

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

Injury No.: 07-070265

Employee: Bonita Miller
Employer: U. S. Airways Group, Incorporated
Insurer: New Hampshire Insurance Company
c/o AIG Domestic Claims, Incorporated

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, heard the parties' arguments, and considered the whole record. Pursuant to §286.090 RSMo, we affirm the denial of compensation by separate opinion. The award and decision of Administrative Law Judge Rebecca S. Magruder issued July 24, 2008, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award, and decision herein.

The administrative law judge recited that the only disputed issue in this case is whether employee's claim for compensation is barred by the statute of limitations. The transcript reveals there are other issues in dispute. One of those other issues is dispositive of the claim.

The instant claim for compensation designated Injury No. 07- 070265 alleges employee sustained work-related bilateral carpal tunnel syndrome caused by repetitive trauma through January 29, 2007. Employee also has a pending claim for compensation designated Injury No. 04-054594 alleging work-related bilateral carpal tunnel syndrome caused by repetitive trauma through June 4, 2004. Employer/insurer admits that employee has sustained an occupational disease arising out of and in the course of employment with employer, but disputes that employee sustained the occupational disease on or about January 29, 2007.

The obvious question becomes *did employee sustain two occupational diseases through her employment with employer?* We agree with the administrative law judge that the medical condition of ill (bilateral carpal tunnel syndrome) underlying the instant claim is the same condition of ill for which employee was diagnosed and treated in 2004. Having determined that employee has not established she sustained a new and distinct injury caused by repetitive trauma through January 29, 2007, as alleged in the instant claim, we deny the claim.

We do not adopt or incorporate the administrative law judge's discussion and conclusions regarding whether this claim for compensation was filed within the periods set forth in the 2004 and 2007 versions of §287.430 RSMo and what version of the statute properly applies because determination of those issues is not necessary to our award and decision. Those issues are more properly addressed in resolution on Injury No. 04-054594.

Given at Jefferson City, State of Missouri, this 25th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

**FINAL AWARD
Denying Compensation**

Employee: Bonita Miller Injury No. 07-070265
Dependents: N/A
Employers: U.S. Airways Group, Incorporated
Insurers: New Hampshire Insurance Company
c/o AIG Domestic Claims, Incorporated
Hearing Date: June 16, 2008 Checked by: RSM/cg

FINDINGS OF FACT AND RULINGS OF LAW

- Are any benefits awarded herein? No.
- 2. Was the injury or occupational disease compensable under Chapter 287? No.
- 3. Was there an accident or incident of occupational disease under the Law? Yes.
- 4. Date of accident or onset of occupational disease: June 2004.
- 5. State location where accident occurred or occupational disease was contracted: Missouri.
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? No.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While performing hard intensive activities, Claimant developed bilateral carpal tunnel syndrome.
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: left and right wrists.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? Unsure.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: N/A.
20. Method wages computation: No agreement.

The only disputed issue in this case is whether the employee's Claim for Compensation filed in October 2007 is barred by the statute of limitations. The parties submitted a signed agreement of stipulated facts which are as follows:

STIPULATED FACTS

1. Bonita R. Miller (hereinafter referred to as "Miller" or "Employee") is a 51 year old woman who has been continuously employed by U.S. Airways or predecessor airlines including Piedmont Airlines from 1984 to the present date. Her place of employment since August 1990 has been KCI airport in Kansas City, Platte County, Missouri.

2. For the first nine months after her 1990 transfer to KCI Airport, Miller was assigned duties of loading baggage on ramp. Thereafter and continuing to the present day, Miller has been assigned customer service agent duties which she has performed on a full-time basis.

3. In her capacity as customer service agent for the past almost 18 years at KCI Airport, Miller has been assigned customer service including check-in duties for approximately ninety per cent (90%) of her work time and has been assigned working the gate for the remainder of her work time (approximately one shift per week). In both of these assignments, Miller performs regular repetitive activity, including keyboarding, lifting luggage, tearing off baggage claims and boarding passes, and other tasks requiring frequent use of her upper extremities.

4. In April 2002, Miller sought medical treatment for neck pain. An EMG was performed on her left upper extremity which showed "very mild early" carpal tunnel syndrome on left side. However, Miller testified she had no numbness, tingling or pain in her left arm at the time.

