

TEMPORARY AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 03-146293

Employee: Michael Livingston

Employers: 1) Rick Gregg Construction Company
2) VTG Holding, Inc.

Insurers: 1) Missouri Employers Mutual Insurance Company
2) Liberty Mutual Fire Insurance Company

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

Date of Accident: April 4, 2003

Place and County of Accident: Stoddard County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. Having reviewed the evidence, heard oral argument, read the briefs, 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 §286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 30, 2008, as supplemented herein.

The administrative law judge found that employee suffered from an occupational disease on or about April 4, 2003, and the employee's bilateral carpal tunnel syndrome is medically causally related to employee's accident or occupational disease. The administrative law judge concluded that employee's work at VTG Holding, Inc. was the substantial contributing factor in the cause of employee's bilateral carpal tunnel syndrome, and the need for bilateral carpal tunnel releases. The administrative law judge further found that since employee's exposure at Rick Gregg Construction Company was less than three months and the exposure at VTG Holding, Inc. was the substantial contributing factor to employee's condition, that VTG Holding, Inc. was liable for employee's bilateral carpal tunnel.

Employer/Insurer filed a timely Application for Review with the Commission alleging that the administrative law judge's award was erroneous because the administrative law judge failed to consider employee's subsequent self-employment as a hazardous exposure and failed to make a finding of fact with regard to whether employee's self-employment was a hazardous exposure. We disagree and affirm the award of the administrative law judge.

We offer this supplemental opinion to address the issue of whether employee engaged in self-employment and whether such employment exposed him to the hazards of the disease, bilateral carpal tunnel syndrome.

Although the administrative law judge did not make a specific finding that employee's self-employment was not a hazardous exposure, he does acknowledge employee's self-employment. The administrative law judge goes on to find that all of the evidence and testimony supports a finding that the employee contracted bilateral carpal tunnel as a result of his work at VTG Holding, Inc.

We agree with that conclusion and find that employee was not exposed to the hazard or risk of carpal tunnel

syndrome by way of self-employment. We find that the evidence supports the conclusion that employee was not self-employed during the period June 2003 through November 2004. Employee provided uncontroverted testimony that he did not engage in self-employment from June 2003, when he quit his employment with Rick Gregg Construction, up and until his father died in September 2005. Employee testified that during that time period he was caring for his father who was battling cancer. Employee testified that he took out an ad in the Yellow Pages in 2004 for a business he and his brother were beginning together. However, the ad did not produce any jobs and employee remained unemployed until November 2004, when he resumed work for Rick Gregg Construction.

Furthermore, even if the evidence supported a finding that employee was self-employed during that timeframe, there is not sufficient evidence for this Commission to conclude that employee's self-employment exposed employee to the hazards of the disease, carpal tunnel syndrome. Employee testified that he began working after his father died in September 2005 on a limited basis doing general construction work. Employee testified that his self-employment consisted of approximately one job per month doing general construction and repair work. There is no evidence linking employee's self-employment to exposure of the repetitive motion which was found to be the cause of the carpal tunnel syndrome. Therefore, employee's bilateral carpal tunnel syndrome was not caused by self-employment, but rather his work at VTG Holding, Inc.

The Commission agrees with the ultimate conclusion reached by the administrative law judge that employee's work at VTG Holding, Inc. was the substantial factor in the cause of his bilateral carpal tunnel syndrome and the need for bilateral carpal tunnel releases.

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 §287.510 RSMo.

The award and decision of Administrative Law Judge Carl Strange, issued January 30, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 31st day of July 2008.

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: Michael Livingston

Injury No. 03-146293

Dependents: N/A

Employer 1: Rick Gregg Construction Company

Insurer 1: Missouri Employers Mutual Insurance Company

Employer 2: VTG Holding, Inc.

