

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

Injury No.: 00-172492

Employee: Jerry Nicholson
Employer: Xerox Corporation
Insurer: CNA Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident/Occupational Disease: May 15, 2000 (Alleged)

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 June 29, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Linda Wenman issued June 29, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of January 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Ken Jacob, Chairman

Bill I. Foster, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Jerry Nicholson

Injury No.: 00-172492

Dependents: N/A

Before the
Division of Workers'

Employer: Xerox Corporation

Additional Party: Second Injury Fund

Insurer: CNA Insurance Company

Hearing Date: March 25, 2004

Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: LJW: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? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 9, 1996
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
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: On September 5, 1996, while traveling as required by her job duties, Claimant developed acute back pain that continued until her last day of employment on May 15, 2000.
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: Low back
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Jerry Nicholson

Injury No.: 00-172492

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1,100.00
19. Weekly compensation rate: \$578.48 / \$303.01
20. Method wages computation: Statutory maximum

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jerry Nicholson	Injury No.:	00-172492
Dependents:	N/A	Before the	
Employer:	Xerox Corporation	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	CNA Insurance Company	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on March 25, 2004. Briefs were received and the case was formally submitted on April 26, 2004. Attorney Harold Johnson represented Jerry Nicholson (Claimant). Xerox Corporation, (Employer) was insured by CNA Insurance Company, and represented by Attorney Edward Vokoun. Assistant Attorney General Carol Barnard represented the Second Injury Fund (SIF).

Prior to the start of the hearing the parties identified the following issues for disposition in this case: accident, arising out of and in the course and scope of employment, occupational disease, medical causation, liability of Employer and/or SIF for permanent total disability or permanent partial disability, appropriate date of disability, and a statute of limitations affirmative defense.

Claimant offered Exhibits A-R. Exhibits A, B, C, E, H-J, L, P, Q-R are admitted, and Exhibits D, F, G, K, M-N are denied. Employer offered Exhibits 1-10. Exhibits 1-9 are admitted, and Exhibit 10 is denied. Any objections not expressly ruled on in this award are overruled. Administrative Judicial Notice is taken of Claimant's Division of Workers' Compensation file, including the claim for compensation, any answers filed, and Claimant's motion to file late

interrogatories.

SUMMARY OF EVIDENCE

Only evidence necessary to support this award will be reviewed and summarized.

Claimant is 59 years old, has attended college for four years and holds an Associates Degree in Computer Science. Claimant has worked for Employer since 1969, first as a secretary, and since 1985 as a systems analyst. As a systems analyst, Claimant supported the sales division by giving presentations, programming equipment, providing demonstrations, and coordinating after sales for clients. Claimant's work involved extensive travel, depending on what region she supported. Between 1992 and 1995, Claimant's travel was limited, but after territory realignment in 1995, Claimant's travel increased dramatically along with her workload.

On September 5, 1996 while in Dallas, Texas, Claimant awoke with "excruciating" pain across her body. She was seen in the emergency room at a local hospital where x-rays were reported as normal, and Claimant was treated with pain medication and muscle relaxants. Claimant was advised to follow-up with her private doctor when she returned home (Exhibit J). Upon her return to St. Louis, Claimant was seen by Dr. Able, her family doctor, and Dr. Barrale her chiropractor. On September 9, 1996, Dr. Barrale took Claimant off work until September 16, 1996 (Exhibit 2). Over the next two years, Claimant treated steadily with Dr. Barrale for low back complaints (Exhibit 1). From 1998 until the present, Claimant has continued to treat with multiple doctors, utilizing multiple treatment modalities. From September 5, 1996 until Claimant went on disability leave, she adjusted her work activities, utilizing help from co-workers, working from home, taking time off, and adjusting her travel schedule. Claimant testified that she has been in pain since the September 5, 1996 event, and that has altered her work and lifestyle.

Claimant acknowledged a long-standing history of intermittent back problems, but indicates that the September 5, 1996 incident was unlike any other back pain that she had ever experienced. Prior to the Dallas incident, Claimant had undergone a CAT scan of her back on July 19, 1996 that demonstrated osteoarthritis of her facet joints at L4-5, and no other abnormal findings. Subsequent diagnostics have not revealed any new significant findings.

Claimant considers the September 5, 1996 event "catastrophic", and she testified she is "absolutely" certain that her condition has been related to her work since September 1996. When specifically questioned during her live testimony if she and Dr. Barrale discussed the relationship of her symptoms and her work, Claimant testified that she doesn't think it was discussed, although they did discuss work modifications. When confronted with her deposition testimony in which she testified that her doctors related her back condition to her work in 1996, Claimant conceded that she spoke with Dr. Able about the relationship, and assumed "all" the doctors knew her problems were related to her duties.

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues related to statute of limitations defense & the appropriate date of disability

Claimant filed a claim alleging occupational disease on May 23, 2001. Claimant indicated the date of occupational disease to be May 15, 2000, the last day she worked for Employer. Employer asserts a statute of limitations defense indicating the appropriate date of occupational disease to be September 5, 1996, the date Claimant initially sought treatment for acute low back symptoms. "The standard for triggering the running of the statute of limitations requires: (1) a disability or injury, (2) that is compensable." *Rupard v. Kiesendahl, DDS*, 114 S.W.3d 389 (Mo.App.2003)(overruled in part)(citing *Mann v. Supreme Express*, 851 S.W.2d 690 (Mo.App.1993)(overruled in part)). The correct date of disability must be ascertained before a determination of statute of limitations bar is made.

