Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

CORRECTING ORDER

Injury No.: 05-142532

Employee: Mark McCutchen

Employer: RG Bieg Plumbing

Insurer: Hawkeye Insurance Company a/k/a Midwestern Indemnity Insurance

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

On this date, June 28, 2009, the Labor and Industrial Relations Commission issued a Final Award Allowing Compensation in this case. The Award is corrected as follows. The following paragraph is substituted for the first paragraph under the heading *Incidence of Occupational Disease*.

Section 287.067.3 RSMo provides that, [a]n injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable."

Given at Jefferson City, State of Missouri, this ____28th_____day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

_____
John J. Hickey, Member

Attest:

_____
Secretary

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 05-142532

Employee: Mark McCutchen

Employer: RG Bieg Plumbing

Insurer: Hawkeye Insurance Company a/k/a Midwestern Indemnity Insurance

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Preliminaries

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the arguments of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of Administrative Law Judge Suzette Carlisle dated July 1, 2008. The award and decision are attached hereto solely for reference.

Although we are not adopting the award and decision of the administrative law judge, we are adopting many entries from the administrative law judge's *Summary of Evidence* as our findings – often verbatim – without further attribution. We have omitted the administrative law judge's formatting. Further, as is our custom, we refer to the injured worker as "employee."

Findings of Fact

Employee is 40-years-old, right handed and worked as a metal trades journeyman for a number of employers in the past, cleaning drains, assisting plumbers, irrigating land, and working with sprinkler systems. Employee began working for employer in July 2005 and worked 38-50 hours per week at $22.70 per hour. Employee worked for employer from his home out of a service van. He did not work in the shop very much. His work duties varied daily. He cabled sanitary and storm drains, and performed high pressure line cleaning known as “jet work.” He backfilled and raked dirt, placed it in mounds, seeded it and spread it with straw.

Employee performed three types of cabling: rooftop, in-house, and in-yard. Employee testified cabling was performed through a roof vent. Employee testified there was “extreme vibration” when pulling against gravity to lift cable 25 feet out of the vent. A hand trigger was used to keep the floor machine from “flipping,” while maintaining balance on the roof.

Employee testified he experienced vibration in the yard when pushing a cable through a drain because the cutter would “bind up” causing the cable to “spring and bounce.” Bouncing made it difficult to control equipment.

Employee testified that pressing the cable lever caused vibration from his fingers to his bilateral shoulders.

Employee used the lever to stabilize equipment. In basements, employee testified he pulled toilets and manually fed cable through traps.

Employee cabled three to four days a week, 6½ hours per day . The remainder of the week he assisted plumbers and excavation crews with digging and installing pipe. He testified he operated an electrical jack hammer 10 to 15 times per year. Employee testified he felt vibration from his fingers to his shoulders and neck when he used the jackhammer. He also testified he poured and removed concrete.

Employee dug ditches using a hand shovel and handpick. Employee testified he dropped "shoring" in the hole and held it while a co-employee pumped hydraulics. Employee identified Exhibit E-1 as a photograph of a Makita, ¾ inch hand drill which he has owned since April 2006, and is similar to the one he used while working for employer. He used it at home to drill and clean drains.

In September 2005, employee began to feel mild tingling in his hands. He first noticed numbness when driving the company truck. Right hand symptoms were worse than left.

Employee performed full duty with no modifications through December 2005. By January 2006, employee suspected his hand problems were work related, but he did not provide written or verbal notice to employer. Employee testified he began to experience numbness when cabling. While driving, employee experienced severe pain and total left hand numbness. He testified he began having left hand throbbing at night.

By February 2006, employee testified his hands felt "inside-out." To relieve pain, employee ran water over his hands, however, the pain returned when he slept. At times he wanted to "chop off his hands" because of the pain.

Employee testified he informed Mindy Rogers he was having hand problems and requested time off to see a physician. Employee testified Ms. Rogers scheduled him off work for a doctor's appointment. Employee thought Ms. Rogers was a supervisor, although he was not certain. Employee testified Ms. Rogers scheduled his service calls, collected paperwork, communicated company information and delivered his pay check.

On February 6, 2006, Dr. Benz examined employee and recommended night splints. According to employee, Dr. Benz did not make a diagnosis. In May 2006, a nerve conduction study revealed severe right carpal tunnel syndrome and less severe left carpal tunnel syndrome. Employee hired attorney Robert Ballman and a Claim for Compensation was filed on May 19, 2006.

Employee testified after he spoke to Ms. Rogers he worked fewer hours, performed no hand digging, and very little cable work. His primary duties became raking and backfilling. Employee testified he was fired for personal use of the company vehicle. His last check was for the pay period ending May 2, 2006.

