of maintenance, which Claimant performed prior to retirement. Ameren relied on his experience because he understood the importance of maintenance. An electrical engineer may have collected data if Claimant had not been hired. Although Ameren is in the business of producing electricity, maintaining the equipment is necessary for production. Electricity cannot be produced if the equipment is not working. Claimant collected data on a regular and frequent schedule for a brief time.

Therefore, I find data collection within the usual course of Ameren’s business and that Claimant is a statutory employee of Ameren. Claimant worked thirty-five hours per week as a statutory employee for three months and three weeks. Twenty percent of his time was spent writing information. Eighty percent of his time was spent inputting data. Dr. Schlafly opined that typing and writing were a substantial factor in Claimant developing carpal tunnel syndrome.

Although Claimant did not demonstrate vibratory tools, the amount of time he spent on the computer and writing increased as a consultant. Claimant’s employment through the purchasing department does not change Claimant’s statutory position. I find Claimant was exposed to the hazards of the occupational disease for more than three months due to his repetitive activities as a consultant for Ameren. I find Employer liable for benefits owed to Claimant.

Issues Related to Liability for Past Medical Expenses

Claimant contends the Employer is liable for \$7,026.85 in past medical expenses for treatment he received from Drs. Malench, McKee, Ali and Anderson Hospital. Employer contends that Claimant was not entitled to reimbursement because Employer is not liable.

Section 287.140.1 provides that 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.

The Employer denied treatment and waived the right to choose the treating physicians. Claimant produced itemized bills totaling \$7,026.85 for treatment provided by Drs. Malench, McKee, Ali and Anderson Hospital for bilateral carpal tunnel syndrome.

A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with the treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 112 (Mo.banc 1989).

I find that Claimant has met his burden in establishing that the \$7,026.85 in expenses is causally related to the treatment he received for bilateral carpal tunnel syndrome. I find that Drs. Schlafly and Ollinger both agree that that treatment was reasonable and necessary to cure and relieve Claimant from the effects of the occupational disease. Therefore, I find Employer is liable for the unpaid medical bills totaling \$7,026.85.

Issues Relating to Temporary Total Disability

Claimant seeks TTD benefits from February 17, 2004 through March 16, 2004 for four weeks totaling \$2,597.28. The Employer denies owing any TTD benefits for the reasons stated above.

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 646 (Mo.App. 1991). (overruled on other grounds). Temporary total disability is only to be granted for the time prior to when the employee can return to work. *Id.* Although a layman is capable of forming an opinion as to whether he is capable of working, medical evidence of injuries may be helpful. *Patterson v. Engineering Evaluation Inspections*, 913 S.W.2d 344, 347 (overruled on other grounds). Both Drs. Schlafly and Ollinger have agreed that the four-week period of time following Claimant’s surgery was a reasonable amount of time to be off work. In post-hearing briefs, the Employer conceded any lost time from work would be from February 17 through March 14, 2004. I find Employer is responsible for temporary total disability payments to Claimant for the four-week period following the carpal tunnel releases from February 17, 2004 to March 16, 2004, totaling \$2,597.28.

Issues Relating to Permanent Partial Disability

Claimant seeks 17 ½% of each wrist in permanent partial disability, a 10% multiplicity and three weeks disfigurement. Claimant has limited finger dexterity and decreased grip strength, but an overall good result. Dr. Ollinger rated Claimant 2% PPD of each wrist and Dr. Schlafly rated 25% of each wrist. I find Claimant sustained 17½% permanent partial disability referable to each wrist at the 175-week level plus a 10% load for multiplicity and three weeks disfigurement from bi-lateral carpal tunnel syndrome and treatment.

CONCLUSION

Claimant was a statutory employee of the Employer and continued to be exposed to the risks of an occupational disease, which arose out of and in the course of his employment. Employer is responsible for past medical expenses, temporary total disability, permanent partial disability and disfigurement. Claimant is granted leave to amend the date of injury to January of 2004. Claimant’s attorney is entitled to a lien of 25% of benefits awarded.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia “Pat” Secrest
Director
Division of Workers' Compensation