5. In June 2004, Miller began experiencing a gradual onset of problems with both hands including numbness and tingling. In early June 2004, she reported these symptoms to her supervisors at U.S. Airways and a Report of

Injury was prepared by her Employer, which identified a date of injury/illness as June 4, 2004.

6. On June 4, 2004, Miller signed an U.S. Airways document entitled "Employee's Responsibility after an Occupational Injury," in which she acknowledged her responsibility to "report all accidents/injuries immediately to your manager supervisor and assist in completing the O1-1 (Report of Occupational Injury)." At or about that time, Miller completed an accident report.

7. In June 2004, when Miller reported her upper extremity conditions to her Employer, she believed those problems were work-related based on her repetitive activities at work and based on the fact that she was not doing anything differently at home. "It had to be work."

8. After reporting her upper extremity condition to her Employer in June 2004, U.S. Airways scheduled Miller to see Dr. Timothy Link. Miller was first examined by Dr. Link on June 7, 2004 with symptoms of bilateral hand pain and numbness. Dr. Link diagnosed bilaterally wrist tendonitis and possible early carpal tunnel syndrome. Dr. Link scheduled Miller for EMG and nerve conduction testing which were performed on or about August 3, 2004 by Dr. Ira Fishman. Based on the results of these tests, Dr. Fishman diagnosed bilateral carpal tunnel syndrome of mild severity, and this diagnosis was reported to Miller.

9. On September 8, 2004, Miller consulted with Dr. James P. Reardon, orthopedic surgeon, regarding possible treatment options for her bilateral carpal tunnel syndrome. Dr. Reardon prescribed Vioxx, advised Miller to continue use of splints, and discussed the possibility of carpal tunnel release surgery. Miller returned to Dr. Reardon on October 6, 2004. Dr. Reardon's notes indicated Miller did not want to have surgery for her carpal tunnel. Dr. Reardon diagnosed her with residual mild carpal tunnel syndrome bilaterally. Dr. Reardon indicated Miller had no limitations and released her to return on an as needed basis.

10. Miller underwent approximately 5 weeks of physical therapy between October 15, 2004 and November 22, 2004, which she testified gave her short-term relief only. Her pain symptoms were no better after than before the course of physical therapy.

11. Following conclusion of physical therapy, Miller did not return to Dr. Link, Dr. Reardon or any other health care provider for her upper extremity symptoms. Miller ceased taking Vioxx after conclusion of physical therapy and, thereafter, used Ibuprofen approximately, three times per week. However, Miller has now doubled her dosage, taking two pills instead of one. Miller also continued to wear splints at night.

12. Ms. Miller has never received any workers' compensation disability benefits, including payments for permanency due to her carpal tunnel syndrome.

13. In January 2007, Miller filled out another accident report in which she advised her Employer of upper extremity complaints. U.S. Airways completed and filed a second Report of Injury, which identified a January 29, 2007 date of injury/illness and described the type of injury/illness as carpal tunnel syndrome.

14. In October 2007, Miller signed and filed two Claims for Compensation, both alleging that parts of body injured were "bilateral upper extremities," both alleging that injury occurred "[d]uring course and scope of employment as a customer service representative, Employer suffered repetitive trauma to her bilateral upper extremities due to lifting luggage and by keyboarding resulting in bilateral carpal tunnel syndrome," and stating that place of accident was "KCI Airport." The first Claim for Compensation alleged a date of accident or occupational disease of "repetitive trauma through 6/04/04." The second Claim for Compensation alleged a date of accident or occupational disease of "repetitive trauma through 1/29/07."

15. Miller has not missed any time from work as a result of her upper extremity ailments to her hands and wrists.

16. Miller's numbness and tingling significantly increased following the holiday season in 2006. She testified she worked over-time during the holidays because of increased traffic and had little down time during the season.

17. U.S. Airways switched to a new computer system which required Miller to undergo training. Her first training began on November 2, 2006 which consisted of eight hours a day for three days on a computer in Phoenix, Arizona. Miller then went for a second training session beginning January 15, 2007 which consisted of eight hours a day for five days in Charlotte, North Carolina. Following her return from training, Miller's hand pain, numbness and tingling became so severe she reported it to her Employer.

