

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

Injury No.: 00-112981

Employee: Debbie Maher

Employer: Hannibal Clinic

Insurer: Reliance Insurance/MIGA

Date of Accident: August 2, 2000

Place and County of Accident: Hannibal, Marion County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. 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 October 12, 2007. The award and decision of Administrative Law Judge Ronald F. Harris, issued October 12, 2007, 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 29th day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Debbie Maher

Injury No. 00-112981

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Hannibal Clinic

Additional Party: N/A

Insurer: Reliance Insurance/MIGA

Hearing Date: July 30, 2007

Checked by: RFH/tmh

### 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: August 2, 2000.
  5. State location where accident occurred or occupational disease was contracted: Hannibal, Marion 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:  
Typing/keyboarding with hands in awkward position over a number of years.
  12. Did accident or occupational disease cause death? No. Date of death? N/A.
  13. Part(s) of body injured by accident or occupational disease: Hands/wrists.
- Nature and extent of any permanent disability: 17 1/2% left wrist; 15% right wrist; 10% multiplicity; two weeks disfigurement.

15. Compensation paid to-date for temporary disability: \$293.23.
16. Value necessary medical aid paid to date by employer/insurer? \$6,973.50.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: -
19. Weekly compensation rate: \$293.23.

- Method wages computation: By agreement.

#### COMPENSATION PAYABLE

- Amount of compensation payable:

**PPD:** 17 1/2% left wrist; 15% right wrist; 10% multiplicity and two weeks disfigurement: **\$18,931.66**

**TOTAL: \$18,931.66**

- Future Requirements Awarded: N/A.

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: Nile Griffiths

### FINDINGS OF FACT and RULINGS OF LAW:

Employee: Debbie Maher

Injury No: 00-112981

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Hannibal Clinic

Additional Party: N/A

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**FINAL AWARD**

On July 30, 2007, Debbie Maher (“Employee”) appeared in person and by her attorney, Mr. Nile Griffiths, for a hearing for a final award on her claim against Hannibal Clinic (“Employer”) and its insurer, Reliance Insurance/Missouri Property & Casualty Insurance Guaranty Association (“Reliance/MIGA”). The employer and its insurer were represented at the hearing by their attorney, Mr. Benjamin Shelledy. At the same time this case was heard, evidence was also taken on Employee’s two companion Claims with Injury Numbers of 00-164838 and 02-024100. Separate Awards are being issued for those companion Claims. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

**STIPULATIONS**

- Employee has alleged an occupational disease claim with a date of injury of August 2, 2000.
- Employee was employed by the employer on or about August 2, 2000.
- Venue is proper.
- Employer received proper notice.
- The Claim was filed within the time prescribed by the law.
- At the relevant time, Employee’s compensation rate for permanent partial disability (PPD) benefits was \$293.23.
- Employer has paid medical expenses in the amount of \$6,973.50.
- Employer has paid temporary total disability benefits in the amount of \$293.23, representing one week of lost time.

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-  
**ISSUES**

- Did Employee sustain an occupational disease?
- Did the occupational disease arise out of and in the course of her employment?
- Are Employee’s injuries and continuing complaints medically causally connected to her alleged occupational disease at work on or about August 2, 2000?
- Application of last exposure rule/liability of insurer.
- Nature and extent of any permanent partial disability.
- Disfigurement.

**EXHIBITS:**

The following exhibits were admitted into evidence:

*Employee Exhibits:*

1. Medical bills (**relating to injury number 00-164838 neck/shoulder only**)
  2. Hannibal Clinic medical records
  3. Deposition of Dr. Volarich
  4. Dr. Hosley medical records
  5. Dr. Bukstein medical records
6. Letter from Missouri Property & Casualty Insurance Guaranty Association to Dr. Bukstein

***Employer/Insurer Exhibits:***

- Deposition of Dr. Strecker
- Deposition of Dr. Lange (relating to injury number 00-164838 neck/shoulder only)
- Dr. Davis medical records (relating to injury number 00-164838 neck/shoulder only)
- Certified insurance coverage records

This case, Injury Number 00-112981, involves a claim for occupational disease/repetitive motion at work on or about August 2, 2000. The employer is Hannibal Clinic. The insurer is Reliance Insurance and following liquidation MIGA. The claim was filed March 31, 2004.

