

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

Injury No.: 01-169441

Employee: Thomas Milkert  
Employer: Union Electric Company  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: June 11, 2001  
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 January 8, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued January 8, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Thomas Milkert

Injury No.: 01-169441

Dependents: N/A  
Employer: Union Electric Company  
Additional Party: Second Injury Fund  
Insurer: Self-Insured  
Hearing Date: November 14, 2006

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

Checked by: MDV:tr

### 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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: See Award
5. State location where accident occurred or occupational disease was contracted: See Award
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? See Award
7. Did employer receive proper notice? See Award
8. Did accident or occupational disease arise out of and in the course of the employment? See Award
9. Was claim for compensation filed within time required by Law? See Award
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
See Award
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: See Award
14. Nature and extent of any permanent disability: Issue not reached
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Thomas Milkert Injury No.: 01-169441

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$1,275.00
19. Weekly compensation rate: \$599.96/\$314.26
20. Method wages computation: Agreed

### COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL:

-0-

23. Future requirements awarded: N/A

Said payments to begin N/A 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:	Thomas Milkert	Injury No.: 01-169441
Dependents:	N/A	Before the
Employer:	Union Electric Company	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Self-Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDV:tr

### **PREFACE**

Four claims were tried together. In Injury Number 01-169441, the issues presented for resolution by way of the hearing were occupational disease, statute of limitations, permanent partial disability, and temporary total disability. The claim was for occupational disease of the left upper extremity and the defendant amended the answer by interlineation at hearing to allege the defense of the statute of limitations.

In Injury Number 03-122189, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Employer sought to amend the answer by interlineation at the hearing to allege the defense of the statute of limitations regarding the left wrist only

In Injury Number 03-050167, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Once again, the Employer amended the answer by interlineation at the time of the hearing to allege the defense of the statute of limitations. All amendments to the answers were objected to by Claimant's counsel.

In Injury Number 03-138356, the issues presented for resolution were occupational disease and the nature and extent of permanent partial disability.

The parties agreed that in each case the average weekly wage was the maximum in excess of \$1,275.00 a week. The rates of compensation in Injury Number 01-169441 are \$599.96/\$314.26; in Injury Number 03-122189 are \$649.32/\$340.12; Injury Number 03-050167 are \$649.32/\$340.12 and in Injury Number 03-138356 are \$662.55/\$347.05.

### **SUMMARY OF DECISIONS**

In each case the claims are denied on the sole ground of the last exposure rule.

### **FINDINGS OF FACT**

1. Claimant was born June 29, 1947, was 59 years old, and married on the date of the hearing. He attended high school, took college classes, and obtained a certificate in Industrial Electricity. Claimant worked for Ameren UE for approximately 31 years, retiring on February 1, 2003.
2. On April 7, 2003, the Claimant began working for Tri Township Park District in Troy, Illinois. In this capacity, he was a maintenance and grounds keeper. His duties included general plumbing, electrical work, construction work, cutting grass, utilizing lawnmowers, riding lawnmowers and tractors to maintain the park system. The park system consisted of 72 acres of park and land, and he was also responsible for maintaining a petting zoo, mixing animal food, and preparing the athletic fields for use. He worked 30 to 40 hours a week and worked there for the next 2 ½ years.
3. Claimant went to work at the Southern Illinois University at Edwardsville from April 2006 to September 2006, again in a maintenance capacity using lawnmowers, picking up trash, trimming shrubs and performing mulching and landscape duties.
4. In approximately 1969, Claimant began his career as a laborer at Ameren UE. In this capacity, he would sweep floors, empty trash, and jackhammer in the coal yards when the trains came in. Claimant then went to work for two years as a porter/laborer at the Ameren's Meramec plant cleaning locker rooms and restrooms, mopping, sweeping, and then transferred to the apprentice electrician program. After three years as an apprentice, he became a journeyman electrician.
5. For the next part of his career, Claimant worked performing motor work, taking transformers apart, taking panels apart using wrenches, box wrenches, socket wrenches, open wrenches, manipulating bolts and screws, all of which exerted stress and pressure on his wrists and hands.
6. In the eleven years prior to retiring, Claimant worked as a supervisor and testified it was less physically demanding than that of the electrician job he previously held. He would occasionally help out with electrician duties but most of his job duties were managerial although they did involve entering information on a computer.
7. Claimant testified that he noticed hand problems beginning back in the 1970s. He first began having hand problems when he would work 16 hours a day cracking rocks with a jackhammer. Claimant's hands would recover overnight and he never mentioned it because he was in a probationary period and so he lived with the discomfort. There was no explanation offered why he did not mention the problems after the probationary period. Claimant testified that his hands would get numb and complaints intensified over the years as a journeyman electrician, especially when he tried to open junction boxes or when he was working overhead.
8. Claimant testified that when he was a supervisor he reported his hand problems to his immediate supervisor, Charlie Defenbaum, and specifically recalls telling Charlie Defenbaum that he thought his problems were work related. This was during his last year working for the company. He did not ask for medical care.
9. As a supervisor responsible for numerous electricians, Claimant was well aware of how to report a work related injury.