18. Miller testified her symptoms were significantly different in 2007 than they were in 2004 in that she began suffering significant pain in her hands which extended into her forearm when lifting bags. Further, she testified that as a result of the significant pain she began modifying her work duties to compensate for the

pain.

19. Miller presently is seeking additional medical treatment for her hands and wrists. Her upper extremity pain is significantly worse in 2007 than it was in 2004. Miller's condition has continued to worsen from 2007 to the present date.

20. Claimant's retained medical expert, Dr. James A. Stuckmeyer, based on a March 6, 2008 examination, has diagnosed work-related "progressively worsening neurological symptoms in both the right and left hand requiring medical treatment." Dr. Stuckmeyer attributed this medical condition to "the repetitive nature of the occupational duties required upon Ms. Miller throughout 25 years of employment with U.S. Airways." Medical records reflect "that dating back to 2002 she was assessed by Dr. Sachen as having very early carpal tunnel syndrome. Obviously, the development of carpal tunnel syndrome is usually related to repetitive activities, and Ms. Miller's occupation would surely fit into this classification. This would represent a series of repetitive overuse type syndrome bilaterally."

21. Employer's retained medical expert, Dr. Anne S. Rosenthal, based on a May 20, 2008 examination, has diagnosed bilateral carpal tunnel syndrome, vocationally related. According to Dr. Rosenthal, "[h]er occupational exposure is the prevailing factor in causing her bilateral carpal tunnel syndrome. She has a hand intense repetitive job, works 40 hours per week, has been working for U.S. Airways for 25 years, and has no medical problems or outside activities that she does with enough intensity that would be the prevailing factor."

Based on the stipulated facts and evidence presented at the hearing, I make the following findings in relation to the statute of limitations issues:

Between June 2004 and December 22, 2004, Claimant experienced bilateral upper extremity complaints to her hands and wrists, reported such complaints to her Employer, knew that such complaints were work-related (from repetitive activities), received authorized medical treatment from Employer, and was diagnosed with a specific medical condition of ill and occupational disease - bilateral carpal tunnel syndrome. Her Employer filed a report of injury regarding her bilateral upper extremity condition on June 4, 2004. The Employer provided medical treatment under the worker's compensation law through early December, 2004 but has provided no medical treatment since that time.

Employee's bilateral carpal tunnel condition was not resolved or cured due to such treatment in 2004. Instead, her condition has worsened and her symptoms have become more severe. According to the experts, the Claimant's ongoing repetitive job related hand activities were what caused her condition to become more severe; her symptomatic medical condition continued to be aggravated by her job related daily activities. In January 2007, Claimant again notified her

Employer of renewed bilateral upper extremity complaints which she believed were related to her job. Subsequently, her Employer filed another report of injury on January 29, 2007 but provided no medical treatment.

Employee filed two Claims for Compensation on or about October 26, 2007 for her previously diagnosed bilateral carpal tunnel syndrome, alleging in each claim an identical repetitive trauma injury to bilateral upper extremities, with one alleging a date of accident or occupational disease of a repetitive trauma through 6/04/04 (Injury #04-054594) and the other alleging a date of accident or occupational disease of repetitive trauma through 1/29/07 (Injury #07-070265).

I find the work-related medical condition of ill alleged in the Claim for Compensation, Injury #07-070265, filed in October 2007 - bilateral carpal tunnel syndrome - is the same work-related medical condition of ill for which Claimant received medical treatment back in 2004. Undoubtedly, her symptoms have become more severe over the years, but I find that it is the same disease, same diagnosis, and same medical condition of ill - bilateral carpal tunnel syndrome. The change in her condition is one of degree not one of kind or type. The medical experts retained by Claimant and Employer opined that it was the general repetitive nature of Employee's job that was the prevailing factor causing the bilateral carpal tunnel syndrome that was diagnosed in 2004. I find that Claimant's repeated job activities since that time have continued to aggravate her bilateral carpal tunnel syndrome. I also find in accordance with Claimant's testimony that in late 2006 her repetitive hand activities became much more frequent and intense than they had been prior to that time. I find that these heightened activities may indeed have accelerated the worsening of her bilateral carpal tunnel to the point where she again notified her Employer of additional complaints. The diagnosis has never changed, however. There has only been a worsening of Claimant's injury not a new or different injury.