Injury Number 02-024100 is also a claim for occupational disease/repetitive motion at work on or about February 18, 2002. The employer is Hannibal Clinic. The insurer is Virginia Surety. The claim was filed March 19, 2004.

Injury Number 00-164838 alleges a specific accident on December 21, 2000, involving the neck and shoulder. The employer is Hannibal Clinic. The insurer is Reliance Insurance and following liquidation MIGA. The claim was filed March 19, 2004.

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

Employee's attorney requests a fee of 25% of all benefits awarded.

### **FINDINGS OF FACT**

Based on a comprehensive review of all the testimony and evidence, I find as follows:

The employee has been employed with the employer for some 29 years. Throughout that entire time period, she has worked as an insurance billing clerk with job duties of answering the telephone, dealing with patient and insurance claims, typing and using the keyboard for the most part of the day.

Employee testified that she began experiencing problems with her hands as far back as 1997 and had gone to the Hannibal Clinic for occasional numbness and tingling in her hands. She was not tested at that time, but was given splints to wear. Around the year 2000, the employer made some ergonomic changes, including putting the keyboards under the desk. Prior to that change, the keyboard had been on the desk and the employee's hands were in an awkward position when typing. Although she did not receive any other treatment for her hands from 1997 until 2000, her hands got progressively worse and she noticed increased symptoms, including more numbness and waking her up at night.

Employee saw Dr. Gysbers for an evaluation in 2000 and had nerve conduction studies performed at that time, which

confirmed bilateral carpal tunnel syndrome. She was referred to Dr. Bukstein, a surgeon, and he scheduled surgery for the right hand in September 2000. The employee was unable to have the surgery done in September, so it was rescheduled and performed on November 30, 2000. She later had surgery on the left hand on February 8, 2001.

While the surgeries did provide some relief, she continued to experience problems, more with the left than the right, but did not have any more treatment until 2002, hence the 02-024100 claim. She then saw Dr. Oullette in March of 2002 and the doctor suggested she return to Dr. Bukstein to determine if her complaints were related to the carpal tunnel. Dr. Bukstein recommended repeat nerve conduction studies. Apparently due to Reliance going through liquidation, authorization to repeat the studies was not given for nearly 17 months after the recommendation. The studies were ultimately performed and Dr. Bukstein noted improvement, although employee was still having symptoms. The doctor did not recommend any additional treatment for the carpal tunnel syndrome.

At the hearing, employee testified that the surgeries did provide some relief, but she still has problems with dropping things, decreased sensation to hot and cold, left hand complaints radiating up to the elbow, mild loss of feeling in the right palm with some swelling and numbness. Her left hand ring and middle finger still go numb on occasion. She also stated that the ergonomic changes had helped as well since she does not have to have her hands in an awkward position now when she does the keyboarding.

The medical treatment for the surgeries and eventually the repeat nerve conduction studies were paid by Reliance or the Missouri Property & Casualty Insurance Guaranty Association following Reliance's liquidation.

Dr. Strecker examined the employee at the request of Reliance/MIGA in April 2007. Dr. Strecker concurred with the diagnosis of bilateral carpal tunnel syndrome and that the treatment rendered was necessary and reasonable. However, the doctor opined that he did not feel the carpal tunnel was causally related to work based on his interpretation of recent medical literature indicating that repetitious keyboarding activity does not cause carpal tunnel syndrome. Rather the doctor felt the cause or causes in this instance were one or more of age, sex, being post menopausal and being overweight. However, the doctor did acknowledge in his deposition that typing in an awkward position could be the significant factor in developing carpal tunnel syndrome. (Employer/Insurer Exhibit C, pgs. 15 & 27). Dr. Strecker, while finding the condition was not work related, did assess a permanent partial disability of 5% at the level of her wrist.

At employee's request, Dr. Volarich examined the employee in April 2006. Dr. Volarich noted that prior to ergonomic changes the employee was required to type on a keyboard on the top of her desk which was much higher than ergonomically advisable requiring the employee's hands to be in an awkward position for significant portions of each day. He also noted the employee estimated she spent 95% of her day typing. The doctor opined this was the cause of her bilateral carpal tunnel syndrome. The doctor assessed a permanent partial disability of 35% of each wrist with a 15% multiplicity factor since both wrists were involved. The doctor also opined that although the employee had filed another claim for compensation reflecting a date of accident or occupational disease of February 18, 2002 (Injury number 02-024100 which will be addressed in a separate award), that the cause of the carpal tunnel syndrome was all related to August 2000, as she was not exposed to this type of hazard after the ergonomic changes had been implemented. He further stated that all her permanent disability also related back to 2000.

