

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

Injury No.: 98-140464

Employee: Joan Marsek
Employer: SSM Health Care St. Louis
Insurer: Self-Insured c/o Sedgwick Claims Management
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: October 23, 1998
Place and County of Accident: St. Louis 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 May 13, 2008. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued May 13, 2008, 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 10th day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified.

The administrative law judge concluded:

I find Claimant has symptomatic, bilateral CMC joint arthritis of the thumbs which is caused by factors other than her work accident of October 23, 1998. The facts established, and the experts explained, the disease is a chronic, progressive condition of wear and tear on the joint due to every day life, and not one traumatic event in particular. Even if the accident directly or indirectly triggered symptoms in Claimant's thumbs, I find that it did not make a substantial contribution. As such, the October 1998 accident was not a substantial factor in either the cause of the arthritis, or the onset of the painful symptoms. As such, Claimant has not established a causal connection between the October 1998 accident and the arthritic condition for which she seeks benefits.

Prior to the work accident, employee experienced no symptoms with her wrists and thumbs. After the accident, employee experienced pain and other symptoms in both wrists. Employee was diagnosed with bilateral deQuervan's for which employer provided treatment. The administrative law judge's finding that the work accident was not a substantial factor in the onset of painful symptoms is against the weight of the evidence.

"[A]n injury is compensable when it is an unexpected result of the performance of the usual and customary duties of an employee which leads to physical breakdown or a change in pathology. *Wolfgeher*, 646 S.W.2d at 784; See also § 287.020.3." *Smith v. Climate Engineering*, 939 S.W.2d 429, 436 (Mo. App. 1996), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003) (citing *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781 (Mo. banc 1983)). If employee had a condition of ill-being in her wrists and thumbs before the accident, it was asymptomatic. After the accident, employee had persistent pain, continuing now especially at the base of the left thumb.

Dr. Schlafly testified that work was a substantial and prevailing factor in causing persistent pain in employee's left CMC joint. Dr. Schlafly testified as to a medically reasonable medical procedure that may relieve that pain and permit more normal function. Naturally, Dr. Schlafly does not believe employee is at maximum medical improvement with regard to her left wrist condition. Dr. Schlafly also believes employee is in need of a revision of her right CMC joint arthrodesis, a condition he also believes is work-related. Employee has met her burden of showing she is entitled to medical treatment for both upper extremities.

I would modify the award of the administrative law judge. I would issue a temporary award of additional medical care for employee's left and right upper extremities as recommended by Dr. Schlafly. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Joan Marsek Injury No.: 98-140464
Dependents: N/A Before the
Employer: SSM Health Care St. Louis **Division of Workers'**
Additional Party: Second Injury Fund (to remain open) **Compensation**
Insurer: Self-Insured c/o Sedgwick Claims Management Department of Labor and Industrial
Hearing Date: February 14, 2008 Relations of Missouri
Checked by: KOB: ms Jefferson City, Missouri

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: October 23,1998.
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant was holding a gait belt while transferring a patient, and when the patient began to fall, Claimant's hands were jerked downward.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left upper extremity at the wrist
14. Nature and extent of any permanent disability: 15% PPD of the left wrist.
15. Compensation paid to-date for temporary disability: \$12,314.16
16. Value necessary medical aid paid to date by employer/insurer? \$24,433.19

Employee: Joan Marsek Injury No.: 98-140464

17. Value necessary medical aid not furnished by employer/insurer? \$0.00
18. Employee's average weekly wages: \$814.71
19. Weekly compensation rate: \$531.52 / 294.73
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:	
26.25 weeks of permanent partial disability from Employer:	\$7,736.66
2 weeks of disfigurement from Employer:	\$ 589.46
22. Second Injury Fund liability: Open	
Total:	<u>\$ 8,326.12</u>
23. Future requirements awarded: None.	