Claimant, however, received no more medical treatment (after December 2004) and has never missed any time from work due to her bilateral carpal tunnel syndrome.

The general statute of limitations in workers' compensation proceedings since 1993 has provided for a 2 year statute of limitations unless employer fails to file a timely report of injury which extends the statute to three years. Section 287.430 RSMo. The statute is one of extinction, however, and generally cannot be revived once lapsed. The general statute of limitations, 287.430 was *not* amended by the 2005 amendments and reads as follows:

“...[N]o proceedings for compensation under this chapter shall be maintained unless a claim

for compensation therefore is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.... The statute of limitations contained in this section is one of extinction and not of repose.”

One of the questions that section 287.430 does not answer on its face is what constitutes “date of injury” - that is, when does the claim for compensation accrue. In the instant case, the claim is for occupational disease rather than accident. Section 287.063.1 specifically provides for when the statute of limitations (287.430) begins to run in occupational disease cases. That section *was amended* by the Legislature in 2005 and said changes became effective on August 28, 2005.

Prior to the 2005 changes, section 287.063.1 provided that the statute of limitations would “not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that *a compensable injury* has been sustained....” The 2005 amendment provides that the limitation period would “not begin to run until it becomes reasonably discoverable and apparent that *an injury* has been sustained *related to such exposure*....” (Emphasis added).

The earlier version of RSMo. 287.063.3 provides for accrual of claim when a ‘compensable injury’ has been sustained, which has been interpreted by the courts to mean the time when the disease has produced a compensable disability which, in turn, has been interpreted as the time when some degree of disability results which can be the subject of compensation. Sellers v. Trans World Airlines, 752 S.W.2d 413, 416 (Mo.App. W.D. 1988). Generally, mere awareness on the part of an employee of a work-related illness is not sufficient knowledge of a compensable injury. Instead, under the ‘compensable injury’ test of RSMo. 287.063.3 (prior to 2005), the statute of limitations begins to run on an occupational disease claim when: (1) employee is no longer able to work due to the occupational disease; (2) an employee must seek medical advice and is advised that she can no longer work in the suspected employment, or (d) an employee experiences some type of disability that is compensable. Rupard v. Kiesendahl, 114 S.W.3d 389, 394 (Mo.App. W.D. 2003).

The amended version of RSMo. 287.063.3 does not define ‘injury’ and there are no appellate cases yet construing the term.

In amending RSMo. 287.063.3 in 2005, however, the Legislature deleted the term ‘compensable’ from the earlier version and left only the word ‘injury’ with the qualifying phrase ‘has been sustained related to such exposure’. The pre 2005 statutory scheme required both resulting medical condition of ill and disability. The latter requirement - disability - has been construed in the case law to mean inability to work, missing work, having decreased earning capacity, or being medically advised that one should not continue working in the suspected employment. See Rupard v. Kiesendahl, 114 S.W.3d 389 (Mo. App. W.D. 2003). However, an injury presumably requires only a resulting medical condition of ill - that is, an occupational disease - regardless of whether that medical condition has caused the employee any disability (loss of work or diminished earning capacity). Therefore, an ‘injury’ occurs when it is reasonably apparent and discoverable that there is a work-related diagnosable

medical condition/disease like bilateral carpal tunnel syndrome while a 'compensable injury' requires that such medical condition/disease disable (even if only temporarily) the employee from earning pre-injury wage or performing pre-injury work tasks.

Legislative changes in wording must be presumed to have purpose and effect. When the General Assembly alters a statute, we are obligated to deem the alteration as having an effect. We are not to conclude that the Legislature's deleting significant terms from its statutes is meaningless. State of Missouri v. Bouse, 150 S.W.3d 326, 334 (Mo.App. W.D. 2004). Here, modification of the language of RSMo. 287.063.3 from accrual upon 'compensable injury' to accrual upon 'injury' must be regarded as eliminating the prior rule that the two year limitations period for filing claims for occupational diseases is tolled until an injury becomes compensable. As of August 28, 2005, an 'injury' alone commences the running of the statute of limitations in occupational disease cases. Here, an injury had been sustained (work-related occupational disease and medical condition of bilateral carpal tunnel syndrome) for which medical treatment had been received more than 2 years after the filing of claims for compensation in late October 2007.