Dr. Benz released the right carpal tunnel on June 6, 2006, and the left on June 20, 2006. Employee received a bill for left wrist surgery totaling $2,946.00. Current complaints include right wrist weakness, pain, and limited range of motion of the wrists and fingers, and inability to perform pushups due to bilateral wrist pain. Employee testified he learned his carpal tunnel syndrome was work related on August 18, 2006 when Dr. Benz wrote a causation opinion.

Ms. Melinda Rogers testified by deposition at employer's request. She worked as a receptionist, back up dispatcher, and performed clerical work for employer from 2001 until 2007. She performed no supervisory duties. Ms. Rogers testified she spoke to employee in the office twice a week. Ms. Rogers testified employee did not discuss his hand problems with her; however, they discussed her mother's carpal tunnel problems when he asked why Ms. Rogers missed work. Ms. Rogers testified employee did not submit a

report of injury or off-work slips to her concerning his hands.

Mr. Dennis Bieg is a plumbing contractor and one of five family members who own employer. Since 1975, Mr. Bieg has worked as a laborer, plumber's apprentice, sewer cleaner, estimator, project manager, and now owner. He purchases equipment and supervises laborers, operators, metal trades workers, and plumbers.

Mr. Bieg testified new employees were instructed to report accidents to Ms. Alice Mantia, his sister and co-owner of the business. Mr. Bieg testified he did not receive written or verbal notice of injury from employee and he never heard employee complain about his hands. Mr. Bieg periodically observed job sites but had no indication employee was having hand problems. Employee performed regular duty without modification and did not submit off work slips. Mr. Bieg testified light duty was available if employee had requested it. Mr. Bieg testified he never saw Exhibit H, the Report of Injury, although, he admitted it showed employer was notified about employee's hand problems on June 26, 2006.

Mr. Bieg testified employee handled three to eight calls per day and was instructed to use only company issued equipment. He serviced drains within a 40 mile radius of St. Louis, delivered materials to job sites, and spent about one hour per day cleaning and maintaining tools. Mr. Bieg testified employee stopped working for employer in April 2006, for failure to report for work. Mr. Bieg retrieved the company van from employee's home and found the window down and keys on the seat. An employee handbook was in the vehicle.

Mr. Bieg testified Exhibit 2 reflected photographs of equipment employee used while working for employer. He further testified the photographs were true and accurate representations of: Eel Model C, Sparten Model 100 cable machine, Sparten Model 1065, a hand-held electric cable, rigid sink machine, sewer camera and electronic locator, Model C cable, Closet Auger and a hand-held drill with Eel Model J Cable.

Mr. Bieg testified workers felt no vibration when operating the machines. The cable spun and absorbed vibration. A hand lever was used on some equipment to move the cable forward and in reverse.

Mr. Bieg identified Exhibit E as a drill similar to the one used by employer, but not the same as employer's drill. Mr. Bieg testified this is the first carpal tunnel case since he began working for the company.

Ms. Alice Mantia is one of five owners of the company. Ms. Mantia has worked for the company since 1984. She handles workers' compensation reports, documents and personal leave records involving metal trades staff, and anything related to scheduling.

After employee was hired in July 2005, Ms. Mantia testified she provided him with a binder containing workers' compensation forms and a list of doctors. Ms. Mantia explained the forms and discussed the procedure for reporting work accidents. The doctors were to be used for minor injuries. She was to be notified if injuries required more treatment.

Injured workers were required to complete the top part of the Employee Accident Report (Exhibit H) as soon as they knew an injury had occurred, and she completed the employer's section. Forms were sent to the insurance company for processing.

Ms. Mantia testified employee did not provide her with an accident report, did not inform her of hand problems, or request medical treatment while working for employer. Ms. Mantia testified large signs were located on the premises, including the shop, listing accident reporting procedures. Signs were visible upon entering the building.

Ms. Mantia testified she first received notice of employee's injury when she received a copy of the Claim for

Compensation from his attorney. Employee was no longer employed so she faxed the form to the insurance representative and "let him handle it." Ms. Mantia testified she never saw or completed the Employee Accident Report (Exhibit H) and did not know who completed it. According to Ms. Mantia, the employee section should be written, not typed. She denied typing her name in the signature box, stating her practice was to sign her name when she completed the form. Ms. Mantia further denied completing the Report of Injury (Exhibit I), or typing her name, and did not know who typed it.

Ms. Mantia testified employee missed no time from work due to his hands. She said Ms. Rogers is a receptionist who answered the telephone, and dispatched calls as needed. She was not a supervisor and had no authority to take reports of injury. Ms. Mantia testified this is the first carpal tunnel case to her knowledge since she began working for the company.