I find the employee to be a very credible witness.

### **RULINGS OF LAW**

Based on a comprehensive review of the substantial and competent evidence described above, including Employee's testimony, the expert medical opinions and depositions, the medical records, my personal observations of Employee at hearing, and the relevant statutory and case law, I find the following:

Given the nature of this Claim and the evidence submitted, these three issues in this case can be addressed at the same time.

***Issue 1: Did Employee sustain an occupational disease?***

***Issue 2: Did the occupational disease arise out of and in the course of employment?***

***Issue 3: Are Employee's injuries and continuing complaints medically causally connected to her alleged occupational disease?***

Under Section 287.067.1 RSMo. occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, 287.067.2 provides that, “an occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.” An injury is defined as clearly work related “if work was a substantial factor in the cause of the resulting medical condition or disability.” 287.020.2 RSMo.

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. 1999), explained the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that, first, the employee must provide substantial and competent evidence that she contracted an occupationally induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the work place. More specifically, employee must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Id.* at 48. Finally, the Court noted, “where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Id.*

Considering the competent and substantial evidence, I find that Employee met her burden of proving the presence of an occupational disease that arose out of and in the course of employment for Employer, and which was medically causally connected to it.

In arriving at this conclusion, I first considered the testimony provided by Employee. I find that Employee credibly described her job duties and the problems with her right and left hands and wrists that arose because of those repetitive job duties. She consistently explained at hearing and in the medical records that her problems with her hands and wrists began around 1997 and got progressively worse up to 2000. Employer presented no evidence to dispute Employee's testimony regarding the nature of her job duties. Additionally, the medical treatment records are consistent with the Employee's testimony. All of these factors lead to the finding that Employee did sustain an occupational disease, due to repetitive job duties, arising out of and in the course of her employment.

In addition to Employee's credible testimony, in order to meet her burden of proof, she also needed to present credible medical evidence to support her claim that there was an occupational disease that arose out of and in the course of her employment and which was medically causally connected to it. In this case, there were opinions from two medical experts submitted into evidence, who while agreeing on the diagnosis of Employee's condition, disagreed as to its relationship to work and whether or not it was medically causally connected to it. On behalf of the employee, Dr. Volarich testified the bilateral carpal tunnel syndrome was related to her work and was medically causally connected to her work, while Dr. Strecker testified that her carpal tunnel syndrome was neither related to work, nor causally connected to work.

After consideration of all of the evidence regarding Employee's job duties, as well as after a thorough review of the basis of each doctor's opinion, I find that Dr. Volarich's opinions on medical causation and the relationship of the bilateral carpal tunnel syndrome to her work with Employer, are more credible and persuasive than the opinions of Dr. Strecker to the contrary. In arriving at that conclusion I also noted that Dr. Strecker acknowledged that typing with one's hands in an awkward position could be the significant factor in developing carpal tunnel syndrome. Employee's

credible testimony was that she had for years spent the biggest part of each work day typing with her hands in an awkward position.

Finally, although Dr. Strecker provided an opinion that Employee's carpal tunnel syndrome was not related to work, that opinion does not appear to be based on a clear understanding of her job duties and responsibilities for the Employer. There is no mention in his report of the fact the employee had for years been required to type with her hands in an awkward position, the very type of thing the doctor would acknowledge in his deposition could cause carpal tunnel syndrome. Dr. Strecker's report does not provide any description of Employee's duties or even an indication the doctor had any awareness of employee's duties, other than the brief statement that he does not believe repetitious keyboarding is a significant causative factor in the development of carpal tunnel. Indeed, the doctor's incorrect characterization of the Employee as a "secretary of twenty-nine years" further brings into question his knowledge of her job duties.

On the other hand, Dr. Volarich's opinions on the presence of an occupational disease, its relationship to work and whether or not it was medically causally connected to it, are credible and persuasive, because of his thorough examination and more complete and thorough history. Dr. Volarich had a better understanding of the employee's job duties and complaints and provided a competent opinion that her repetitive work for Employer was the substantial factor in the development of this condition. In that respect, I believe he established that the carpal tunnel syndrome was caused by conditions in the workplace. All in all, I found his opinion to have a more solid basis than did Dr. Strecker's.