It is presumed that the Legislature is aware of the state of the law at the time it amends a statute. Cook v. Newman, 142 S.W.3d 880, 888 (Mo.App. W.D. 2004). Accordingly, when the Legislature amended RSMo. 287.063.3 to provide for accrual of occupational disease claims upon 'injury' only, it would have been aware of the case law (including Rupard) which had construed 'compensable injury' to require both work-related medical condition and resulting disability. By narrowing what triggers accrual of 'an injury' sustained relating to workplace exposure, the Legislature overruled prior case law relating to compensable injury. In ascertaining legislative intent with the adoption of Senate Bill 130 in 2005, the word 'injury' must be considered in its plain and ordinary meaning. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 251 (Mo.banc 2003). *overruled on other grounds by* Hampton v. Big Boy Steel Erectors, 121 S.W.3d 220 (Mo.banc. 2003). Plainly, an 'injury' occurs when an employee has received a diagnosis of an occupationally related disease or medical condition of ill. Whether such injury has disabled her from performing

work tasks or caused her to lose time from work is irrelevant.

Although Employee testified at the hardship hearing to certain minor modifications in her job duties and tasks after 2004, there is no medical evidence that these new job tasks were the prevailing factors in causing any new diagnosis, medical condition of ill or disease. I therefore find Claimant has sustained only one injury - bilateral carpal tunnel syndrome - and it became reasonably discoverable and apparent in June 2004 that the injury she had sustained was related to her hand intensive employment duties.

If the pre-2005 statute of limitations were applied in this case, the October 2007 filing of Employee's Claim for Compensation would clearly be timely. A 'compensable injury' as defined by the court in Rupard had not been sustained when she filed her claim. In fact, Claimant still has not sustained a 'compensable injury' because she has not yet missed any time from work due to her carpal tunnel syndrome. Although Claimant knew of her work-related bilateral carpal tunnel occupational disease back in June of 2004, such disease did not so interfere with her job that it caused her to miss work, nor was she advised by any health care provider she should no longer work as a customer service representative for Employer, nor was the need for surgery manifested (although Dr. Reardon did discuss with Employee in October 2004 the possibility of carpal tunnel release surgery, which Employee declined).

By contrast, if the amended statute is applied in this case, the claims filed in 2007 would be barred. Under the amended statute, accrual of an occupational disease claim occurs when it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure. The requirement of a compensable injury - that is, that a claim of occupational disease does not accrue until the employee has missed work, been taken off work, or received the recommendation of a health care provider not to work in her present job position - has been removed. The amended statute provides for accrual of occupational disease claim occurs when: (1) work-relatedness of a medical condition become known - reasonably discoverable and apparent that an injury has been sustained related to such exposure; and (2) an injury has been sustained.

If the 2005 statute is applied in the instant case, all of the elements for accrual of the claim for occupational disease -

bilateral carpal tunnel syndrome - were established in June of 2004. At that time, Employee knew that her bilateral carpal tunnel syndrome was related to her repetitive job tasks for Employer. She reported this condition to Employer as work-related and, moreover, testified during her deposition that she believed and understood her symptoms to be the result of repetitive work activities, and not any activity she was engaging in outside of work. It had to be work. (Employer's Exhibit No. 1, pp. 63-64; Agreed Statement of Facts, paragraph 7). Secondly, while the medical condition - bilateral carpal tunnel syndrome - may not have been a 'compensable injury' under the old law (because Employee was not taken off work and did not miss any time from work), it certainly was an 'injury' under the new law. It was a diagnosed disease for which Employee

underwent medical treatment during 2004, including diagnostic procedures, prescribed medication (Vioxx), medical devices - splints, physical therapy, and even a discussion with a health care provider about possible carpal tunnel release surgeries.

No medical treatment or compensation was provided to Employee by Employer or its insurance carrier after conclusion of physical therapy in December 2004, and the last payment made on account of the injury was on January 12, 2005. Employer timely filed its report of injury on June 4, 2004 and thus the two year rather than the three year statute of limitations would apply. Under the 2005 amendments, Employee had two years from January 12, 2005 (last payment made on account of injury) to file her claim. Because she did not file any claim until October 2007, said claim would be barred as the statute of limitations would have run on January 12, 2007.