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: William Meehan

FINDINGS OF FACT and RULINGS OF LAW

Employee:	Joan Marsek	Injury No.:	98-140464
Dependents:	N/A	Before the	
Employer:	SSM Healthcare St. Louis	Division of Workers'	
		Compensation	
Additional Party:	Second Injury Fund (to remain open)	Department of Labor and Industrial	
		Relations of Missouri	
Insurer:	Self-Insured c/o Sedgwick Claims Management	Jefferson City, Missouri	
		Checked by:	KOB: ms

PRELIMINARIES

The matter of Joan Marsek (“Claimant”) proceeded to hearing to determine whether Claimant is in need of additional medical treatment to cure and relieve a work related injury. Attorney William Meehan represented Claimant. Attorney Thomas Tobin represented SSM Health Care St. Louis (“Employer”), which is self-insured c/o Sedgwick Claims Management. The claim against the Second Injury Fund was left open pursuant to an agreement between Claimant’s attorney and the Assistant Attorney General.

The parties agreed Claimant sustained an accidental injury on October 23, 1998, which arose out off and in the course of her employment. At the time, Claimant earned an average weekly wage of \$814.71, which corresponds to rates of compensation of \$531.52 for total disability benefits, and \$294.73 for permanent partial disability benefits. Employer paid temporary total disability benefits of \$12,314.16, and medical benefits totaling \$24,433.19. Employment, venue, notice, timeliness of the claim, and coverage of the Act were not at issue.

The issues to be determined are:

1. Is Claimant’s current medical condition causally related to her work accident of October 23, 1998;

2. Is Employer liable for additional medical care to cure and relieve the effects of the October 23, 1998 injury;
3. Is Employer liable for future temporary total disability benefits; and
4. If Claimant is not entitled to receive additional medical treatment, what is the nature and extent of Claimant's permanent partial disability?

Claimant is primarily seeking a temporary award ordering additional medical care to cure and relieve the effect of her work injury. Alternatively, Claimant agrees if the issue of medical care is decided in Employer's favor, an award determining the nature and extent of permanent partial disability associated with the work accident is appropriate. Employer seeks a final award.

FINDINGS OF FACT

Based on a careful review of all the evidence, including witness testimony, the medical records, documents, and the depositions, I make the following findings of fact:

1. Claimant is a 54 year old woman who has worked as a registered nurse in the healthcare field since 1974, when she earned her degree at Forest Park Community College. For approximately 20 years, Claimant worked for Employer, or its predecessors, in various capacities, including as a team leader, and providing direct patient care such as bathing, dressing, and distributing medication.
2. In late 1997 or early 1998, Claimant fell and hyper-extended the middle fingers on her left hand. She had x-rays taken. No further treatment was necessary.
3. In Fall 1998, Claimant worked as a nurse manager in a doctor's office. Her varied tasks involved direct patient care, medical records, and insurance. She was responsible for 10 to 12 patients a day, half of which involved physical lifting or transfers. She also taught fellow nurses, and assisted in conducting nerve conduction velocity tests.
4. On October 23, 1998, Claimant was transferring a 5'3", 200 pound female stroke victim with left side paralysis. With the use of a gait belt, Claimant attempted to lift the patient up to the table, but the patient's left leg buckled. To keep the patient from falling to the floor, Claimant lifted up against her falling weight, causing sudden downward pressure on her fingers and hands. Claimant sustained a strain injury affecting the volar aspect of the wrist from the base of the thumb to about halfway up the forearm. Initially Claimant reported an uncomfortable feeling and she took over-the-counter medications. Over time, the symptoms became more acute.
5. After Claimant filed a report, Employer sent her to Dr. Chawla at SSM Employee Health on November 6, 1998. Claimant reported complaints of pain at the left distal location of the PIP joint and the metacarpal as well as the radius to the metacarpal junction. The November 5th x-ray showed no abnormalities. Claimant received non-steroidal anti-inflammatories, lifting, pulling, and pushing restrictions, physical therapy and a few cortisone injections. On January 20, 1999, Claimant noted symptoms on the right side due to overuse, and Dr. Chawla diagnosed bilateral tenosynovitis on February 24, 1999, with the left almost completely resolved. Dr. Chawla discharged Claimant on May 19, 1999 at MMI.
6. On June 23, 1999, Claimant saw Dr. Strege, who diagnosed bilateral de Quervain's tenosynovitis, and recommended bilateral release of the first dorsal compartment, which Claimant had on the left on August 5, 1999. With therapy, her left wrist got better. Dr. Strege's notes indicate as of September 1999, radiographs of the right thumb demonstrate only mild early degenerative changes at the thumb CMC joint. Claimant's tenosynovitis appeared resolved, and she was then experiencing symptoms more consistent with arthritis. In November, 1999, Dr. Strege noted Claimant's left wrist symptoms completely resolved, and Claimant agreed that this is true for the most part. In December, Claimant was having increasing complaints on the right "primarily related to the thumb CMC joint." As of February 23, 2000, radiographs of the right thumb demonstrate moderate narrowing at the thumb CMC joint.
7. On August 3, 2000, Dr. Strege performed a right CMC arthrodesis with bone graft. Unfortunately, the bones did not fuse and Claimant experienced a non-union healing of her right thumb. She wore a hard cast for 16 weeks, underwent physical therapy, and thereafter used bilateral splints on her hands.