In cases of occupational disease, the time in which a compensable injury has been sustained is the time when the disease has produced a compensable disability. *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413 (Mo.App.1988)(overruled in part). Compensable disability has been interpreted as being "the time when some degree of disability results which can be the subject of compensation". *Id.* "Mere awareness on the part of the employee of the presence of a work-related illness is not, in and of itself, sufficient knowledge of a compensable injury." *Wiele v. National Super Markets Inc.*, 948 S.W.2d 142 (Mo.App.1997)(overruled in part). An employee is entitled to receive reliable information that the condition is the result of employment prior to filing a claim. Thus, an employee can rely on a physician's diagnosis, rather than the employee's own impressions of the condition. *Mann v. Supreme Express*, 851 S.W.2d 690 (Mo. App.1993) (overruled in part). However, an expert opinion is not absolute, and each case should be judged by its facts. *Sellers @ 417*. When an injury is reasonably apparent and discoverable is a question of fact to be determined by the trier of fact. *Thomas v. Becker Materials Corp.*, 805 S.W.2d 271 (Mo.App. 1991).

Claimant's testimony at hearing was inconsistent concerning when a doctor informed her that her employment duties were a factor in her low back problems. However, there was no inconsistency in her deposition testimony. Claimant was

deposed on January 18, 2002 and testified to the following:

Q. When did you first come to believe that your back condition was related to your work in doing the various duties that you have described here?

A. 1996.

Q. What caused you to believe that your back condition was related at that time to your work?

A. When I had the – when I woke up in the hotel with all of the pain I knew it was from carrying all of those things all over the place and that I had to find a way to slow this down, working, standing, pushing, the schedule. I had to slow it down and get attention and get it fixed. That is when I knew.

Q. Did a doctor ever tell you that your condition was related to those particular duties?

A. I believe they all, pretty much all have.

Q. When did a doctor first tell you that he thought your back problems - -

A. Well, Dr. Barrale did. That was probably the first one.

Q. Do you know when that was?

A. At that time, 1996.

(Exhibit 8A, pgs.40-41)

Later in Claimant's deposition she testified to when she notified Employer:

Q. What I'm asking you, Ms. Nicholson, is whether you reported your back condition though as related to your employment duties to them?

A. Yes.

Q. Not just that you had some back problems.

A. Yes. I'm trying to think of when he took that management job. The same time. I reported it to him at the same time.

Q. So this would be in September of 1996?

A. Yes.

(Exhibit 8A, pg.52)

This testimony is also consistent with information Claimant provided to her medical providers. On June 30, 2000, Claimant told physicians at Washington University Pain Management that "she does a great deal of travel with her work and relates that travel including carrying her luggage and computer equipment was related to the onset of her symptoms three years ago." (Exhibit H, pg.16) On multiple occasions Claimant has acknowledged personal knowledge that her back condition was related to her work duties as of September 1996. On multiple occasions Claimant indicated that medical providers also linked her low back complaints to her work duties. Further, Claimant lost time from work in September 1996 when Dr. Barrale took her off work on September 9, 1996 (Exhibit 2). At a minimum, Claimant had a compensable disability by September 9, 1996. I find the appropriate date of disability to be September 9, 1996, the date Claimant was taken off work by Dr. Barrale, and began to lose time from employment.

Section 287.430 RSMo., provides that a claim for compensation must be filed within two years after the date of injury or the last payment made by employer due to injury, except, if employer fails to file a report of injury, then the claim must be filed within three years after the date of injury or last payment. Section 287.063.3 RSMo., provides that the statute of limitations will not begin to run in cases of occupational disease until it becomes reasonably discoverable that a compensable injury has been sustained. Employer did not timely file a first report of injury, therefore, Claimant is entitled to the benefit of a three-year statute of limitations. Claimant's disability began on September 9, 1996, and a claim for compensation needed to be filed by September 9, 1999. Claimant filed her claim on May 23, 2001, more than three years after disability began. I find that Claimant's claim is barred by the statute of limitations.

In her brief, Claimant argues that Employer has waived its right to the affirmative defense because it was raised in an amended answer. Claimant filed its initial answer and two amended answers. The last amended answer filed on February 11, 2004 asserts the statute of limitations defense (Administrative Judicial Notice). With leave of the court, an answer may

be amended to include a statute of limitations defense at any time prior to the start of trial. *Patel v. Pate*, 128 S.W.3d 873 (Mo.App. 2004). Further, no abuse of discretion occurs in allowing the amendment as the party opponent has notice of the issue prior to trial. *Arnoneit v. Ezell*, 59 S.W.3d 628 (Mo.App. 2001). I find the statute of limitations defense was properly asserted by Employer and has not been waived. In the alternative, Claimant also asserts that she was uneducated regarding the filing requirements of the Workers' Compensation law. While the result is harsh, the old legal maxim applies, ignorance of the law is no excuse, and it does not relieve Claimant of her filing obligations.

CONCLUSION

In summary, Claimant's claim against Employer and Second Injury Fund is barred by the statute of limitations. Any remaining issues not discussed are moot.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Reneé T. Slusher
Director
Division of Workers' Compensation