Division of Workers' Compensation (Division) records contain an Employee Accident Report, noting, "injury to wrists, hands, arms, and person as a whole from intensive job work" dated June 27, 2006, with the typed preparer's name as Alice Mantia (Exhibit H). DWC records contain a Report of Injury, listing Alice Mantia as the preparer. Administrator was notified June 27, 2006, according to the report (Exhibit I).

On February 6, 2006, employee treated on his own with Dr. Stephen Benz for burning and tingling hands, thumb, index, and middle fingers radiating to the elbow waking him, numbness when driving and other activities, right hand more symptomatic than left. Dr. Benz noted, "employee performs a lot of cable work as a plumber and feels this may have aggravated his hands."

Examination revealed a positive Phalen's, reverse Phalen's, and median nerve compression. Dr. Benz diagnosed carpal tunnel syndrome. On May 16, 2006, nerve conduction studies and EMG's revealed bilateral carpal tunnel syndrome (CTS), right greater than left.

On May 17, 2006, Dr. Benz wrote: "Mr. McCutchen is a gentleman who I had seen in the past and I had given a diagnosis of carpal tunnel syndrome. He is still bothered by nocturnal paresthesia that wakes him up several nights out of the week. He has not gotten any relief from conservative care. Splints have actually hurt him." Dr. Benz recommended carpal tunnel release. Dr. Benz released the right carpal tunnel on June 6, 2006 and the left on June 20, 2006.

Dr. Ronald Hoffman is a retired board certified orthopedic surgeon, who provided an independent medical examination at the request of employee's attorney on December 12, 2006. Dr. Hoffman noted "tremendous vibrations" when employee demonstrated use of a drill during examination. Dr. Hoffman testified he personally observed a major difference in vibration between manual equipment and electric equipment used by companies to unclog his drains. Based on employee's job description, and the drill demonstration, Dr. Hoffman opined employee's repetitive work for employer was the prevailing factor in development of bilateral CTS. Dr. Hoffman testified his opinion could change if employer used different equipment. Dr. Hoffman found carpal tunnel surgery was reasonable and necessary to cure and relieve the effects of the injury, and rated 25% PPD of each wrist plus a 20% load factor because both wrists were surgically repaired. Dr. Hoffman opined the surgery, related charges, and physical therapy were fair and reasonable.

Dr. R. Evan Crandall is a board certified plastic surgeon who examined employee at employer's request. Based on employee's job description and deposition, Dr. Crandall found it "theoretically possible for employee's job activities to be the prevailing factor in causing CTS." He rated 7% PPD of each wrist. Dr. Crandall recommended employer provide an ergonomic evaluation of current workers if they did not believe employee's work was hand intensive. No evaluation is contained in the record.

Conclusions of Law

Notice

The administrative law judge denied the claim based upon her findings that employee did not provide timely written notice of his injury to employer and employer was prejudiced by the delay.

The administrative law judge denied employee's claim relying on § 287.420 RSMo, that provides, in relevant part:

…No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

The administrative law judge concluded that employee did not give timely notice under § 287.420 and that employer was prejudiced. Consequently, the administrative law judge denied the claim:

Having given careful consideration to the entire record and based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant did not provide timely written notice of injury to Employer and Employer was prejudiced by the delay.
…

I find Claimant had a reasonable awareness his condition was caused by work by February 6, 2006.
…

Section 287.420 starts the notice clock ticking based on the date of diagnosis, not the date diagnosis is confirmed by nerve conduction results or the doctor issues a causation opinion…
Award pp. 9-10.

Since the administrative law judge issued her award, the Missouri Court of Appeals for the Southern District handed down its opinion holding just the opposite.

Looking to the plain, obvious, and natural import of the language, it follows that a person cannot be diagnosed with an "occupational disease or repetitive trauma" until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure. See section 287.067 (defining the term occupational disease to mean, as relevant to this appeal, "an identifiable disease arising with or without human fault out of and in the course of the employment.").

Allcorn v. Tap Enters., 277 S.W.3d 823, 829-830 (Mo. App. 2009).
We are bound to follow the most recent pronouncement of the appellate courts. We will use the date a diagnostician issued an opinion establishing a causal connection between employee's bilateral carpal tunnel syndrome and his work activities as the date employee's thirty-day written notice period began to run.

On February 6, 2006, Dr. Benz diagnosed employee with bilateral carpal tunnel syndrome. On May 16, 2006, nerve conduction studies confirmed the diagnosis. On May 19, 2006, employee's counsel filed a claim for compensation with the Division of Workers Compensation (Division). The Division sent acknowledgment of the claim to employer and insurer on July 26, 2006.

Ms. Mantia testified that she serves as employer's office manager and handles workers' compensation matters. She testified she first learned of employee's hand problems when she received a copy of the claim for compensation from employee's counsel. The report of injury indicates that employer received notice of the injury on June 27, 2006.