Based on the foregoing, the claim of compensation filed on or about October 26, 2007 for repetitive trauma through 6/04/04" is plainly time-barred, if the 2005 amendment applies. Furthermore, the second claim of compensation filed in October 2007 for "repetitive trauma through 1/29/07" is also time-barred because it relates to the same 'injury' - that is, the same occupational disease and work-related medical condition of bilateral carpal tunnel syndrome that had manifested itself back in 2004. If injury in a repetitive trauma case were intended to mean that injury occurs each day of work-related exposure, then the Legislature would have made that clear in its 2005 amendments to RSMo. 287.063.3 by providing for accrual of occupational accident claims on last day of exposure. Instead, accrual occurs when it becomes reasonably discoverable and apparent that an injury...related to her work had occurred. RSMo. 287.063.3 (2005 Supp.)(Emphasis added). 'An injury' occurred, and became reasonably discoverable and apparent, herein back in 2004 with the diagnosis of work-related bilateral carpal tunnel syndrome and Employee cannot overcome the new accrual statute by arguing that new 'injuries' were suffered on and after January 29, 2007. In fact, Employee testified to a gradual worsening of her bilateral carpal tunnel syndrome injury and neither Employee nor Employer's retained medical expert opined that new medical conditions, new occupational diseases, or new injuries had been sustained. The uncontroverted medical evidence is that the medical condition for which Employee sought medical treatment after January 2007 and for which she filed the two claims for compensation in late October 2007 were identical to the medical condition diagnosed and treated in 2004 (and for which Employee took Ibuprofen after she ceased examination and treatment by health care providers at the end of 2004).

The last determination to be made then is whether the new provision contained in section 287.063.3 should be applied retrospectively. Prospective application of a statute is presumed unless the Legislature evidences a clear intent to apply the amended statute retroactively, or where the statute is found to be procedural in nature. Lawson v. Ford Motor Co., 217 SW3d 345 (Mo. App. E.D. 2007). There is no express language in amended section 287.067 evidencing any legislative intent to apply any portion of that section retroactively. Therefore, *only* if the amended provision is deemed procedural will it be applied retroactively. A statute deemed to effect only the remedy is

procedural and is to be applied retroactively; a statute deemed to effect the exercise of the right itself is substantive and is to be applied prospectively. Substantive law relates to the rights and duties giving rise to the cause of actions whereas procedural law is the machinery used to effect the suit. See Fletcher v. Second Injury Fund, 922 S.W.2d 402, (Mo App. 1996) *citing* Wilkes v. Missouri Highway Transportation Commission, 762 S.W.2d 27 (Mo. banc 1988).

In several appellate cases, the courts of this state have decided whether a particular amendment to the statute of limitations in Workers' Compensation Law is procedural or substantive. E.g., Wentz v. Price Candy Co., 352 Mo. 1, 175 S.W.2d 852 (1943)(where court found statute enlargement from 6 mos. to 1 year procedural and applied it

retroactively to allow claim to be filed within one year but after 6 mos - the 6 mos. statute being in effect at time the injury was sustained); Loard v. Tri-State Motor Transit, 813 S.W.2d 71 (Mo. App. 1991)(where Court found amendment that added provision to include 'last payment made on account of the injury' to commence running of statute of limitations procedural, claim allowed under 2 yr statute of limitations in effect at time of injury with no such last payment provision at time of injury - where claim filed 7 years after injury but within two years of last payment made); Foreman v. Shelter Insurance Co., 706 S.W.2d 227 (Mo.App. W.D. 1986)(where Court found statutory changes substantive – 2 changes: (1)enlarged 1yr period to 2 yr period and (2)proclaimed statute was one of extinction not one of repose – due primarily to the 2nd change ct found the statutory amendments substantive and did not apply retroactively. Claim filed within 2 yrs but not within 1 year was therefore barred). *See also* Brown v. Ozark Christian Schools of Neosho, 847 SW2d 888 (Mo. App. S.D. 1993); Newbound v. Kingsford Charcoal Co., 786 SW2d 226 (Mo. App. W.D. 1990).