Insurer 2: Liberty Mutual Fire Insurance Company

Additional Party: Second Injury Fund (Left Open)

Hearing Date: November 8, 2007

Checked by: CS/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes
- Was the injury or occupational disease compensable under Chapter 287? Yes
- Was there an accident or incident of occupational disease under the law? Yes
- Date of accident or onset of occupational disease? April 4, 2003
- State location where accident occurred or occupational disease contracted: Stoddard County, Missouri
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- Did employer receive proper notice? Yes
- Did accident or occupational disease arise out of and in the course of the employment? Yes
- Was claim for compensation filed within time required by law? Yes

- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted:
The employee contracted bilateral carpal tunnel syndrome through repetitive use of his hands.
- Did accident or occupational disease cause death? No
- Parts of body injured by accident or occupational disease: bilateral wrists
- Compensation paid-to date for temporary total disability: \$0.00
- Value necessary medical aid paid to date by employer-insurer? \$0.00
- Value necessary medical aid not furnished by employer-insurer? See Findings
- Employee's average weekly wage: \$354.24
- Weekly compensation rate: \$236.16
- Method wages computation: By Agreement
- Amount of compensation payable:

Additional Medical Aid: The employer-insurer 2 (VTG Holding, Inc. and Liberty Mutual Fire Insurance Company) is directed to furnish additional medical aid pursuant to Section 287.140 RSMo (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 November 8, 2007, the employee, Michael Livingston, (hereinafter referred to as "employee") appeared in person and by his attorney, Sheila Blaylock, for a hearing on a temporary or partial award. The employee filed a claim against two of his previous employers for the occupational disease of bilateral carpal tunnel. The employer 1, Rick Gregg Construction Company, and the insurer 1, Missouri Employers Mutual Insurance Company, (hereinafter collectively referred to as "employer-insurer 1") were represented at the hearing by their attorney, Chris Patt. The employer 2, VTG Holding, Inc., and the insurer 2, Liberty Mutual Fire Insurance Company, (hereinafter collectively referred to as "employer-insurer 2") were represented at the hearing by their attorney, Fielding Poe. By agreement of the parties, the employee's claim against the Second Injury Fund was left open. At the time of the hearing, the parties agreed on certain undisputed facts and identified the facts that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. VTG Holding, Inc., whose liability was fully insured by Liberty Mutual Fire Insurance Company, and Rick Gregg Construction Company, whose liability was fully insured by Missouri Employers Mutual Insurance Company, were operating under and subject to the provisions of the Missouri Workers' Compensation Act.
2. The employee was an employee of both VTG Holding, Inc. and Rick Gregg Construction Company and was working under the Workers' Compensation Act.
3. The employers had notice of employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage while working for employer 2, VTG Holding, Inc., was \$354.24, and his rate for temporary total disability is \$236.16.
6. The employers and insurers have furnished no medical aid to employee.
7. The employers and insurers have paid no temporary total disability benefits.

ISSUES:

- Occupational Disease
- Average Weekly Wage – Employer 1 only
- Medical Causation
- Additional Medical Aid

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- Evaluation Report of Dr. Bruce Schlafly dated 11/2/2005;
- Evaluation Reports of Dr. Richard Howard dated 12/4/2005 & 1/4/2006;
- Medical Records of Cross Trails Medical Center;
- Earning History; and
- Attorney Contract.

Employer-Insurer 1's Exhibits

- Employee's Claim for Compensation;
- Report of Injury filed by Employer 1;
- Employee's 2003 Wage Statement with Employer 1;
- Employee's 2004 Wage Statement with Employer 1;
- Employee's 2004 W-2 from Employer 1; and
- Transcript from Unemployment Hearing.

FINDINGS OF FACT:

Based on the testimony of Michael Livingston ("employee") and the medical records and reports admitted, I find as follows:

In September of 1996 or 1997, the employee began working for Horizon Music, Inc. Although the company changed its name approximately 7 times over the years and eventually became known as VTG Holding, Inc., the employee's jobs stayed essentially the same. While working for VTG Holding, Inc., the employee soldered and stripped coax cables and speaker cables. In order to meet his quota in his first years of employment, the employee would strip 40 cables or 20 heavy cables per hour for eight hours a day. Once he moved to the snake line, the employee would strip 2 main jackets and feed 54 cables into both jackets each hour for eight hours a day. All of his duties at VTG Holding, Inc. required constant gripping, pulling and twisting. After several years, the employee began experiencing tingling, numbness and sharp pain in his hands that would wake him up at night. As a result, VTG Holding, Inc. supplied the employee with braces that did not relieve the employee's complaints. Since he did not feel that he could constantly solder cables for eight hours a day, the employee quit his employment with VTG Holding, Inc. on April 4, 2003.