On August 14, 2006, Dr. Benz issued an opinion that employee's work as a metal trade journeyman could

have been a direct result of his carpal tunnel syndrome. Under the holding in *Allcorn*, *supra*, the thirty-day period of § 287.420 began to run on August 14, 2006. Employee gave written notice of his injury to employer, in the form of his claim for compensation, no later than June 27, 2006 – the date the report of injury was filed. Because employee gave written notice of the time, place, and nature of the injury ***before*** Dr. Benz' causation opinion, it is clear that he gave the notice "***no later than thirty days after*** the diagnosis of the condition." Employee's claim is not barred by § 287.420.

Having determined that notice is not a bar to employee's claim, we must determine the remaining issues in dispute, to wit: Did employee sustain an occupational disease? If so, was employee's work exposure the prevailing factor in causing the medical condition and resulting disability? Is employer liable for past medical expenses? Is employer liable for TTD benefits? What is the nature and extent of employee's permanent disability?

Incidence of Occupational Disease

Section 287.067.1 RSMo provides that, "[a]n injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable."

Dr. Benz considered employee's job duties and concluded they could have been a direct cause of his carpal tunnel syndrome. Dr. Hoffman opined that employee's repetitive work for employer was the prevailing and substantial factor in causing his bilateral carpal tunnel syndrome. Dr. Crandall reported that employee's description of his job duties for employer described hand-intensive activities for a significant portion of the work day. Dr. Crandall believed that employee's job thusly described could theoretically be considered the prevailing factor in causing employee's carpal tunnel syndrome. There is no affirmative medical evidence suggesting that employee's exposure to repetitive work was not the cause of employee's carpal tunnel syndrome. We conclude that employee's exposure to repetitive and vibrational forces is the prevailing factor in causing his bilateral carpal tunnel syndrome and his permanent partial disability resulting therefrom.

Past Medical Expenses

The bills in evidence reflect charges for treatment of employee's bilateral carpal tunnel syndrome for the period February 16, 2006, through June 21, 2006. The bills cover diagnostic testing and the carpal tunnel syndrome releases. The bills reveal total charges of $8,387.00. Dr. Benz' medical records support the treatment corresponding to the charges. Employee testified about the treatment. Employee has established entitlement to an award of past medical expenses. Employee requests that we award $4,779.89 in past medical expenses as that amount is the amount employee is required to reimburse his union health and welfare plan.

Temporary Total Disability

Dr. Benz' records reflect that employee was unable to work from May 16, 2006, through August 18, 2006. We conclude that employee was entitled to temporary total disability for that period. Employee is entitled to temporary total disability for 133/7 weeks at the stipulated temporary total disability rate of $600.00.

Permanent Disability

After considering the rating opinions of Drs. Hoffman and Crandall, as well as employee's descriptions of the problems he experiences with his wrists, we conclude that employee has sustained 17.5% permanent partial disability of each wrist (30.625 weeks). The permanent disability to both wrists results in employee experiencing a greater overall disability than the simple sum of the wrist disabilities warranting an enhancement of the award by a multiplicity of 10%. Employee is entitled to permanent partial disability for 67.375 weeks at the stipulated rate of $365.08.

Award

We reverse the award of the administrative law judge on the issue of notice.

We direct the employer/insurer to pay to employee the sum of $4,779.89 for past medical expenses.

We direct the employer/insurer to pay to employee $8,057.14 for temporary total disability benefits.

We direct employer/insurer to pay to claimant $24,597.27 for permanent partial disability benefits.

Employee's claim against the Second Injury Fund remains open.

Robert Ballman, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 28th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

_____
John J. Hickey, Member

Attest:

_____
Secretary

AWARD

Employee: Mark McCutchen Injury No.: 05-142532

Dependents: N/A

Employer: RG Bieg Plumbing

Additional Party: Second Injury Fund

Insurer: Hawkeye Insurance Company aka Midwestern Indemnity Insurance

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: March 27, 2008 & April 2, 2008 Checked by: SC:KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

- 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

- Date of accident or onset of occupational disease: Alleged September 30, 2005

- State location where accident occurred or occupational disease was contracted: St. Louis City, 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? No

8. Did accident or occupational disease arise out of and in the course of the employment? No

- 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 alleged bilateral hand injuries from repetitive drilling, cabling, and shoveling to from unclog sewer drains.