Accordingly, on the basis of Employee's credible testimony and the credible and persuasive testimony of Dr. Volarich, I find that Employee met her burden of proving the presence of an occupational disease (carpal tunnel syndrome) that arose out of and in the course of employment for Employer, and which was medically causally connected to the work.

#### ***Issue 4: Application of Last Exposure Rule/Liability of insurer.***

Section 287.063 RSMO, also known as "the last exposure" provision of the Workers' Compensation Act, addresses employer liability in occupational disease cases:

- An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo.
- The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.

The interpretation and application of this last exposure rule, as it relates to occupational disease due to repetitive motion, has been addressed by our Supreme Court in *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo. banc 2002). The court stated the last exposure rule is not a rule of causation. It held that, "as a starting point, the last employer before the date of the claim is liable if that employer exposed the employee to the hazard of the occupational disease." *Id.* This same analysis must be applied in assessing liability involving successive employers and insurers.

There is one statutory exception to the last exposure rule, the 90 day rule in Section 287.067.7. Since this case involves successive insurers and not successive employers, the 90 day rule does not apply. *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756 (Mo. App. 2002) (overruled on other grounds). A bright line conclusive presumption is to be

utilized in establishing liability for occupational diseases and the fairness of the approach is not determinative. *Walker v. Klaric Masonry, Inc.*, 937 S.W.2d 219, 220 (Mo. App. 1996).

Reliance/MIGA argues they are not responsible for any permanent partial disability the employee may have as the result of her carpal tunnel syndrome because the claim was filed on March 31, 2004, and they did not provide coverage for the employer on that date. Reliance/MIGA argues a third insurer, not a party to either this case or injury number 02-024100, is the carrier responsible for any compensation deemed owed to employee since that third carrier provided coverage when the claim was filed in March 2004. Official notice is taken of the Division file indicating the Claim for Compensation was filed on March 31, 2004. Employer/Insurer Exhibit H confirms that as of the date the claim was filed, Reliance/MIGA did not provide coverage for the employer.

Finally, Reliance/MIGA refers to a recent decision by the Labor and Industrial Relations Commission (“Commission”) asserting that the Commission’s decision in that case supports the argument that it has no liability in this case. See *Vitale v. VeeJay Cement Construction Company* (issued October 12, 2005). Reliance/MIGA asserts that the Commission in that case found the insurance company on the risk at the time the employee was last employed as an iron worker before the date of the claim relieves them from any liability in this case. This interpretation of the Commission’s decision in *Vitale* is not entirely accurate.

It is important to point out the Commission’s decision was not simply based upon what insurance company had coverage at the time the employee was “last employed as an iron worker before the date of the claim”. Rather, the Commission relied on *Endicott* (noted above) and Section 287.063.2 RSMo, which bears repeating at this point. “The employer liable for the compensation in this section provided shall be the employer in whose employment the employee *was last exposed to the hazard of the occupational disease for which claim is made* regardless of the length of time of such last exposure.” (Emphasis added). In *Vitale*, the employee was last exposed to the hazard of the occupational disease prior to the filing of the claim on the last day he worked as an iron worker. Consequently, the insurer providing the coverage at that time was found to be liable.

Since we have only one employer here, there is no question which employer last exposed the employee to the hazard of the occupational disease. However, since the same analysis is applied to the insurer, the question becomes which insurer carried the coverage at the time the employee was last exposed to the hazard of the occupational disease before the claim was filed; not merely just which employer carried the coverage at the time the claim was filed.

Reliance/MIGA’s doctor, Dr. Strecker, while of the opinion employee’s carpal tunnel syndrome was not work related, did acknowledge typing in an awkward position could be “the significant factor” in developing carpal tunnel syndrome. Dr. Volarich also noted that the employee had for a number of years been required to have her hands in an awkward position while spending a significant portion of each day keyboarding. Once the ergonomic changes were implemented, the employee was no longer exposed to the hazard of the occupational disease, because she no longer had to operate the keyboard with her hands in an awkward position.