10. Claimant went and saw his primary care physician, Robert Ayers, M.D., who sent him to Dr. Matos, a hand physician, who performed some injections in the left elbow that were not helpful. Dr. Matos referred Claimant to Dr. McKay who performed left carpal tunnel surgery on June 11, 2001. Claimant was off work during this time period but does not recall how long. He was not paid any temporary total disability benefits.
11. Dr. Sheerer performed the right carpal tunnel surgery on November 12, 2004, after Claimant retired from UE. Claimant was on light duty following this surgery at Tri Township Park District until November 29, 2004. He did not get paid any temporary total disability benefits and did not request light duty.
12. Exhibit 2 indicates that Claimant's job at the park system included the use of lawnmowers, tractors, vibratory equipment and loud riding mowers and tractors.
13. Dr. Ollinger testified that Claimant was exposed to the hazards of carpal tunnel syndrome in his job at Tri-Township Park District. Dr. Schlafly, Claimant's expert, also opined work at the Park District exposed Claimant to the hazards of carpal tunnel syndrome and epicondylitis and other upper extremity complaints including elbow tendonitis. (Exhibit H, pgs. 16, 24, 25, 30, 31, 39, and 46).
14. Each of these claims is for occupational disease. The first three alleging injuries to the upper extremities, the fourth for tinnitus or ringing in the ears. Claimant has no compensable hearing loss.
15. The claim in the first case was filed on December 4, 2003. The claim in the second case was filed on December 4, 2003. The claim in the third case was filed on December 4, 2003, and the claim in the fourth case, the one for tinnitus, was filed February 24, 2004.

## RULINGS OF LAW

### *Occupational Disease/Last Exposure*

The decisive issue is the application of the pre 2005 version of §287.063. It reads: "1) 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.; 2) 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". "This last exposure rule is not a rule of causation". Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 615 (Mo.banc 2002). "Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease." Id.

Section 287.067.7 has been recognized as a turning point to shift liability away from the last employer in certain circumstances involving employment for less than three months. Copeland v. Associated Wholesale Grocers, \_\_\_ S.W.3d \_\_\_ 2006 W.L. 2940746 (Mo.App. S.D.). This exception is not applicable in this case.

The Southern District has noted another turning point shifting liability away from the last employer in Maynard v. Lester E. Cox Medical Center/Oxford Health Care, 111 S.W.3d 487 (Mo.App. 2003). "For the liability for claimant's occupational disease to [accrue to] subsequent employers claimant would have to have been employed in an occupation or process in which the hazard of the disease exists." Id. at 491 citing §287.063.1. This concept can be thought of as a "no exposure rule". Thus if claimant is not exposed to the hazard of an occupational disease in the subsequent employment, that employer is not liable.

Reviewing the substantial, competent and credible evidence in this case, it is clear that Claimant was exposed to the hazard of the occupational diseases complained of in his subsequent employment with both Tri County and SIUE. Since the claims were filed while Claimant was employed with Tri County, and after he had been there for three months, the last exposure rule operates in each of these cases to absolve Ameren Union Electric from liability for Claimant's occupational diseases. This is so even though Claimant had surgery while at Ameren UE on his left wrist. The rule operates to place that liability on the subsequent employer. As in Copeland, justice and fairness might lead to a different result under the facts of this case, especially since the left carpal tunnel surgery occurred while at Ameren UE, subsequent employers had "minimal, fair, legal means of inquiring as to Claimant's pre-employment medical status and medical history" and Claimant delayed for several years in filing the Claim for Compensation. Copeland, supra.

Nevertheless, the Supreme Court recently reaffirmed the application of the last exposure rule:

"The exception to the last exposure rule is usually invoked by downstream employers seeking to deny benefits to a new employee with a pre-existing condition and shift liability back upstream to a

prior employer. Here, [employee] interpreted the statute as an instruction to bypass the ordinary procedure of filing the claim against his then-current employer and instead file his claim against [previous employer]. [Employee] contends that [the subsequent employer] did not expose him to the hazard of the occupational disease that caused his injury because his repetitive activities at [subsequent employer] were different and less strenuous than those he performed at [former employer]. [Employee] identifies swinging a sledgehammer as the specific "hazard of the occupational disease" referenced in section 287.063 and as the "substantial contributing factor" referenced in section 287.067.7.

It is undisputed that [employee] had been performing repetitive work using his upper extremities throughout his tenure at [subsequent employer]. At the administrative hearing, [employee] described his various assignments and testified that he did not experience shoulder pain until he began overhead work around September 3. However, records of a medical consultation that Pierce received at [subsequent employer] indicate that he reported having pain "about 2 weeks after starting the repetitious work." The ALJ weighed the evidence and concluded that Pierce was exposed to the hazard of his occupational disease for more than three months at [subsequent employer].

The ALJ properly noted that grading the level of activity is not a factor once the employee has been exposed to repetitive activity for three months. The relevant statutes along with this Court's holding in Endicott create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws. [Employee's] medical records document his shoulder pain during several months of employment at [subsequent employer] before he filed the present claim. The last exposure rule of section 287.063 requires only that the employee be exposed to the "hazard of the occupational disease." It does not require that the hazard to which he was exposed be the "substantial contributing factor" to the injury. In other words, as to ... the most recent employer, [employee] need only show that he was exposed to the same type of hazard.

Pierce v. BSC, Inc., SC87689, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Mo.banc. December 5, 2006).

Likewise, I am not going to distinguish between the levels of activity at the different employers. I merely determine that Claimant was exposed to the hazard of all the occupational diseases complained of while at subsequent Employer. The last exposure rule operates here as a bright line test to absolve Ameren Union Electric of any liability.