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: Alleged bilateral Hands and wrists

- Nature and extent of any permanent disability: N/A

15. Compensation paid to-date for temporary disability: -0-

16. Value necessary medical aid paid to date by employer/insurer? -0-

17. Value necessary medical aid not furnished by employer/insurer? -0-

- Employee's average weekly wages: $900.00/$365.08

19. Weekly compensation rate: $600.00/

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: Dismissed

Total: $0.00

23. Future requirements awarded: None

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mark McCutchen

Injury No.: 05-142532

Dependents: N/A

Employer: RG Bieg Plumbing

Additional Party: Second Injury Fund

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Insurer: Hawkeye Insurance Company aka Midwestern Indemnity Insurance Checked by: SC:KOB

PRELIMINARIES

A hearing was held for a final award at the Missouri Division of Workers' Compensation (DWC) St. Louis office on March 27, 2008 at the request of Mark McCutchen ("Claimant"). The hearing was continued to April 2, 2008. Attorney Robert Ballman represented Claimant. Attorney Bradley McChesney represented RG Bieg Plumbing ("Employer") and Hawkeye Insurance Company aka Midwest Indemnity Insurance Company ("Insurer"). The Second Injury Fund is to be left open only if the Award favors Claimant on the issue of compensability. The record closed after presentation of evidence on April 2, 2008. Hearing venue is correct and jurisdiction properly lies with DWC.

STIPULATIONS

The parties have stipulated that on or about September 30, 2005:

- Claimant was employed by Employer;
- The alleged injury occurred in St. Louis City, Missouri;
- Employer and Claimant were operating under the provision of the Missouri Workers' Compensation Law;
- Employer's liability was fully insured by Insurer;
- A Claim for Compensation was filed within the time prescribed by law;
- Claimant's hourly rate was $22.70;
- Claimant's average weekly wage is $900.00. The Temporary Total Disability (TTD) rate is $600.00 and the Permanent Partial Disability (PPD)rate is $365.08;
- Employer paid no TTD benefits;
- Employer paid no medical benefits;
- The deposition of Miss Melinda Rogers (Mindy) is to be used in lieu of live testimony at the hearing; and
- Hawkeye Insurance Company is to be substituted for Midwestern Indemnity Insurance Company, which is Employers' Insurance Company.

ISSUES

-

- Did Employer receive proper notice of an occupational disease?
- If so, did Claimant sustain an occupational disease?
- If so, was the medical condition medically causally related to a work accident?
- Is Employer liable for past medical expenses totaling $4,779.89?
- Is Employer liable for 13 3/7 weeks of past TTD benefits totaling $8,057.14 ?
- What is the nature and extent, if any, of Claimant's PPD?

EXHIBITS

Claimant offered exhibits A-U. Exhibits A-T were admitted without objection. Exhibit U is not admitted based on relevance and is retained with the record. Employer offered Exhibits 1-2 which were admitted without objection. Any notations contained in the records were present when admitted into evidence.

SUMMARY OF EVIDENCE

All evidence was reviewed, but only evidence supporting this award is referenced below. Any objections not expressly ruled upon in the award are overruled.

- **Claimant** is 40-years-old, right handed and worked as a metal trades journeyman for a number of employers in the past, cleaning drains, assisting plumbers, irrigating land, and working with sprinkler systems.

- Claimant began working for Employer in July 2005 and worked 38-50 hours per week at $22.70 per hour

- Claimant worked for Employer from his home out of a service van. He did work in the shop very much. Work varied everyday. He cabled sanitary and storm drains, and performed high pressure line cleaning known as "jet work." He backfilled and raked dirt, placed it in mounds, seeded it and spread it with straw.

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- Claimant identified Exhibit E-1 as a photograph of a Makita, ¾ inch hand drill which he has owned since April 2006, and is similar to the one he used while working for Employer. He used it at home to drill and clean drains.

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- Claimant performed full duty with no modifications through December 2005. By January 2006, Claimant suspected his hand problems were work related, but he did not provide written or verbal notice to Employer.

- Claimant testified he began to experience numbness when cabling. While driving, Claimant experienced severe pain and total left hand numbness. He testified he began having left hand throbbing at night.

- By February 2006, Claimant testified his hands felt "inside-out." To relieve pain, Claimant ran water over his hands, however, the pain returned when he slept. At times he wanted to "chop off his hands" because of the pain.

- Claimant testified he informed Mindy Rogers he was having hand problems and requested time off to see a physician. Claimant testified Ms. Rogers scheduled him off work for a doctor's appointment. Claimant further testified he thought Ms. Rogers was a supervisor, although he was not certain. Claimant testified Ms. Rogers scheduled his service calls, collected paperwork, communicated company information and delivered his pay check.

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- Dr. Benz released the right carpal tunnel on June 6, 2006, and the left on June 20, 2006. Claimant received a bill for left wrist surgery totaling $2,946.00.

- Current complaints include right wrist weakness, pain, and limited range of motion of the wrists and fingers, and inability to perform pushups due to bilateral wrist pain.

- Claimant testified he learned CTS was work related on August 18, 2006 when Dr. Benz wrote a causation opinion.