The employee testified the ergonomic changes took place around 2000, which is consistent with the time period her condition had deteriorated to the point she needed to have, and in fact did have, surgery. Employee was last exposed to the hazard of the occupational disease prior to filing the claim immediately prior to the ergonomic changes being implemented. Once those ergonomic changes were implemented, exposure to the hazard ceased. Reliance/MIGA carried the coverage for the employer at that time.

Therefore, in accordance with the statute, the Supreme Court decision in *Endicott* and the Commission decision in *Vitale*, I find that liability for Employee’s occupational disease of repetitive motion is with Reliance/MIGA.

#### ***Issue 5: Nature and Extent of Permanent Partial Disability***

#### ***Issue 6: Disfigurement***

The ratings provided by Drs. Strecker and Volarich have previously been summarized. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the

special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983) (overruled on other grounds).

Dr. Strecker's history is not very thorough and brings into question the accuracy of his description of the employee's complaints and symptoms at the time of his visit. According to Dr. Strecker, her right hand complaints were asymptomatic and her left side complaints were apparently limited to the ring and small finger.

Dr. Volarich noted pain and loss of feeling in the right palm and into the small and ring finger on the right. With respect to the left hand, he noted more severe pain and loss of feeling from the palm into the ring and small fingers. He also noted her fingers occasionally would feel stiff and swollen upon arising in the morning; severe loss of sensation to extremes of hot and cold water and that her hands would still cause her to awaken at night. The complaints noted by Dr. Volarich are much more consistent with those expressed by the employee at the hearing, even though Dr. Strecker saw the employee after Dr. Volarich and prior to the hearing.

Based on the testimony and the evidence, I find the employee does still have residual problems with her hands, more so on the left, and determine she has a permanent partial disability of 17.5% of the left hand, 15% of the right hand, with a 10% multiplicity factor to take into consideration the combined disability to both hands. I also award an additional two weeks of compensation for the disfigurement for the scars to the wrists.

Reliance/MIGA is directed to pay the Employee the sum of \$18,931.66, which represents: Left hand 17.5% x 175 weeks = 30.625 weeks of compensation + Right hand 15% x 175 = 26.25 for a total of 56.875 weeks of compensation x 10% multiplicity = 5.6875 + 56.875 = 62.5625 + 2 weeks disfigurement = 64.5625 weeks of compensation x \$293.23 = \$18,931.66.

### CONCLUSION

Employee met her burden of proving that she sustained a compensable occupational disease arising out of and in the course of her employment for Employer, and which was medically causally connected to it. Reliance/MIGA is the carrier response for compensating employee for her permanent disability of 17.5% of the left hand, 15% of the right hand, 10% multiplicity and two additional weeks of compensation for disfigurement for a total of \$18,931.66.

Employee's attorney requests and is granted a lien in the amount of 25% of all payments for necessary legal services.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

RONALD F. HARRIS  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey Buker  
*Director*  
*Division of Workers' Compensation*

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

Injury No.: 02-024100

Employee: Debbie Maher

Employer: Hannibal Clinic

Insurer: Virginia Surety

Date of Accident: February 18, 2002

Place and County of Accident: Hannibal, Marion County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. 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 October 12, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Ronald F. Harris, issued October 12, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**AWARD**

Employee: Debbie Maher

Injury No. 02-024100

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Hannibal Clinic

Additional Party: N/A

Insurer: Virginia Surety

Hearing Date: July 30, 2007

Checked by: RFH/tmh

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: February 18, 2002.
5. State location where accident occurred or occupational disease was contracted: Hannibal, Marion 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? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Typing/keyboarding.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Both hands/wrists.
- Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: -

19. Weekly compensation rate: \$293.23.

- Method wages computation: By agreement.

#### **COMPENSATION PAYABLE**

- Amount of compensation payable: None.

- Future Requirements Awarded: N/A.