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

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

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION

(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-050167

Employee: Thomas Milkert  
Employer: Union Electric Company  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: May 28, 2003  
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 January 8, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued January 8, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Thomas Milkert

Injury No.: 03-050167

Dependents: N/A

Before the  
**Division of Workers'**

Employer: Union Electric Company

**Compensation**

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri  
Jefferson City, Missouri

Insurer: Self-Insured

Hearing Date: November 14, 2006

Checked by: MDV:tr

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
3. 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
6. Date of accident or onset of occupational disease: See Award
7. State location where accident occurred or occupational disease was contracted: See Award
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? See Award
7. Did employer receive proper notice? See Award
8. Did accident or occupational disease arise out of and in the course of the employment? See Award
10. Was claim for compensation filed within time required by Law? See Award
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
See Award
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: See Award
15. Nature and extent of any permanent disability: Issue not reached
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Thomas Milkert

Injury No.:

03-050167

17. Value necessary medical aid not furnished by employer/insurer? -0-
19. Employee's average weekly wages: \$1,275.00
19. Weekly compensation rate: \$649.32/\$340.12
20. Method wages computation: Agreed

### COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: N/A

Said payments to begin N/A 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:	Thomas Milkert	Injury No.: 03-050167
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Union Electric Company	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Self-Insured	Checked by: MDV:tr

### **PREFACE**

Four claims were tried together. In Injury Number 01-169441, the issues presented for resolution by way of the hearing were occupational disease, statute of limitations, permanent partial disability, and temporary total disability. The claim was for occupational disease of the left upper extremity and the defendant amended the answer by interlineation at hearing to allege the defense of the statute of limitations.

In Injury Number 03-122189, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Employer sought to amend the answer by interlineation at the hearing to allege the defense of the statute of limitations regarding the left wrist only

In Injury Number 03-050167, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Once again, the Employer amended the answer by interlineation at the time of the hearing to allege the defense of the statute of limitations. All amendments to the answers were objected to by Claimant's counsel.

In Injury Number 03-138356, the issues presented for resolution were occupational disease and the nature and extent of permanent partial disability.

The parties agreed that in each case the average weekly wage was the maximum in excess of \$1,275.00 a week. The rates of compensation in Injury Number 01-169441 are \$599.96/\$314.26; in Injury Number 03-122189 are \$649.32/\$340.12; Injury Number 03-050167 are \$649.32/\$340.12 and in Injury Number 03-138356 are \$662.55/\$347.05.

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**SUMMARY OF DECISIONS**  
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In each case the claims are denied on the sole ground of the last exposure rule.

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**FINDINGS OF FACT**  
-

16. Claimant was born June 29, 1947, was 59 years old, and married on the date of the hearing. He attended high school, took college classes, and obtained a certificate in Industrial Electricity. Claimant worked for Ameren UE for approximately 31 years, retiring on February 1, 2003.
17. On April 7, 2003, the Claimant began working for Tri Township Park District in Troy, Illinois. In this capacity, he was a maintenance and grounds keeper. His duties included general plumbing, electrical work, construction work, cutting grass, utilizing lawnmowers, riding lawnmowers and tractors to maintain the park system. The park system consisted of 72 acres of park and land, and he was also responsible for maintaining a petting zoo, mixing animal food, and preparing the athletic fields for use. He worked 30 to 40 hours a week and worked there for the next 2 ½ years.
18. Claimant went to work at the Southern Illinois University at Edwardsville from April 2006 to September 2006, again in a maintenance capacity using lawnmowers, picking up trash, trimming shrubs and performing mulching and landscape duties.
19. In approximately 1969, Claimant began his career as a laborer at Ameren UE. In this capacity, he would sweep floors, empty trash, and jackhammer in the coal yards when the trains came in. Claimant then went to work for two years as a porter/laborer at the Ameren's Meramec plant cleaning locker rooms and restrooms, mopping, sweeping, and then transferred to the apprentice electrician program. After three years as an apprentice, he became a journeyman electrician.
20. For the next part of his career, Claimant worked performing motor work, taking transformers apart, taking panels apart using wrenches, box wrenches, socket wrenches, open wrenches, manipulating bolts and screws, all of which exerted stress and pressure on his wrists and hands.
21. In the eleven years prior to retiring, Claimant worked as a supervisor and testified it was less physically demanding than that of the electrician job he previously held. He would occasionally help out with electrician duties but most of his job duties were managerial although they did involve entering information on a computer.
22. Claimant testified that he noticed hand problems beginning back in the 1970s. He first began having hand problems when he would work 16 hours a day cracking rocks with a jackhammer. Claimant's hands would recover overnight and he never mentioned it because he was in a probationary period and so he lived with the discomfort. There was no explanation offered why he did not mention the problems after the probationary period. Claimant testified that his hands would get numb and complaints intensified over the years as a journeyman electrician, especially when he tried to open junction boxes or when he was working overhead.
23. Claimant testified that when he was a supervisor he reported his hand problems to his immediate supervisor, Charlie Defenbaum, and specifically recalls telling Charlie Defenbaum that he thought his problems were work related. This was during his last year working for the company. He did not ask for medical care.
24. As a supervisor responsible for numerous electricians, Claimant was well aware of how to report a work related injury.
25. Claimant went and saw his primary care physician, Robert Ayers, M.D., who sent him to Dr. Matos, a hand physician, who performed some injections in the left elbow that were not helpful. Dr. Matos referred

Claimant to Dr. McKay who performed left carpal tunnel surgery on June 11, 2001. Claimant was off work during this time period but does not recall how long. He was not paid any temporary total disability benefits.