On April 30, 2003, the employee started working for Rick Gregg Construction Company. Following a disagreement with the employer, the employee quit his job on June 2, 2003 (Employee Exhibit D, page 2). Although he was employed by this employer for 34 days, the employee actually worked only a total of 14 days during this time (Employer-Insurer's 1 Exhibit 3). As part of his job duties during this time, the employee performed general construction work that included removing and replacing shingles, cleaning trash, moving yard, cleaning gutters, and washing trucks. After obtaining unemployment benefits, the employee did not immediately return to work. Since his father had contracted cancer, he took care of him instead and did approximately one carpentry job a month for the next year in order to earn extra money. After his father died, the employee returned to work for Rick Gregg Construction Company on November 10, 2004. The employee was subsequently laid off from Rick Gregg Construction Company on December 15, 2004 since there was no work available. Although he was employed by this employer for 35 days this time, the employee actually worked only a total of 12 days during this period (Employer-Insurer's 1 Exhibit 4).

The employee finally was able to get evaluated for his carpal tunnel by going to Crosstrails Medical Center on January 18, 2005 (Employee Exhibit C). On March 25, 2005, the employee filed a claim for compensation against employer-insurer 1 and employer-insurer 2 (Employer-Insurer's 1 Exhibit 1). The employee was then examined on November 2, 2005 by Dr. Bruce Schlafly who diagnosed the employee with bilateral carpal tunnel. Further, Dr. Schlafly opined that the employee's work at VTG Holding, Inc. was the substantial factor in the cause of his bilateral carpal tunnel syndrome, and the need for bilateral carpal tunnel releases. However, Dr. Schlafly did note that "work as a roofer is a cause of occupational carpal tunnel syndrome, but I do not find that Mr. Livingston's work for Gregg Construction is a substantial factor in the cause of his bilateral carpal tunnel syndrome" (Employee Exhibit A, page 3).

The employer-insurer 2 had the employee evaluated by Dr. Richard Howard on December 4, 2006. After examining the employee, Dr. Howard opined that the employee had "significant carpal tunnel syndrome" and that his job at VTG Holding, Inc. would be considered a causative factor in the development of the carpal tunnel syndrome

(Employee Exhibit B, page 2). Following correspondence from the employer-insurer 2, Dr. Howard noted that “working in a roofing environment is grip intensive, heavy lifting, which is repetitive and is certainly a causative factor for the development of carpal tunnel syndrome.” However, Dr. Howard did acknowledge that the problem predated his beginning work as a roofer (Employee Exhibit B, page 3).

At the time of the hearing, the employee still had tingling, numbness and sharp pain in his hands that would wake him up at night. At this point, he has had very little treatment for his bilateral carpal tunnel syndrome other than the evaluations. In order to cope with the pain, the employee takes Tylenol or Excedrine. He is currently self-employed doing general construction work.

APPLICABLE LAW:

- Section 287.063.2 RSMo. in effect at the time of the occupational disease provided that “the employer who is liable to pay compensation for an occupational disease 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.”
- Section 287.063.1 RSMo. in effect at the time of the occupational disease stated that “an employee is 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 is set forth in subsection 7 of section 287.067, RSMo.”
- Section 287.067.7 RSMo. in effect at the time of the occupational disease stated that “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 a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.”
- Endicott v Display Technologies, Inc., 77 S.W.3d 612 (Mo banc 2002): The Supreme Court unequivocally held that in applying the last exposure rule under Section 287.063 that the last exposure rule is not a rule of causation, and “the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease”. After considering the three-month exception under 287.067.7, the Supreme Court emphasized, “if this exposure with an employer is for more than three months, that employer may not invoke the exception in Section 287.067.7”. *Id.* However, the Court did note that section 287.067.7 could shift “liability to a prior employer *only* if the employee's exposure at a later employer is less than three months *and* exposure with a prior employer was the substantial contributing factor to the injury.”
- Pierce v BSC, Inc., 207 S.W.3d 619 (Mo banc 2006): The Supreme Court held that if the employee is exposed to the hazard of the occupational disease for more than three months, the exception to the last exposure rule is inapplicable.
- The burden is on the employee to prove all material elements of the employee's claim. Melvies 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).
- It is sufficient that causation be supported only by reasonable probability. See Davis v. Brezner, 380 S.W.2d 523 (Mo. App. 1964) and Downing v. Willamette Industries, Inc., 895 S.W.2d 658 (Mo. App. 1995). In Landers v. Chrysler Corporation, 963 S.W.2d 275 (Mo. App. 1997), the Court held that it is sufficient to award medical benefits if the employee shows by “reasonable probability” that he is in need of additional medical treatment by reason of his work related accident.
- Under Section 287.410.1, the statute 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 be reasonably be required after the injury or disability to cure and relieve from the effects of the injury”.