### **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Debbie Maher

Injury No: 02-024100

Dependents: N/A

Employer: Hannibal Clinic

Additional Party: N/A

Insurer: Virginia Surety

Checked by: RFH/tmh

#### **FINAL AWARD**

On July 30, 2007, Debbie Maher (“Employee”) appeared in person and by her attorney, Mr. Nile Griffiths, for a hearing for a final award on her claim against Hannibal Clinic (“Employer”) and its insurer, Virginia Surety (“Insurer”). The employer and its insurer were represented at the hearing by their attorney, Ms. Susan Kelly. At the same time this case was heard, evidence was also taken on Employee’s two companion Claims with Injury Numbers of 00-112981 and 00-164838. Separate Awards are being issued for those companion Claims. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

#### **STIPULATIONS**

- Employee has alleged an occupational disease claim with a date of injury of February 18, 2002.
- Employee was employed by the employer on or about February 18, 2002.
- Venue is proper.
- Employer received proper notice.
- The Claim was filed within the time prescribed by the law.
- At the relevant time, Employee's compensation rate for permanent partial disability (PPD) benefits was \$293.23.
- Employer has paid no medical expenses.
- Employer has paid no temporary total disability benefits.

### ISSUES

- Did Employee sustain an occupational disease?
- Did the occupational disease arise out of and in the course of her employment?
- Are Employee's injuries and continuing complaints medically causally connected to her alleged occupational disease at work on or about February 18, 2002?
- Application of last exposure rule/liability of insurer.
- Nature and extent of any permanent partial disability.
- Disfigurement.

### **EXHIBITS:**

The following exhibits were admitted into evidence:

#### ***Employee Exhibits:***

1. Medical bills (**relating to injury number 00-164838 neck/shoulder only**)
  2. Hannibal Clinic medical records
  3. Deposition of Dr. Volarich
  4. Dr. Hosley medical records
  5. Dr. Bukstein medical records
6. Letter from Missouri Property & Casualty Insurance Guaranty Association to Dr. Bukstein

#### ***Employer/Insurer Exhibits:***

- Deposition of Dr. Strecker
- Deposition of Dr. Lange (relating to injury number 00-164838 neck/shoulder only)
- Dr. Davis medical records (relating to injury number 00-164838 neck/shoulder only)
- Certified insurance coverage records

This case, Injury Number 02-024100 involves a claim for occupational disease/repetitive motion at work on or about February 18, 2002. The employer is Hannibal Clinic. The insurer is Virginia Surety. The claim was filed March 19, 2004.

Injury Number 00-112981 is also a claim for occupational disease/repetitive motion at work on or about August 2, 2000. The employer is Hannibal Clinic. The insurer is Reliance Insurance and following liquidation MIGA. The claim was filed March 31, 2004.

Injury Number 00-164838 alleges a specific accident on December 21, 2000, involving the neck and shoulder. The employer is Hannibal Clinic. The insurer is Reliance Insurance and following liquidation MIGA. The claim was filed March 19, 2004.

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

Employee's attorney requests a fee of 25% of all benefits awarded.

### **FINDINGS OF FACT**

Based on a comprehensive review of all the testimony and evidence, I find as follows:

The employee has been employed with the employer for some 29 years. Throughout that entire time period, she has worked as an insurance billing clerk with job duties of answering the telephone, dealing with patient and insurance claims, typing and using the keyboard for the most part of the day.

Employee testified that she began experiencing problems with her hands as far back as 1997 and had gone to the Hannibal Clinic for occasional numbness and tingling in her hands. She was not tested at that time but was given splints to wear. Around the year 2000, the employer made some ergonomic changes including putting the keyboards under the desk. Prior to that change, the keyboard had been on the desk and the employee's hands were in an awkward position when typing. Although she did not receive any other treatment for her hands from 1997 until 2000, her hands got progressively worse and she noticed increased symptoms including more numbness and waking her up at night.

Employee saw Dr. Gysbers for an evaluation in 2000 and had nerve conduction studies performed at that time which confirmed bilateral carpal tunnel syndrome. She was referred to Dr. Bukstein, a surgeon, and he scheduled surgery for the right hand in September 2000. The employee was unable to have the surgery done in September, so it was rescheduled and performed on November 30, 2000. She later had surgery on the left hand on February 8, 2001.

While the surgeries did provide some relief, she continued to experience problems, more with the left than the right, but did not have any more treatment until 2002, hence the 02-024100 claim. She then saw Dr. Oullette in March of 2002 and the doctor suggested she return to Dr. Bukstein to determine if her complaints were related to the carpal tunnel. Dr. Bukstein recommended repeat nerve conduction studies. Apparently due to Reliance going through liquidation, authorization to repeat the studies was not given for nearly 17 months after the recommendation. The studies were ultimately performed and Dr. Bukstein noted improvement although employee was still having symptoms. The doctor did not recommend any additional treatment for the carpal tunnel syndrome.