26. Dr. Sheerer performed the right carpal tunnel surgery on November 12, 2004, after Claimant retired from UE. Claimant was on light duty following this surgery at Tri Township Park District until November 29, 2004. He did not get paid any temporary total disability benefits and did not request light duty.
27. Exhibit 2 indicates that Claimant's job at the park system included the use of lawnmowers, tractors, vibratory equipment and loud riding mowers and tractors.
28. Dr. Ollinger testified that Claimant was exposed to the hazards of carpal tunnel syndrome in his job at Tri-Township Park District. Dr. Schlafly, Claimant's expert, also opined work at the Park District exposed Claimant to the hazards of carpal tunnel syndrome and epicondylitis and other upper extremity complaints including elbow tendonitis. (Exhibit H, pgs. 16, 24, 25, 30, 31, 39, and 46).
29. Each of these claims is for occupational disease. The first three alleging injuries to the upper extremities, the fourth for tinnitus or ringing in the ears. Claimant has no compensable hearing loss.
30. The claim in the first case was filed on December 4, 2003. The claim in the second case was filed on December 4, 2003. The claim in the third case was filed on December 4, 2003, and the claim in the fourth case, the one for tinnitus, was filed February 24, 2004.

## RULINGS OF LAW

### *Occupational Disease/Last Exposure*

The decisive issue is the application of the pre 2005 version of §287.063. It reads: "1) 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.; 2) 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". "This last exposure rule is not a rule of causation". Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 615 (Mo.banc 2002). "Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease." Id.

Section 287.067.7 has been recognized as a turning point to shift liability away from the last employer in certain circumstances involving employment for less than three months. Copeland v. Associated Wholesale Grocers, \_\_\_ S.W.3d \_\_\_ 2006 W.L. 2940746 (Mo.App. S.D.). This exception is not applicable in this case.

The Southern District has noted another turning point shifting liability away from the last employer in Maynard v. Lester E. Cox Medical Center/Oxford Health Care, 111 S.W.3d 487 (Mo.App. 2003). "For the liability for claimant's occupational disease to [accrue to] subsequent employers claimant would have to have been employed in an occupation or process in which the hazard of the disease exists." Id. at 491 citing §287.063.1. This concept can be thought of as a "no exposure rule". Thus if claimant is not exposed to the hazard of an occupational disease in the subsequent employment, that employer is not liable.

Reviewing the substantial, competent and credible evidence in this case, it is clear that Claimant was exposed to the hazard of the occupational diseases complained of in his subsequent employment with both Tri County and SIUE. Since the claims were filed while Claimant was employed with Tri County, and after he had been there for three months, the last exposure rule operates in each of these cases to absolve Ameren Union Electric from liability for Claimant's occupational diseases. This is so even though Claimant had surgery while at Ameren UE on his left wrist. The rule operates to place that liability on the subsequent employer. As in Copeland, justice and fairness might lead to a different result under the facts of this case, especially since the left carpal tunnel surgery occurred while at Ameren UE, subsequent employers had "minimal, fair, legal means of inquiring as to Claimant's pre-employment medical status and medical history" and Claimant delayed for several years in filing the Claim for Compensation. Copeland, supra.

Nevertheless, the Supreme Court recently reaffirmed the application of the last exposure rule:

"The exception to the last exposure rule is usually invoked by downstream employers seeking to deny benefits to a new employee with a pre-existing condition and shift liability back upstream to a prior employer. Here, [employee] interpreted the statute as an instruction to bypass the ordinary

procedure of filing the claim against his then-current employer and instead file his claim against [previous employer]. [Employee] contends that [the subsequent employer] did not expose him to the hazard of the occupational disease that caused his injury because his repetitive activities at [subsequent employer] were different and less strenuous than those he performed at [former employer]. [Employee] identifies swinging a sledgehammer as the specific "hazard of the occupational disease" referenced in section 287.063 and as the "substantial contributing factor" referenced in section 287.067.7.

It is undisputed that [employee] had been performing repetitive work using his upper extremities throughout his tenure at [subsequent employer]. At the administrative hearing, [employee] described his various assignments and testified that he did not experience shoulder pain until he began overhead work around September 3. However, records of a medical consultation that Pierce received at [subsequent employer] indicate that he reported having pain "about 2 weeks after starting the repetitious work." The ALJ weighed the evidence and concluded that Pierce was exposed to the hazard of his occupational disease for more than three months at [subsequent employer].

The ALJ properly noted that grading the level of activity is not a factor once the employee has been exposed to repetitive activity for three months. The relevant statutes along with this Court's holding in Endicott create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws. [Employee's] medical records document his shoulder pain during several months of employment at [subsequent employer] before he filed the present claim. The last exposure rule of section 287.063 requires only that the employee be exposed to the "hazard of the occupational disease." It does not require that the hazard to which he was exposed be the "substantial contributing factor" to the injury. In other words, as to ... the most recent employer, [employee] need only show that he was exposed to the same type of hazard.

Pierce v. BSC, Inc., SC87689, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Mo.banc. December 5, 2006).

Likewise, I am not going to distinguish between the levels of activity at the different employers. I merely determine that Claimant was exposed to the hazard of all the occupational diseases complained of while at subsequent Employer. The last exposure rule operates here as a bright line test to absolve Ameren Union Electric of any liability.