8. Claimant chose not to undergo any further surgeries with Dr. Strege, but saw him occasionally over the years for symptom control. It was Dr. Strege's opinion Claimant's continuing pain and problems were due to the ununified arthrodesis at the thumb CMC joint of the right hand, and ongoing pain related to thumb CMC arthritis on the left hand.
9. On February 1, 2002, Claimant saw Dr. Strege for a six year history of shoulder complaints, but he also note her bilateral thumb symptoms were not bad enough for surgery. On December 22, 2003, radiographs of the left thumb demonstrated moderate degenerative changes at the thumb CMC joint. By November 25, 2004, x-rays showed advanced osteoarthritis at the left CMC joint of the thumb.
10. Dr. Strege released Claimant from care on November 9, 2004, noting the left thumb had been doing well until a recent recurrence of pain. He testified it was his opinion the cause of Claimant's bilateral CMC joint arthritis was "multifactoral," and her employment with SSM was a triggering factor as to part of the cause of this arthritis, as opposed to a substantial or significant factor. In other words, work was a factor, but not the primary factor. Claimant's current need for treatment is due to all activities throughout life, and not solely to job activities at SSM.
11. In 2000, Claimant received a job transfer to St. Mary's Pain Clinic. In 2002 or 2003, Employer implemented budget cuts which resulted in Claimant's hours being cut to part time. At work, Claimant needs a splint on her wrist for lifting patients or pushing wheelchairs. Claimant finds it difficult to release medication from blister packs, upright syringes, and engage in fine motor motion.
12. Claimant attempted to return to work in the healthcare industry for about a year but found she could not lift or distribute medication in blister packs. She stopped working in direct patient care due to staffing changes implemented by her then employer.
13. Claimant currently works as a legal assistant and nurse consultant for a law firm, which involves reviewing records, summarizing medical records, and issuing reports. She intermittently uses her hands to operate the keyboard, dial the phone, and perform file work. Claimant has problems sorting papers, and using large clips.
14. Claimant outlined numerous complaints and limitations she attributes to her work injuries. She finds it difficult or impossible to use a hair dryer, operate buttons or zippers, and perform kitchen tasks such as using a garlic press or lifting a gallon of milk. Claimant no longer participates in outdoor activities, sports, or crafts. Claimant sold her house because she cannot take care of a yard, and is earning less because she no longer does direct patient care. Claimant cannot take non-steroidal anti-inflammatories due to gastric distress.
15. On the right side, Claimant has pain at the non-union, the wrist, and the base of the thumb with an increase in fatigue, and a decrease in grip strength, fine motor skills and sensations. On the left, Claimant has less fine manipulation and strength. She has two scars on the right measuring one and two inches respectively, and a one and one-half inch scar on the left.
16. Claimant is still seeking the surgery to her left thumb recommended by Dr. Strege and Dr. Schlafly, and for treatment on the right hand.
17. Dr. David Brown evaluated Claimant at Employer's request. He diagnosed: 1) bilateral first CMC joint (aka trapeziometacarpal or basal joint) arthritis, 2) failed fusion of right CMC joint, and 3) status-post de Quervain's release. He stated CMC joint arthritis is very common in women in their 40's, and the substantial cause of the condition is aging. Dr. Brown felt Claimant had permanent partial disability of 4% of the left wrist due to the CMC joint arthritis, and 10% of the right wrist due to the CMC joint arthritis, surgery and non-union, but that none of the disability was related to the work injury.
18. Dr. Bruce Schlafly examined Claimant in early 2006, reviewed her medical records, and testified on her behalf. Dr. Schlafly diagnosed Claimant with painful osteoarthritis of the left thumb CMC joint, and recommended a reconstructive surgery for pain relief. It was his opinion the work injury of October 23, 1998 is the substantial and