RULINGS OF LAW:

Issue 1. Occupational Disease, Issue 3. Medical Causation

All of evidence and testimony in this case support a finding that the employee contracted bilateral carpal tunnel as a result of his work activities at VTG Holding, Inc. Both Dr. Schlafly and Dr. Howard opined that the employee had bilateral carpal tunnel and that his work at VTG Holding, Inc. was a causative factor in the development of this condition. In fact, Dr. Schlafly went further and opined that the employee’s work at VTG Holding, Inc. is the substantial factor in the cause of his bilateral carpal tunnel syndrome, and the need for bilateral carpal tunnel releases. Neither employer-insurer offered any credible evidence to discredit this medical opinion. Instead, the employer-insurer 2 (VTG Holding, Inc. and Liberty Mutual Fire Insurance Company) argued that the employer-insurer 1 (Rick Gregg Construction Company and Missouri Employers Mutual Insurance Company) should be liable based on the holdings in *Endicott v Display Technologies, Inc.* and *Pierce v BSC, Inc.* Basically, the employer-insurer argued that since the employer-insurer 1 exposed him to the hazards of the occupational disease, they are now liable for the condition and treatment. Both Dr. Schlafly and Dr. Howard agree that work as a roofer is a cause of occupational carpal tunnel syndrome which satisfies the requirement that Rick Gregg Construction Company exposed the employee to the hazards of the occupational disease. However, the employee was only employed by Rick Gregg Construction Company for 34 days in 2003 and 35 days in 2004 with an approximate 17 month gap between the two periods. Neither the individual periods nor the sum of the two periods total three months.

Based on the evidence, I find that the employee’s work at VTG Holding, Inc. is the substantial contributing factor in the cause of his bilateral carpal tunnel syndrome, and the need for bilateral carpal tunnel releases. Further, I find that Rick Gregg Construction Company exposed the employee to the hazard of the occupational disease for less than a three month period. Since the employee’s exposure at a later employer is less than a three month period and the exposure with VTG Holding, Inc was the substantial contributing factor to the bilateral carpal tunnel, I find that the employer-insurer 2 (VTG Holding, Inc. and Liberty Mutual Fire Insurance Company) is liable for treatment of the employee’s bilateral carpal tunnel. Therefore, I further find that the employee did suffer a compensable occupational disease on or about April 4, 2003, and the employee’s bilateral carpal tunnel syndrome is medically causally related to his accident or occupational disease.

Issue 2. Average Weekly Wage – Employer 1 only

Based on my above findings that the employer-insurer 1 is not liable for the employee’s bilateral carpal tunnel, this issue is moot. Therefore, I make no findings or rulings of law regarding the employee’s average weekly wage and rate while employed with Rick Gregg Construction Company.

Issue 3. Additional Medical Aid

The employee has requested an award for additional medical aid in accordance with Dr. Schlafly’s report. The only defense that the employer-insurer 2 had to deny the employee’s request for additional medical aid was based on the issues set out above. Given the finding under each of the issues above, the employer-insurer 2 has no other basis for denying the employee’s request for additional medical aid. The medical evidence unequivocally supports a finding that future treatment and surgery being suggested by Dr. Schlafly is both reasonable and necessary to cure and relieve the employee from the effects of his injury.

Based on these findings, the employer-insurer 2 (VTG Holding, Inc. and Liberty Mutual Fire Insurance Company) is directed to furnish additional medical aid in accordance with Section 287.140 RSMo.

ATTORNEY'S FEE:

Shelia Blaylock, 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.

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:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Director
Division of Workers' Compensation

Mr. Jeff Buker
Director
Division of Workers' Compensation