I generally find determinations (and the rationale for such determinations) of whether a statutory change is procedural or substantive mystifying. *See, e.g.,* Lawson v. Ford Motor Co., 217 S.W.3d 345 (Mo.App. E.D. 2007). Both the Employee and the Employer offered several well reasoned arguments for their positions on this issue. I find the 2005 amendments to section 287.063.3 operate on the remedy rather than the right to compensation and should be applied retroactively. I make that decision primarily because of the following three reasons:

The first reason is because the Missouri Supreme Court pronounced the general rule that ordinary statutes of limitations affect the remedy only. *See* Wentz v. Price Candy Co., 175 S.W.2d 852 (1943). Although the courts have found many exceptions to this rule, it is deemed the general rule. I was unable to find, however, any case where a claim had been timely filed under an earlier statute of limitations and also filed before the effective of a newer statute of limitations but was barred before resolution of the claim due to retroactive application of the later statute. Although the claim in the instant case had not been filed before the effective date of the new statute, if the amended 287.063.3 is deemed procedural, its application in some cases could create that result. (*See both Employee and Employer's reply briefs and reply briefs.*)

The second reason I have applied the provision retroactively is because of other 2005 statutory changes made to chapter 287, especially the legislative pronouncement that all provisions of the Workers' Compensation Law are to be construed strictly and that the evidence presented shall be weighed impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts. *See generally,* Norman v. Phelps County Regional Medical Center, ___ S.W.3d ___, Case No. 28646 (Mo.App. S.D. June 24, 2008)(Court cites the strict construction rule of RSMo. 287.800.1 Supp. 2005 in holding that it is without jurisdiction to review a temporary or partial award). While there are virtually no factual conflicts in the instant case, the edict to give no benefit of a doubt to any party is different from the prior legislative guidepost. Prior to 2005, the Workers' Compensation Law was to be broadly and liberally construed extending its benefits to the largest possible class....Any doubt as to the right of an employee to compensation was to be resolved in favor to the injured employee. There is no longer any presumption that limitations periods and accrual statutes under the Act should be construed in favor of the injured employee. The harshness of a result vis-a-vis such employee is also not to be considered, particularly where the Legislature has made clear that accrual of occupational disease claims will occur sooner (and with less preconditions) than before. Rupard and cases discussed therein as well as most of the statute of limitations cases referenced above construe the provisions of RSMo. 287.063.3 and 287.430 with the liberal construction rule in mind. The more conservative rule of construction must be applied in resolving the issue at hand.

The third and, in my opinion, most important reason I am ruling as I am is because of the need for clarification and guidance on this legal issue from the appellate court. If I find the statute substantive and the Commission agrees, then the Employer would be required to provide benefits without recourse until there was a final award in this case. *See* Norman v. Phelps County Medical, Case No. 28646 (Mo App. S.D. June 24, 2008). The Missouri Workers' Compensation provides no mechanism for an employer's recovery of its expenses if employee's claim is ultimately barred. If the Commission affirms my finding that the statute has run and Employee's claim is barred, then the denial can be appealed to the appellate courts.

For the foregoing reasons, I find amended section 287.063.3 is procedural in nature and should be applied retroactively in the instant case and therefore find Employee's claim for compensation in Injury #07-070265 filed on October 2007 is barred. Compensation is denied.

Date: _____

Made by: _____

Rebecca S. Magruder
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeff Buker
Director
Division of Workers' Compensation

We take administrative notice of the Division of Workers' Compensation records in this matter. The Division's records reveal employee has filed a third claim for compensation for bilateral carpal tunnel syndrome designation Injury No. 05-144695. That claim for compensation alleges bilateral carpal tunnel syndrome caused by repetitive trauma through August 28, 2005. The Division should consider consolidating Injury Nos. 04-054594 and 05-144695 for trial. This Award will contain references and dicta regarding Injury 04-054594 as both claims were filed on the same day and both claims contain very similar allegations. The general definition section of the Workers' Compensation Act defines injury as an injury which has arisen out of and in the course of employment. The terms injury and personal injuries mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body. However, [t]hese terms shall in no case except as specifically provided be construed to include occupational disease in any form. RSMO.287.020.3(1) and (5). An injury by occupational disease is compensable only if the occupational exposure was a prevailing factor in causing both the resulting medical condition and disability. RSMo.287.067.2 (2005 Supp.)