prevailing factor in the cause of the persistent pain coming from the CMC joint at the base of the left thumb, although he agreed the cause of osteoarthritis is multifactorial, and it is a “wear and tear disease.” He also found the left de Quervain’s tendon sheath release performed in 2000 was caused by the work accident and helped Claimant’s left wrist tendonitis. However, in Dr. Schlafly’s opinion, Claimant may eventually need surgery on the right wrist to address the failed fusion of the CMC joint. Dr. Schlafly testified Claimant has disability to her hands, but it could be altered by the surgeries he suggests.

19. The condition with which Claimant now suffers in her hands is CMC joint arthritis at the left thumb. Claimant also has symptoms in the right hand due to non-unified arthrodesis at the thumb CMC joint, which represents a failed attempt to address the CMC joint arthritis at the right thumb. CMC joint arthritis is a progressive disease caused by wear and tear.

RULINGS OF LAW

Based on substantial and competent evidence, including the above findings of fact, Claimant’s testimony, and the expert opinions I find most credible, as well as the Law of the State of Missouri, I find and rule as follows:

1. Claimant’s work injury of October 23, 1998 is not a substantial factor in her CMC joint arthritis of the thumbs.

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.D. 2004)(citations omitted). Under § 287.020.2, an injury is compensable if it is clearly work-related. That section explains that “[a]n injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability,” and “[a]n injury is not compensable merely because work was a triggering or precipitating factor.” *Loven v. Greene County*, 94 S.W.3d 475, 478 (Mo.App. S.D. 2003). Section 287.020.3(2)(a) provides, in part, that an injury is deemed to arise out of and in the course of the employment if, among other things, it is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury. *Loven at 478*. “Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Williams v. DePaul Health Center*, 996 S.W.2d 619, 631 (Mo. App. E.D. 1999)overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003). When medical theories conflict, deciding which to accept is an issue peculiarly for the determination of the [factfinder]. *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 877 (Mo.App. S.D. 1984).

The overwhelming, uncontroverted evidence establishes the condition with which Claimant now suffers in her hands is CMC joint arthritis at the left thumb. Claimant also has symptoms in the right had due to non-unified arthrodesis at the thumb CMC joint, which represents a failed attempt to address the CMC joint arthritis at the right thumb. Thus, the initial issue is whether the work accident was a substantial factor in causing Claimant’s CMC joint arthritis. On this critical issue, I find the work accident was not a substantial factor in the cause of the CMC joint arthritis.

The factual evidence does not establish the work accident was a substantial factor in the cause of Claimant’s CMC joint arthritis. X-rays show the arthritis on the left side progresses from “no abnormalities” in November 1998 to “moderate” degenerative changes at the thumb CMC joint as of December 22, 2003, and “advanced osteoarthritis” on November 25, 2004. On the right side, degenerative changes were “mild” in September 1999, but on February 23, 2002, x-rays showed moderate narrowing at the thumb CMC joint. Thus, the disease was clearly progressive and chronic. Although Claimant had acute pain, particularly on the left side, immediately following the accident, those symptoms, which were related to de Quervain’s tenosynovitis, discussed below, improved following surgery. As of late 1999, Dr. Strege noted the de Quervain’s symptoms had essentially resolved, and the remaining complaints were related to thumb CMC joint arthritis.

The credible medical opinion evidence does not support a finding of causation. I find the opinion of Dr. Strege, the treating physicin, the most credible, clear and consistent with the evidene. He felt the cause of Claimant’s bilateral CMC joint arthritis was “multifactorial,” and her employment with Employer was a triggering factor as to part of the

cause of this arthritis, as opposed to a substantial or significant factor. In other words, work was a factor, but not the primary factor. Dr. Brown provided additional details as to cause, stating the prevalence of the condition in women over 40 years old, and the disease's relationship to aging. Agreeing cause of osteoarthritis is multifactorial, and it is a "wear and tear disease," Dr. Schlafly concluded "the injury of October 23, 1998 is the substantial and prevailing factor in the cause of the persistent pain coming from the CMC joint at the base of the left thumb," but failed to offer a lucid explanation as to how or why he so concluded. I particularly find fault because left symptoms were not "persistent" from the date of injury, but rather improved with treatment of the de Quervain's, and thereafter worsened as the CMC joint arthritis followed it's natural progression.