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

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

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION \_\_\_\_\_

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

Employee: Thomas Milkert  
Employer: Union Electric Company  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: January 31, 2003  
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 January 8, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued January 8, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Thomas Milkert  
Dependents: N/A  
Employer: Union Electric Company  
Additional Party: Second Injury Fund

Injury No.: 03-122189  
Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: Self-Insured

Hearing Date: November 14, 2006

Checked by: MDV:tr

**FINDINGS OF FACT AND RULINGS OF LAW**

- 1. Are any benefits awarded herein? No
- 4. 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
- 8. Date of accident or onset of occupational disease: See Award
- 9. State location where accident occurred or occupational disease was contracted: See Award
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? See Award
- 7. Did employer receive proper notice? See Award
- 8. Did accident or occupational disease arise out of and in the course of the employment? See Award
- 11. Was claim for compensation filed within time required by Law? See Award
- 10. Was employer insured by above insurer? Yes
- 11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
See Award
- 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: See Award
- 16. Nature and extent of any permanent disability: Issue not reached
- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Thomas Milkert

Injury No.:

03-122189

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 20. Employee's average weekly wages: \$1,275.00
- 19. Weekly compensation rate: \$649.32/\$340.12
- 20. Method wages computation: Agreed

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: No
- TOTAL: -0-
- 23. Future requirements awarded: N/A

Said payments to begin N/A 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:	Thomas Milkert	Injury No.:	03-122189
Dependents:	N/A	Before the	
Employer:	Union Electric Company	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund	<b>Compensation</b>	
Insurer:	Self-Insured	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	MDV:tr

### **PREFACE**

Four claims were tried together. In Injury Number 01-169441, the issues presented for resolution by way of the hearing were occupational disease, statute of limitations, permanent partial disability, and temporary total disability. The claim was for occupational disease of the left upper extremity and the defendant amended the answer by interlineation at hearing to allege the defense of the statute of limitations.

In Injury Number 03-122189, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Employer sought to amend the answer by interlineation at the hearing to allege the defense of the statute of limitations regarding the left wrist only

In Injury Number 03-050167, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Once again, the Employer amended the answer by interlineation at the time of the hearing to allege the defense of the statute of limitations. All amendments to the answers were objected to by Claimant's counsel.

In Injury Number 03-138356, the issues presented for resolution were occupational disease and the nature and extent of permanent partial disability.

The parties agreed that in each case the average weekly wage was the maximum in excess of \$1,275.00 a week. The

rates of compensation in Injury Number 01-169441 are \$599.96/\$314.26; in Injury Number 03-122189 are \$649.32/\$340.12; Injury Number 03-050167 are \$649.32/\$340.12 and in Injury Number 03-138356 are \$662.55/\$347.05.

### **SUMMARY OF DECISIONS**

In each case the claims are denied on the sole ground of the last exposure rule.

### **FINDINGS OF FACT**

31. Claimant was born June 29, 1947, was 59 years old, and married on the date of the hearing. He attended high school, took college classes, and obtained a certificate in Industrial Electricity. Claimant worked for Ameren UE for approximately 31 years, retiring on February 1, 2003.
32. On April 7, 2003, the Claimant began working for Tri Township Park District in Troy, Illinois. In this capacity, he was a maintenance and grounds keeper. His duties included general plumbing, electrical work, construction work, cutting grass, utilizing lawnmowers, riding lawnmowers and tractors to maintain the park system. The park system consisted of 72 acres of park and land, and he was also responsible for maintaining a petting zoo, mixing animal food, and preparing the athletic fields for use. He worked 30 to 40 hours a week and worked there for the next 2 ½ years.
33. Claimant went to work at the Southern Illinois University at Edwardsville from April 2006 to September 2006, again in a maintenance capacity using lawnmowers, picking up trash, trimming shrubs and performing mulching and landscape duties.
34. In approximately 1969, Claimant began his career as a laborer at Ameren UE. In this capacity, he would sweep floors, empty trash, and jackhammer in the coal yards when the trains came in. Claimant then went to work for two years as a porter/laborer at the Ameren's Meramec plant cleaning locker rooms and restrooms, mopping, sweeping, and then transferred to the apprentice electrician program. After three years as an apprentice, he became a journeyman electrician.
35. For the next part of his career, Claimant worked performing motor work, taking transformers apart, taking panels apart using wrenches, box wrenches, socket wrenches, open wrenches, manipulating bolts and screws, all of which exerted stress and pressure on his wrists and hands.
36. In the eleven years prior to retiring, Claimant worked as a supervisor and testified it was less physically demanding than that of the electrician job he previously held. He would occasionally help out with electrician duties but most of his job duties were managerial although they did involve entering information on a computer.
37. Claimant testified that he noticed hand problems beginning back in the 1970s. He first began having hand problems when he would work 16 hours a day cracking rocks with a jackhammer. Claimant's hands would recover overnight and he never mentioned it because he was in a probationary period and so he lived with the discomfort. There was no explanation offered why he did not mention the problems after the probationary period. Claimant testified that his hands would get numb and complaints intensified over the years as a journeyman electrician, especially when he tried to open junction boxes or when he was working overhead.
38. Claimant testified that when he was a supervisor he reported his hand problems to his immediate supervisor, Charlie Defenbaum, and specifically recalls telling Charlie Defenbaum that he thought his problems were work related. This was during his last year working for the company. He did not ask for medical care.
39. As a supervisor responsible for numerous electricians, Claimant was well aware of how to report a work related injury.
40. Claimant went and saw his primary care physician, Robert Ayers, M.D., who sent him to Dr. Matos, a hand physician, who performed some injections in the left elbow that were not helpful. Dr. Matos referred Claimant to Dr. McKay who performed left carpal tunnel surgery on June 11, 2001. Claimant was off work during this time period but does not recall how long. He was not paid any temporary total disability benefits.
41. Dr. Sheerer performed the right carpal tunnel surgery on November 12, 2004, after Claimant retired from UE. Claimant was on light duty following this surgery at Tri Township Park District until November 29, 2004. He

did not get paid any temporary total disability benefits and did not request light duty.

42. Exhibit 2 indicates that Claimant's job at the park system included the use of lawnmowers, tractors, vibratory equipment and loud riding mowers and tractors.
43. Dr. Ollinger testified that Claimant was exposed to the hazards of carpal tunnel syndrome in his job at Tri-Township Park District. Dr. Schlafly, Claimant's expert, also opined work at the Park District exposed Claimant to the hazards of carpal tunnel syndrome and epicondylitis and other upper extremity complaints including elbow tendonitis. (Exhibit H, pgs. 16, 24, 25, 30, 31, 39, and 46).
44. Each of these claims is for occupational disease. The first three alleging injuries to the upper extremities, the fourth for tinnitus or ringing in the ears. Claimant has no compensable hearing loss.
45. The claim in the first case was filed on December 4, 2003. The claim in the second case was filed on December 4, 2003. The claim in the third case was filed on December 4, 2003, and the claim in the fourth case, the one for tinnitus, was filed February 24, 2004.

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-  
**RULINGS OF LAW**

-  
***Occupational Disease/Last Exposure***

The decisive issue is the application of the pre 2005 version of §287.063. It reads: "1) 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.; 2) 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". "This last exposure rule is not a rule of causation". Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 615 (Mo.banc 2002). "Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease." Id.

Section 287.067.7 has been recognized as a turning point to shift liability away from the last employer in certain circumstances involving employment for less than three months. Copeland v. Associated Wholesale Grocers, \_\_\_ S.W.3d \_\_\_ 2006 W.L. 2940746 (Mo.App. S.D.). This exception is not applicable in this case.

The Southern District has noted another turning point shifting liability away from the last employer in Maynard v. Lester E. Cox Medical Center/Oxford Health Care, 111 S.W.3d 487 (Mo.App. 2003). "For the liability for claimant's occupational disease to [accrue to] subsequent employers claimant would have to have been employed in an occupation or process in which the hazard of the disease exists." Id. at 491 citing §287.063.1. This concept can be thought of as a "no exposure rule". Thus if claimant is not exposed to the hazard of an occupational disease in the subsequent employment, that employer is not liable.

Reviewing the substantial, competent and credible evidence in this case, it is clear that Claimant was exposed to the hazard of the occupational diseases complained of in his subsequent employment with both Tri County and SIUE. Since the claims were filed while Claimant was employed with Tri County, and after he had been there for three months, the last exposure rule operates in each of these cases to absolve Ameren Union Electric from liability for Claimant's occupational diseases. This is so even though Claimant had surgery while at Ameren UE on his left wrist. The rule operates to place that liability on the subsequent employer. As in Copeland, justice and fairness might lead to a different result under the facts of this case, especially since the left carpal tunnel surgery occurred while at Ameren UE, subsequent employers had "minimal, fair, legal means of inquiring as to Claimant's pre-employment medical status and medical history" and Claimant delayed for several years in filing the Claim for Compensation. Copeland, supra.

Nevertheless, the Supreme Court recently reaffirmed the application of the last exposure rule:

"The exception to the last exposure rule is usually invoked by downstream employers seeking to deny benefits to a new employee with a pre-existing condition and shift liability back upstream to a prior employer. Here, [employee] interpreted the statute as an instruction to bypass the ordinary procedure of filing the claim against his then-current employer and instead file his claim against [previous employer]. [Employee] contends that [the subsequent employer] did not expose him to the

hazard of the occupational disease that caused his injury because his repetitive activities at [subsequent employer] were different and less strenuous than those he performed at [former employer]. [Employee] identifies swinging a sledgehammer as the specific "hazard of the occupational disease" referenced in section 287.063 and as the "substantial contributing factor" referenced in section 287.067.7.

It is undisputed that [employee] had been performing repetitive work using his upper extremities throughout his tenure at [subsequent employer]. At the administrative hearing, [employee] described his various assignments and testified that he did not experience shoulder pain until he began overhead work around September 3. However, records of a medical consultation that Pierce received at [subsequent employer] indicate that he reported having pain "about 2 weeks after starting the repetitious work." The ALJ weighed the evidence and concluded that Pierce was exposed to the hazard of his occupational disease for more than three months at [subsequent employer].

The ALJ properly noted that grading the level of activity is not a factor once the employee has been exposed to repetitive activity for three months. The relevant statutes along with this Court's holding in Endicott create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws. [Employee's] medical records document his shoulder pain during several months of employment at [subsequent employer] before he filed the present claim. The last exposure rule of section 287.063 requires only that the employee be exposed to the "hazard of the occupational disease." It does not require that the hazard to which he was exposed be the "substantial contributing factor" to the injury. In other words, as to ... the most recent employer, [employee] need only show that he was exposed to the same type of hazard.

Pierce v. BSC, Inc., SC87689, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Mo.banc. December 5, 2006).

Likewise, I am not going to distinguish between the levels of activity at the different employers. I merely determine that Claimant was exposed to the hazard of all the occupational diseases complained of while at subsequent Employer. The last exposure rule operates here as a bright line test to absolve Ameren Union Electric of any liability.

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

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

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION \_\_\_\_\_

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

Injury No.: 03-138356

Employee: Thomas Milkert

Employer: Union Electric Company  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 1, 2003  
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 January 8, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge, issued, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Thomas Milkert

Injury No.: 03-138356

Dependents: N/A

Before the

**Division of Workers'**

**Compensation**

Employer: Union Electric Company

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Self-Insured

Hearing Date: November 14, 2006

Checked by: MDV:tr

**FINDINGS OF FACT AND RULINGS OF LAW**

- 1. Are any benefits awarded herein? No
- 5. 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
- 10. Date of accident or onset of occupational disease: See Award
- 11. State location where accident occurred or occupational disease was contracted: See Award
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? See Award
- 7. Did employer receive proper notice? See Award
- 8. Did accident or occupational disease arise out of and in the course of the employment? See Award
- 12. Was claim for compensation filed within time required by Law? See Award
- 10. Was employer insured by above insurer? Yes
- 11. Describe work employee was doing and how accident occurred or occupational disease contracted: See Award
- 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: See Award
- 17. Nature and extent of any permanent disability: Issue not reached
- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Thomas Milkert Injury No.: 03-138356

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 21. Employee's average weekly wages: \$1,275.00
- 19. Weekly compensation rate: \$662.55/\$347.05
- 20. Method wages computation: Agreed

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: No
- TOTAL: -0-
- 23. Future requirements awarded: N/A

Said payments to begin N/A 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:	Thomas Milkert	Injury No.: 03-138356
Dependents:	N/A	Before the <b>Division of Workers'</b> <b>Compensation</b>
Employer:	Union Electric Company	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Self-Insured	Checked by: MDV:tr

### **PREFACE**

Four claims were tried together. In Injury Number 01-169441, the issues presented for resolution by way of the hearing were occupational disease, statute of limitations, permanent partial disability, and temporary total disability. The claim was for occupational disease of the left upper extremity and the defendant amended the answer by interlineation at hearing to allege the defense of the statute of limitations.

In Injury Number 03-122189, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Employer sought to amend the answer by interlineation at the hearing to allege the defense of the statute of limitations regarding the left wrist only

In Injury Number 03-050167, the issues presented for resolution were occupational disease, the nature and extent of permanent partial disability, and the nature and extent of temporary total disability. The claim was for occupational disease to the left and right upper extremities, elbows and wrists. Once again, the Employer amended the answer by interlineation at the time of the hearing to allege the defense of the statute of limitations. All amendments to the answers were objected to by Claimant's counsel.

In Injury Number 03-138356, the issues presented for resolution were occupational disease and the nature and extent of permanent partial disability.

The parties agreed that in each case the average weekly wage was the maximum in excess of \$1,275.00 a week. The rates of compensation in Injury Number 01-169441 are \$599.96/\$314.26; in Injury Number 03-122189 are \$649.32/\$340.12; Injury Number 03-050167 are \$649.32/\$340.12 and in Injury Number 03-138356 are \$662.55/\$347.05.

## SUMMARY OF DECISIONS

In each case the claims are denied on the sole ground of the last exposure rule.

### FINDINGS OF FACT

46. Claimant was born June 29, 1947, was 59 years old, and married on the date of the hearing. He attended high school, took college classes, and obtained a certificate in Industrial Electricity. Claimant worked for Ameren UE for approximately 31 years, retiring on February 1, 2003.
47. On April 7, 2003, the Claimant began working for Tri Township Park District in Troy, Illinois. In this capacity, he was a maintenance and grounds keeper. His duties included general plumbing, electrical work, construction work, cutting grass, utilizing lawnmowers, riding lawnmowers and tractors to maintain the park system. The park system consisted of 72 acres of park and land, and he was also responsible for maintaining a petting zoo, mixing animal food, and preparing the athletic fields for use. He worked 30 to 40 hours a week and worked there for the next 2 ½ years.
48. Claimant went to work at the Southern Illinois University at Edwardsville from April 2006 to September 2006, again in a maintenance capacity using lawnmowers, picking up trash, trimming shrubs and performing mulching and landscape duties.
49. In approximately 1969, Claimant began his career as a laborer at Ameren UE. In this capacity, he would sweep floors, empty trash, and jackhammer in the coal yards when the trains came in. Claimant then went to work for two years as a porter/laborer at the Ameren's Meramec plant cleaning locker rooms and restrooms, mopping, sweeping, and then transferred to the apprentice electrician program. After three years as an apprentice, he became a journeyman electrician.
50. For the next part of his career, Claimant worked performing motor work, taking transformers apart, taking panels apart using wrenches, box wrenches, socket wrenches, open wrenches, manipulating bolts and screws, all of which exerted stress and pressure on his wrists and hands.
51. In the eleven years prior to retiring, Claimant worked as a supervisor and testified it was less physically demanding than that of the electrician job he previously held. He would occasionally help out with electrician duties but most of his job duties were managerial although they did involve entering information on a computer.
52. Claimant testified that he noticed hand problems beginning back in the 1970s. He first began having hand problems when he would work 16 hours a day cracking rocks with a jackhammer. Claimant's hands would recover overnight and he never mentioned it because he was in a probationary period and so he lived with the discomfort. There was no explanation offered why he did not mention the problems after the probationary period. Claimant testified that his hands would get numb and complaints intensified over the years as a journeyman electrician, especially when he tried to open junction boxes or when he was working overhead.
53. Claimant testified that when he was a supervisor he reported his hand problems to his immediate supervisor, Charlie Defenbaum, and specifically recalls telling Charlie Defenbaum that he thought his problems were work related. This was during his last year working for the company. He did not ask for medical care.
54. As a supervisor responsible for numerous electricians, Claimant was well aware of how to report a work related injury.
55. Claimant went and saw his primary care physician, Robert Ayers, M.D., who sent him to Dr. Matos, a hand physician, who performed some injections in the left elbow that were not helpful. Dr. Matos referred Claimant to Dr. McKay who performed left carpal tunnel surgery on June 11, 2001. Claimant was off work during this time period but does not recall how long. He was not paid any temporary total disability benefits.
56. Dr. Sheerer performed the right carpal tunnel surgery on November 12, 2004, after Claimant retired from UE. Claimant was on light duty following this surgery at Tri Township Park District until November 29, 2004. He did not get paid any temporary total disability benefits and did not request light duty.