- **Ms. Melinda Rogers** testified by deposition at Employer's request. She worked as a receptionist, back up dispatcher, and performed clerical work for Employer from 2001 until 2007. She performed no supervisory duties.

- Ms. Rogers testified she spoke to Claimant in the office twice a week. Ms. Rogers testified Claimant did not discuss his hand problems with her; however, they discussed her mother's carpal tunnel problems when he asked why Ms. Rogers missed work. Ms. Rogers testified Claimant did not submit a report of injury or off-work slips to her concerning his hands.

- **Mr. Dennis Bieg** is a plumbing contractor and one of five family members who own Employer. Since 1975, Mr Bieg has worked as a laborer, plumber's apprentice, sewer cleaner, estimator, project manager, and now owner. He purchases equipment and supervises laborers, operators, metal trades workers, and plumbers.

- Mr. Bieg testified new employees were instructed to report accidents to Ms. Alice Mantia, his sister and co-owner of the business.

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- Mr. Bieg testified Exhibit 2 reflected photographs of equipment Claimant used while working for Employer. He further testified the photographs were true and accurate representations of: Eel Model C, Sparten Model 100 cable machine, Sparten Model 1065, a hand-held electric cable, rigid sink machine, sewer camera and electronic locator, Model C cable, Closet Auger and a hand-held drill with Eel Model J Cable.

- Mr. Bieg testified workers felt no vibration when operating the machines. The cable spun and absorbed vibration. A hand lever was used on some equipment to move the cable forward and in reverse.

- Mr. Bieg identified Exhibit E as a drill similar to the one used by Employer, but not the same as Employer's drill. Mr. Bieg testified this is the first carpal tunnel case since he began working for the company.

- **Ms. Alice Mantia** is one of five owners of the company. Ms. Mantia has worked for the company since 1984. She handles workers' compensation reports, documents and personal leave records involving metal trades staff, and anything related to scheduling.

- After Claimant was hired in July 2005, Ms. Mantia testified she provided him with binder containing workers' compensation forms and a list of doctors. Ms. Mantia explained the forms and discussed the procedure for reporting work accidents. The doctors were to be used for minor injuries. She was to be notified if injuries required more treatment.

- Injured workers were required to complete the top part of the Employee Accident Report (Exhibit H) as soon as they knew an injury had occurred, and she completed the Employer's section. Forms were sent to the insurance company for processing.

- Ms. Mantia testified Claimant did not provide her with an accident report, did not inform her of hand problems, or request medical treatment while working for Employer.

- Ms. Mantia testified large signs were located on the premises, including the shop, listing accident reporting procedures. Signs were visible upon entering the building.

- Ms. Mantia testified she first received notice of Claimant's injury when she received a copy of the Claim for Compensation from his attorney. Claimant was no longer employed so she faxed the form to the insurance representative and "let him handle it."

- Ms. Mantia testified she never saw or completed the Employee Accident Report (Exhibit H) and did not know who completed it. According to Ms. Mantia, the employee section should be written, not typed. She denied typing her name in the signature box, stating her practice was to sign her name when she completed the form.

- Ms. Mantia further denied completing the Report of Injury (Exhibit I), or typing her name, and did not know who typed it..

- Ms. Mantia testified Claimant missed no time from work due to his hands.

- Ms Mantia testified Ms. Rogers is a receptionist who answered the telephone, and dispatched calls as needed. She was not a supervisor and had no authority to take reports of injury.

- Ms. Mantia testified this is the first carpal tunnel case to her knowledge since she began working for the company.

Division Records

- DWC records contain an Employee Accident Report, noting "injury to wrists, hands, arms, and person as a whole from intensive job work" dated June 27, 2006 with the typed preparers' name as Alice Mantia (Exhibit H).

- DWC records contain a Report of Injury, listing Alice Mantia as the preparer. Administrator was notified June 27, 2006, according to the report (Exhibit I).

Medical Evidence

- On February 6, 2006, Claimant treated on his own with **Dr. Stephen Benz** for burning and tingling hands, thumb, index, and middle fingers radiating to the elbow waking him, numbness when driving and other activities, right hand more symptomatic than left. **Dr. Benz** noted "Claimant performs a lot of cable work as a plumber and feels this may have aggravated his hands."

- Examination revealed a positive Phalens's, reverse Phalen's, and median nerve compression. **Dr. Benz** diagnosed carpal tunnel syndrome. On May 16, 2006, nerve conduction studies and EMG's revealed bilateral carpal tunnel syndrome (CTS), right greater than left.

- On May 17, 2006, **Dr. Benz** wrote: "Mr. McCutchen is a gentleman who I had seen in the past and I had given a diagnosis of carpal tunnel syndrome. He is still bothered by nocturnal paresthesia that wakes him up several nights out of the week. He has not gotten any relief from conservative care. Splints have actually hurt him." **Dr. Benz** recommended carpal tunnel release. **Dr. Benz** released the right carpal tunnel on June 6, 2006 and the left on June 20, 2006.

- **Dr. Ronald Hoffman** is a retired board certified orthopedic surgeon, who provided an independent medical examination at the request of Claimant's attorney on December 12, 2006.

- **Dr. Hoffman** noted "tremendous vibrations" when Claimant demonstrated use of a drill during examination.
- **Dr. Hoffman** testified he personally observed a major difference in vibration between manual equipment and electric equipment used by companies to unclog his drains.

- Based on Claimant's job description, and the drill demonstration, **Dr. Hoffman** opined Claimant's repetitive work for Employer was the prevailing factor in development of bilateral CTS. **Dr. Hoffman** testified his opinion could change if Employer used different equipment.

- **Dr. Hoffman** found carpal tunnel surgery was reasonable and necessary to cure and relieve the effects of the injury, and rated 25% PPD of each wrist plus a 20% load factor because both wrists were surgically repaired. **Dr. Hoffman** opined the surgery, related charges, and physical therapy were fair and reasonable.

- **Dr. R. Evan Crandall** is a board certified plastic surgeon who examined Claimant at Employer's request. Based on Claimant's job description and deposition, **Dr. Crandall** found it "theoretically possible for Claimant's job activities to be the prevailing factor in causing CTS." He rated 7% PPD of each wrist.

- **Dr. Crandall** recommended Employer provide an ergonomic evaluation of current workers if they did not believe Claimant's work was hand intensive. No evaluation is contained in the record.

FINDINGS OF FACT and RULINGS OF LAW

Having given careful consideration to the entire record and based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant did not provide timely written notice of injury to Employer and Employer was prejudiced by the delay.

Factual disputes exist regarding notice. The first question is whether notice was proper. Employer contends Employee failed to notify Employer of injury within 30 days of the CTS diagnosis. Claimant asserts he did not know CTS was work related until Dr. Benz issued a report on August 18, 2006.

Burden of Proof: Section 287.808 RSMo (2005) provides that Claimant has the burden to prove that more likely than not, he is entitled to compensation. The claimant bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. ***Grime v. Altec Industries***, 83 S.W.3d 581, 583 (Mo.App. 2002) (*overruled by* ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220, 223 (Mo. 2003)).

Claimant's reliance on Section 287.127.1(2) for notice is not persuasive. Section 287.127 outlines information an employer is required to post and the penalty for failure to comply. Moreover, Section 287.800 RSMo (2005) requires strict statutory construction of all provisions contained in the chapter, and Section 287.127.1(2) does not require an employee obtain a medical causation opinion in order to become "reasonably aware of work relatedness."

I find Claimant had a reasonable awareness his condition was caused by work by February 6, 2006. Claimant testified he began having problems with his hands in September

2005, and by January 2006, he suspected it was caused by work. Claimant's concerns were reflected in Dr. Benz's February 6, 2006 report. Additionally, the Claim for Compensation, filed May 19, 2006, reflects injury to "both wrists, hands ... from hand intensive and repetitive work, including cabling, pulling, hooking, and running vibrating and twisting cables... " Clearly, the claim was filed before August 2006. I find Claimant's testimony is not credible that he did not know he had CTS or that it was work related until Dr. Benz issued a report on August 18, 2006.

Section 287.420 starts the notice clock ticking based on the date of diagnosis, not the date diagnosis is confirmed by nerve conduction results or the doctor issues a causation opinion. Section 287.420 RSMo (2005) states in part:

No proceedings for compensation for any occupational disease or repetitive trauma ... shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days **after the diagnosis** of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice. (Emphasis added)

I find Dr. Benz diagnosed CTS on February 6, 2006. Claimant's testimony is not credible that he was unaware Dr. Benz diagnosed CTS on February 6, 2006. Dr. Benz found a positive Phalen's, reverse Phalen's, and median nerve compression, diagnosed CTS and ordered nerve conduction studies. Dr. Benz wrote: "I am going to give him a diagnosis of CTS." Also, Dr. Benz's May 2006 report referred his earlier CTS diagnosis.

I find Claimant did not notify Employer in writing within 30 days of Dr. Benz's diagnosis. Ms. Mantia testified she instructed Claimant how to report work accidents and provided forms. Claimant testified he never notified Employer in writing of his hand complaints. Ms. Mantia did not learn Claimant was injured until after he left the company, more than 60 days after he was diagnosed with CTS. Mr. Bieg testified Claimant did not inform him of hand problems.