I find Claimant has symptomatic, bilateral CMC joint arthritis of the thumbs which is caused by factors other than her work accident of October 23, 1998. The facts established, and the experts explained, the disease is a chronic, progressive condition of wear and tear on the joint due to every day life, and not one traumatic event in particular. Even if the accident directly or indirectly triggered symptoms in Claimant's thumbs, I find that it did not make a substantial contribution. As such, the October 1998 accident was not a substantial factor in either the cause of the arthritis, or the onset of the painful symptoms. As such, Claimant has not established a causal connection between the October 1998 accident and the arthritic condition for which she seeks benefits.

While the work accident did not cause the CMC joint arthritis, the evidence does establish Claimant was injured as a result of her October 23, 1998 work accident. Claimant developed de Quervain's tenosynovitis as a result of the accident. She required treatment, including surgery on the left arm. While successful in alleviating the de Quervain's symptoms, the surgery was invasive and left her with scarring. The de Quervain's tenosynovitis is a condition in which the work accident was a substantial factor, and for which Claimant is entitled to compensation.

2. Employer is not liable for additional medical care or temporary total disability compensation.

Claimant has specifically asked for treatment to cure and relieve the effects of her CMC joint arthritis, as well as temporary total disability compensation associated with such treatment. Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Mickey v. City Wide Maintenance*, 996 S.W.2d 144, 149 (Mo.App. W.D.1999) overruled in part by *Hampton*.. Having found no medical causal relationship between Claimant's CMC joint arthritis and her work accident, I find Employer is not responsible for any additional medical care or temporary total disability compensation.

3. Nature and Extent of Permanent Partial Disability.

Claimant sought alternative outcomes at this hearing. If she was not successful in securing additional treatment, Claimant, through her attorney, requested a final award of permanent partial disability compensation based on the evidence presented. Employer, through its attorney, stipulated such an award would be appropriate under the circumstances. Stipulations are controlling and conclusive, and the courts are bound to enforce them. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 436 (Mo.App. E.D. 2001) citing *Spacewalker, Inc. v. American Family*, 954 S.W.2d 420, 424 (Mo.App. E.D.1997). A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish. *Id.* Here, by requesting the court to address the issue of permanency, the parties are seeking finality.

Claimant's de Quervain's tenosynovitis is a compensable injury. Under the Missouri Workers' Compensation Act, the claimant who alleges permanent disability must adduce medical evidence that demonstrates with reasonable certainty that the claimed disability is permanent. *Cochran v. Industrial Fuels & Resources, Inc.*, 995 S.W.2d 489, 497 (Mo. App. S.D. 1999). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). There is not a great deal of evidence regarding the permanency of the tenosynovitis. However, the diagnosis is undisputed, the treatment was reasonable and related, and surgery resulted. Surgery was invasive, and resulted in permanent scarring. As Claimant recovered from her tenosynovitis surgery, her CMC joint arthritis was becoming increasingly symptomatic, so she may not have found the residual symptoms worth mentioning. Although Dr. Strega and Dr. Brown are silent as to whether Claimant has permanent disability from the tenosynovitis, Dr. Schlafly notes Claimant

has an unquantified degree of disability from her work injury.

Although the evidence is minimal regarding the degree of disability associated with Claimant's de Quervain's tenosynovitis, I find there is sufficient evidence on which to make a sound finding of disability, particularly in light of the stipulation of the parties for the alternate issuance of a final award. Based on the evidence of record, I find Claimant has permanent partial disability of 15% of the left wrist due to her de Quervain's tenosynovitis, along with 2 weeks of compensation for disfigurement.

CONCLUSION

Claimant's October 23, 1998 accident was a substantial factor in causing her left de Quervain's tenosynovitis, but not her bilateral thumb CMC joint arthritis. Claimant is not entitled to receive additional medical benefits, because any treatment she may need is not related to a compensable injury. However, Claimant shall recover 28.25 weeks of permanent partial disability and disfigurement benefits on account of her de Quervain's tenosynovitis.

This award is subject to a lien for attorney fees in the amount of 25% in favor of Attorney William Meehan.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation