

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

Injury No.: 04-143610

Employee: Michael Martin

Employer: City of St. Ann

Insurer: Missouri Rural Workers' Compensation Insurance Trust

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 17, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued August 17, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Michael Martin

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 reversed and reimbursement for past medical expenses, temporary total disability benefits, and permanent partial disability benefits should be awarded.

First, there is no question that employee developed bilateral carpal tunnel syndrome and right cubital tunnel syndrome by April 1, 2004. However, it is my opinion, based upon the medical records, testimony provided, and other evidence presented that employee met his burden of proof regarding causation and should be awarded reimbursement for past medical expenses, temporary total disability benefits, and permanent partial disability benefits.

As correctly stated in the award by the administrative law judge under § 287.067.1 RSMo (2000) an occupational disease is defined as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2 RSMo (2000) goes on to state that “[a]n occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable... An occupational disease is not compensable merely because work was a triggering or precipitating factor.”

In examining occupational diseases, the courts have stated that the determinative inquiry involves two considerations: “(1) whether there was an exposure to the disease which was 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.” *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo. App. 1991), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Employee began working for employer as a full-time police dispatcher in 1996. In February, 2002, employee was promoted to dispatcher supervisor. His duties and responsibilities changed after the promotion, as did the nature of key stroking he was required to perform. Employee’s other duties as a dispatcher and dispatcher supervisor involved the repetitive usage of the upper extremities, including writing, filing, holding

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and gripping telephones, lifting boxes and pushing and holding buttons on a radio console.

Employee first noticed hand and right elbow symptoms as early as 2001. Employee's first indicator was pain and numbness that occurred at night and later while mowing his lawn. Employee did not seek medical treatment for the conditions until April, 2005, when he went to see Dr. Vic Glogovac for treatment. Employee reported hand pain for a period of about two years.

On April 21, 2005, Dr. Glogovac performed a right carpal tunnel decompression and a right elbow cubital tunnel release on employee. On May 4, 2005, Dr. Glogovac performed a left carpal tunnel decompression on employee. On May 10, 2005, Dr. Glogovac reexamined employee and determined he was making satisfactory progress from the prior surgeries. On May 18, 2005, Dr. Glogovac released employee to return to work as tolerated by employee. On May 25, 2005, employee reported some ongoing pain issues and Dr. Glogovac determined that he was unable to work until June 1, 2005.

Dr. Volarich examined employee on February 13, 2007, for the purpose of performing an Independent Medical Evaluation. Dr. Volarich was informed by employee that leading up to April 2004, employee developed pain, numbness and tingling in both upper extremities. Employee informed Dr. Volarich that he typed or wrote rapidly for up to 12-hours per shift as a part of his police dispatcher duties and over time developed upper extremity symptoms. In addition to examining employee, Dr. Volarich also reviewed the medical records of Dr. Glogovac.

Dr. Volarich noted that he had previously diagnosed carpal tunnel syndrome in police dispatchers.

Dr. Volarich's diagnosis of employee was overuse syndrome of the left and right upper extremities, requiring bilateral carpal tunnel surgeries and right cubital tunnel release. Dr. Volarich opined that it was employee's job activities, including excessive key stroking, elbow flexion, writing and other overuse of the hands that were the cause of employee's symptoms. Dr. Volarich provided permanent partial disability ratings of 35% of both the right and left upper extremities rated at the wrists, and 35% permanent partial disability of the right upper extremity rated at the elbow. The ratings were based on the present pain, paresthesia and weakness. Dr. Volarich added a 15% body as a whole multiplicity factor due to the combination of the injuries.

Dr. Volarich did not believe that employee's admitted motorcycle riding was the cause of his symptoms. Dr. Volarich opined that the motorcycle rides would have to be very long, cross country-type trips, with many hours of riding a day in order to have the noted impact on the wrist nerves or elbow. Dr. Volarich believed work was the substantial factor.

Dr. Ollinger evaluated employee on August 27, 2007, for the purpose of performing an Independent Medical Evaluation. Dr. Ollinger focused a lot of his attention on employee's motorcycle riding. Dr. Ollinger noted that he believed employee's

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motorcycle trips would cause both carpal tunnel syndrome and cubital tunnel syndrome. Dr. Ollinger testified that he reviewed information provided by employer regarding employee's repetitive work, particularly the number of calls that came in and the keyboarding that these calls entailed. However, Dr. Ollinger did not make any effort to further question employee in detail about employee's repetitive job duties, relying on the employer provided reports.

Ultimately, Dr. Ollinger found work was not a substantial factor in causing employee's bilateral carpal tunnel syndrome or cubital tunnel syndrome of the right elbow. Dr. Ollinger rated employee at 3% permanent partial disability of the right upper extremity rated at the right elbow, and 2% permanent partial disability of the left upper extremity rated at the wrist.

It is my opinion that the administrative law judge erred in finding Dr. Ollinger more credible than Dr. Volarich. The administrative law judge gave a lot of weight to Dr. Ollinger's opinions that employee's motorcycle trips caused employee's carpal tunnel syndrome of the wrists and cubital tunnel syndrome of the right elbow. However, on cross-examination Dr. Ollinger conceded that he obtained little detail about the "long motorcycle trips" employee allegedly took. Dr. Ollinger admitted that the duration of the riding was a significant factor, yet he sought no detailed information regarding the duration of the rides, how many long rides had occurred, and when they occurred.

In addition, Dr. Ollinger was not given information regarding officer radio calls or traffic in 2004 or prior to 2004 that required extensive keyboarding. Dr. Ollinger was unaware of the number of officers on duty who would be creating this radio traffic. Dr. Ollinger only took into account the entries to only the in-house computer for a period when much of employee's duties involved excessive entries into a second computer system. Employee testified that the 2004 entries reviewed by Dr. Ollinger reflected a small percentage of his actual keyboarding volume as a supervisor, and did not account for employee's keyboarding prior to becoming a supervisor in 2002.

On the other hand, Dr. Volarich had previously seen patients who were police dispatchers, was well aware of the dispatching duties, and was aware of the hectic, repetitive nature of the tasks. Dr. Volarich also testified that he had diagnosed carpal tunnel syndrome previously on several dispatchers. Dr. Ollinger could not remember ever reviewing a police dispatcher case, much less one for carpal tunnel syndrome.

Based on the above, I believe that employee has carried his burden of proving that there was an exposure to the carpal tunnel syndrome and cubital tunnel syndrome which was greater than that which affects the public generally, and that there was a recognizable link between the carpal tunnel syndrome and cubital tunnel syndrome and employee's job duties as a police dispatcher. Although extreme amounts of motorcycling could cause employee's condition, there is no evidence that employee rode his motorcycle enough times or for long enough periods of time to cause his wrist and elbow problems. Employee's job required him to work constantly with his hands, including writing, filing, holding and gripping phones, lifting boxes and keyboarding for hours. The administrative law judge and Dr. Ollinger incorrectly ignored all aspects of

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employee's job except keyboarding. Dr. Volarich, on the other hand, took into account all of employee's duties and determined that they were a substantial factor in causing employee's bilateral carpal tunnel syndrome and cubital tunnel syndrome of employee's right elbow. I find Dr. Volarich's opinions more credible than Dr. Ollinger's.

I find that employee is entitled to reimbursement for past medical expenses, temporary total disability benefits, and permanent partial disability benefits. As such, I would reverse the award of the administrative law judge and award employee the same.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member