I find credible testimony by Ms. Mantia and Mr. Bieg that Claimant did not report hand problems, display problems working, or wear splints. Claimant did not inform Ms. Mantia or Mr. Bieg about his appointment with Dr. Benz or the nerve conduction test. He lost no time from work because of his hands, performed full duty, and did not request Employer provide treatment. The record contains no evidence Claimant notified either Ms. Mantia or Mr. Bieg about hand problems.

I find Employer did not receive actual or imputed notice of Claimant's medical condition. Notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. ***Ford v. Bi-State Development Agency***, 677 S.W.2d 899, 902 -903 (Mo.App. 1984) (*other citations omitted*) (*overruled on other grounds by* ***Hampton,*** 121 at 223. Knowledge of a potentially compensable injury makes a prima facie showing that the employer was not prejudiced by the failure to receive timely written notice and shifts to the employer the burden of proving the contrary. ***Id.***

I find not credible Claimant's testimony that he reported hand complaints to Ms. Rogers. Ms. Rogers denied Claimant reported hand problems to her. Also, Ms. Rogers was a receptionist, not a supervisor. Claimant admitted during the hearing he did not know Ms. Roger's title. Assuming Ms. Rogers was a supervisor and Claimant notified her of his hand complaints prior to seeing Dr. Benz, he did not report to Ms. Rogers, Ms. Mantia or Mr. Bieg after the appointment. He did not inform anyone Dr. Benz ordered nerve conduction studies and he did not request Employer provide treatment.

Additionally, Ms. Mantia provided Claimant with an Employee Accident Report however, there is no evidence he completed it. Ms. Mantia denied completing Employer's section. She also denied completing the Report of Injury (Exhibit I). In this case, it is immaterial who completed Exhibits H and I as they show the injury was reported June 26 and 27, 2006, 4 ½ months after CTS was diagnosed. Similarly, the original

Claim for Compensation was received by DWC on May 19, 2006, more than three months after diagnosis.

***I find Employer and Insurer were prejudiced by Claimant's failure to provide written notice of injury within 30 days of diagnosis*.** Claimant had difficulty sleeping because of his hands. Claimant testified his hands hurt so bad he wanted to "chop them off," and they felt like they were "turning inside out" until he ran water over them. However, numbness returned as soon as he fell asleep. He began to experience numbness when cabling and driving, total left hand numbness, throbbing at night, and severe pain.

Claimant's first medical appointment occurred five months after the onset of symptoms. Mr. Bieg testified he could have provided light duty if he had known Claimant was having problems. Claimant may have avoided severe symptoms and possibly surgery with prompt medical care.

Based upon medical reports and testimony by Claimant, Ms. Rogers, Ms. Mantia and Mr. Bieg, I find Claimant did not provide written notice of CTS within 30 days of diagnosis. I further find Employer was prejudiced by the delay.

All other issues are moot.

CONCLUSION

Claimant did not provide written notice of injury within 30 days of diagnosis and Employer was prejudiced by the delay. The Second Injury Fund is dismissed.

Date: _____

Made by: _____
Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Jeffrey W. Buker
Director
Division of Workers' Compensation

All statutory references are to the 2005 Revised Statutes of Missouri unless otherwise indicated.
Employee testified cabling included unloading equipment, cabling, unwinding equipment, and loading the van.
Employee testified the area shoveled measured 4 feet by 4 feet, and 40 inches deep.
Dr. Crandall considered employee's work hand intensive if it exceeded OSHA guidelines for hand activity; which included repetitive movement every 2 to 3 seconds over 4 hours per day, and using high torque vibratory tools 2 hours a day, 5 days a week.
Section 1.040 RSMo, provides: "The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday it shall be excluded."

(30.625 + 30.625) X 1.10
The alleged past TTD period covers May 16, 2006 through August 18, 2006.
Employer/Insurer's objection is sustained that an offer to pay benefits is an admission of liability. (*See* ***Dister v. Ludwig***, 240 S.W., 2d 694, 701 Mo 1951).

Claimant testified cabling included unloading equipment, cabling, unwinding equipment, and loading the van.
Claimant testified the area shoveled measured 4 feet by 4 feet, and 40 inches deep.
Dr. Crandall considered Claimant's work hand intensive if it exceeded OSHA guidelines for hand activity; which included repetitive movement every 2 to 3 seconds over 4 hours per day, and using high torque vibratory tools 2 hours a day, 5 days a week.
Section 287.127.1(2) RSMo (2005) states: ... Employees must report all injuries immediately to the employer by advising the employer personally, the employer's designated individual or the employee's immediate boss, supervisor or foreman and that the employee may lose the right to receive compensation if the injury or illness is not reported within thirty days or in the case of occupational illness or disease, within thirty days of the time he is reasonably aware of work relatedness of the injury, employees who fail to notify their employer within thirty days may jeopardize their ability to receive compensation, and any other benefits under this chapter.