At the hearing, employee testified that the surgeries did provide some relief, but she still has problems with dropping things, decreased sensation to hot and cold, left hand complaints radiating up to the elbow, mild loss of feeling in the right palm with some swelling and numbness. Her left hand ring and middle finger still go numb on occasion. She also stated that the ergonomic changes had helped as well, since she does not have to have her hands in an awkward position now when she does the keyboarding.

The medical treatment for the surgeries and eventually the repeat nerve conduction studies were paid by Reliance or the Missouri Property & Casualty Insurance Guaranty Association following Reliance's liquidation.

Dr. Strecker examined the employee at the request of Reliance/MIGA in April 2007. Dr. Strecker concurred with the

diagnosis of bilateral carpal tunnel syndrome and that the treatment rendered was necessary and reasonable. However, the doctor opined that he did not feel the carpal tunnel was causally related to work based on his interpretation of recent medical literature indicating that repetitious keyboarding activity does not cause carpal tunnel syndrome. Rather, the doctor felt the cause or causes in this instance were one or more of age, sex, being post menopausal and being overweight. However, the doctor did acknowledge in his deposition that typing in an awkward position could be the significant factor in developing carpal tunnel syndrome. (Employer/Insurer Exhibit C, pgs. 15 & 27). Dr. Strecker, while finding the condition was not work related, did assess a permanent partial disability of 5% at the level of her wrist.

At employee's request, Dr. Volarich examined the employee in April 2006. Dr. Volarich noted that prior to ergonomic changes the employee was required to type on a keyboard on the top of her desk which was much higher than ergonomically advisable requiring the employee's hands to be in an awkward position for significant portions of each day. He also noted the employee estimated she spent 95% of her day typing. The doctor opined this was the cause of her bilateral carpal tunnel syndrome. The doctor assessed a permanent partial disability of 35% of each wrist with a 15% multiplicity factor since both wrists were involved. The doctor also opined that although the employee had filed another claim for compensation reflecting a date of accident or occupational disease of February 18, 2002, that the cause of the carpal tunnel syndrome was all related to August 2000, as she was not exposed to this type of hazard after the ergonomic changes had been implemented. He further stated that all her permanent disability also related back to 2000.

I find the employee to be a very credible witness.

### **RULINGS OF LAW**

Based on a comprehensive review of the substantial and competent evidence described above, including Employee's testimony, the expert medical opinions and depositions, the medical records, my personal observations of Employee at hearing and the relevant statutory and case law, I find the following:

#### ***Issue 1: Did Employee sustain an occupational disease?***

Under Section 287.067.1 RSMo. occupational disease is defined as "an identifiable disease arising with or without human fault out of and in the course of the employment." Additionally, 287.067.2 provides that, "an occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." An injury is defined as clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability." 287.020.2 RSMo.

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. 1999), explained the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that, first, the employee must provide substantial and competent evidence that she contracted an occupationally induced disease, rather than an ordinary disease of life. There are two considerations to that inquiry: (1) whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Id.* at 48. Finally, the Court noted, "where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible." *Id.*

Considering the competent and substantial evidence, I find that this claim is merely a continuation of the complaints alleged in injury number 00-112981 for carpal tunnel syndrome. Employee filed this claim merely because she was attempting to obtain authorization for a repeat nerve conduction study arising out of the earlier claim.

Dr. Volarich attributes all of employee's complaints and disability to the 00-112981 injury number claiming an occupational disease arising on or about August 2, 2000. The doctor does not believe there was any subsequent exposure to carpal tunnel syndrome following the ergonomic changes implemented by the employer.

Based upon the testimony and the evidence, I find that any benefits to which the employee might be entitled relate back to the occupational disease claim on or about August 2, 2000, and will be addressed in a separate award on injury number 00-112981. The employer and insurer Virginia Surety have no liability for an occupational disease on this claim. Employee's claim is denied.

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**CONCLUSION**

Employee has not met her burden of proving that she sustained a compensable occupational disease arising out of and in the course of her employment for Employer on or about February 18, 2002. Employee's claim is denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

RONALD F. HARRIS  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey Buker  
*Director*  
*Division of Workers' Compensation*

While Dr. Strecker's rating refers only to "the wrist," he acknowledged in his deposition he meant to say "each wrist".  
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