57. Exhibit 2 indicates that Claimant's job at the park system included the use of lawnmowers, tractors, vibratory equipment and loud riding mowers and tractors.
58. Dr. Ollinger testified that Claimant was exposed to the hazards of carpal tunnel syndrome in his job at Tri-Township Park District. Dr. Schlafly, Claimant's expert, also opined work at the Park District exposed Claimant to the hazards of carpal tunnel syndrome and epicondylitis and other upper extremity complaints including elbow tendonitis. (Exhibit H, pgs. 16, 24, 25, 30, 31, 39, and 46).
59. Each of these claims is for occupational disease. The first three alleging injuries to the upper extremities, the fourth for tinnitus or ringing in the ears. Claimant has no compensable hearing loss.
60. The claim in the first case was filed on December 4, 2003. The claim in the second case was filed on December 4, 2003. The claim in the third case was filed on December 4, 2003, and the claim in the fourth case, the one for tinnitus, was filed February 24, 2004.

## **RULINGS OF LAW**

### ***Occupational Disease/Last Exposure***

The decisive issue is the application of the pre 2005 version of §287.063. It reads: "1) 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.; 2) 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". "This last exposure rule is not a rule of causation". Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 615 (Mo.banc 2002). "Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease." Id.

Section 287.067.7 has been recognized as a turning point to shift liability away from the last employer in certain circumstances involving employment for less than three months. Copeland v. Associated Wholesale Grocers, \_\_\_ S.W.3d \_\_\_ 2006 W.L. 2940746 (Mo.App. S.D.). This exception is not applicable in this case.

The Southern District has noted another turning point shifting liability away from the last employer in Maynard v. Lester E. Cox Medical Center/Oxford Health Care, 111 S.W.3d 487 (Mo.App. 2003). "For the liability for claimant's occupational disease to [accrue to] subsequent employers claimant would have to have been employed in an occupation or process in which the hazard of the disease exists." Id. at 491 citing §287.063.1. This concept can be thought of as a "no exposure rule". Thus if claimant is not exposed to the hazard of an occupational disease in the subsequent employment, that employer is not liable.

Reviewing the substantial, competent and credible evidence in this case, it is clear that Claimant was exposed to the hazard of the occupational diseases complained of in his subsequent employment with both Tri County and SIUE. Since the claims were filed while Claimant was employed with Tri County, and after he had been there for three months, the last exposure rule operates in each of these cases to absolve Ameren Union Electric from liability for Claimant's occupational diseases. This is so even though Claimant had surgery while at Ameren UE on his left wrist. The rule operates to place that liability on the subsequent employer. As in Copeland, justice and fairness might lead to a different result under the facts of this case, especially since the left carpal tunnel surgery occurred while at Ameren UE, subsequent employers had "minimal, fair, legal means of inquiring as to Claimant's pre-employment medical status and medical history" and Claimant delayed for several years in filing the Claim for Compensation. Copeland, supra.

Nevertheless, the Supreme Court recently reaffirmed the application of the last exposure rule:

"The exception to the last exposure rule is usually invoked by downstream employers seeking to deny benefits to a new employee with a pre-existing condition and shift liability back upstream to a prior employer. Here, [employee] interpreted the statute as an instruction to bypass the ordinary procedure of filing the claim against his then-current employer and instead file his claim against [previous employer]. [Employee] contends that [the subsequent employer] did not expose him to the hazard of the occupational disease that caused his injury because his repetitive activities at [subsequent employer] were different and less strenuous than those he performed at [former employer]. [Employee] identifies swinging a sledgehammer as the specific "hazard of the

occupational disease" referenced in section 287.063 and as the "substantial contributing factor" referenced in section 287.067.7.

It is undisputed that [employee] had been performing repetitive work using his upper extremities throughout his tenure at [subsequent employer]. At the administrative hearing, [employee] described his various assignments and testified that he did not experience shoulder pain until he began overhead work around September 3. However, records of a medical consultation that Pierce received at [subsequent employer] indicate that he reported having pain "about 2 weeks after starting the repetitious work." The ALJ weighed the evidence and concluded that Pierce was exposed to the hazard of his occupational disease for more than three months at [subsequent employer].

The ALJ properly noted that grading the level of activity is not a factor once the employee has been exposed to repetitive activity for three months. The relevant statutes along with this Court's holding in Endicott create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws. [Employee's] medical records document his shoulder pain during several months of employment at [subsequent employer] before he filed the present claim. The last exposure rule of section 287.063 requires only that the employee be exposed to the "hazard of the occupational disease." It does not require that the hazard to which he was exposed be the "substantial contributing factor" to the injury. In other words, as to ... the most recent employer, [employee] need only show that he was exposed to the same type of hazard.

Pierce v. BSC, Inc., SC87689, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Mo.banc. December 5, 2006).

Likewise, I am not going to distinguish between the levels of activity at the different employers. I merely determine that Claimant was exposed to the hazard of all the occupational diseases complained of while at subsequent Employer. The last exposure rule operates here as a bright line test to absolve Ameren Union Electric of any liability.

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

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

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*