

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

Injury No.: 00-164824

Employee: Marlene O'Donnell

Employer: 1) Station Casino
2) Ameristar Casino

Insurer: 1) Zurich North America Insurance Co.; Legion Insurance
2) Self-Insured adjusted by Specialty Risks Services

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

Date of Accident: November 30, 2000

Place and County of Accident: St. Charles 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. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated August 23, 2005. The award and decision of Administrative Law Judge Leslie E. H. Brown, issued August 23, 2005, is attached and incorporated by this reference.

The sole and determinative issue in this case is which of two consecutive employers of employee is responsible for workers' compensation benefits due the employee for her contraction of an occupational disease arising out of and in the course of her employment. The controlling statutes are section 287.063 RSMo and section 287.067 RSMo, generically referred to as the "last exposure rule."

The administrative law judge determined and concluded that the employer liable for the workers' compensation benefits to employee and in whose employment the employee was last exposed to the hazard of the occupational disease for which claim was made, was employer Ameristar Casino (Ameristar). The Commission disagrees with that conclusion, reverses that determination, and in lieu thereof, concludes that employer Station Casino (Station) is the employer liable for the workers' compensation benefits and in whose employment the employee was last exposed to the hazard of the occupational disease for which claim was made.

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge, and will merely be summarized below.

The pertinent facts are as follows: between May 21, 1998 and December 20, 2000, employee was continuously employed with Station in the capacity of a dealer; employee had no other employment during this time frame; between December 20, 2000 and the date of trial employee was continuously employed by Ameristar, initially as a dealer, and as a dual rate supervisor as of July, 2002; and as relevant to the instant case, employee has had no additional employment.

In approximately January, 2000, employee developed symptoms of numbness and tingling in her bilateral upper extremities; due to these symptoms during the calendar year 2000, the employee was seen, treated and or evaluated by several medical experts and received conservative treatment in order to cure and relieve her from the effects of these symptoms; ultimately, employee was referred to a hand surgeon, Dr. Sudekum, on December 4, 2000, and Dr. Sudekum diagnosed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome; Dr. Sudekum commenced active medical treatment of the employee; culminating with surgeries performed January 5, 2001, consisting of a right carpal tunnel release and a right cubital tunnel release, and a second surgery performed

on January 19, 2001, consisting of a left carpal tunnel release and left cubital tunnel release.

On December 11, 2000, Dr. Sudekum imposed a light duty work restriction removing employee from her capacity as a dealer as Dr. Sudekum was unequivocally of the opinion that her occupation was exposing her to the contraction of her occupational disease, i.e., bilateral carpal tunnel syndrome as well as bilateral cubital tunnel syndrome.

Due to the imposition of Dr. Sudekum's light duty work restriction, the employee was removed from her injurious work exposure between December 11, 2000 and her initial surgery occurring January 5, 2001, followed up by her second surgery January 19, 2001, and her post operative recovery; the employee did eventually return to her occupation as a dealer in approximately June, 2001, and continued in such capacity until approximately July, 2002, when she became a supervisor at Ameristar.

Employee's initial claim for compensation was filed January 3, 2002; and employee's amended claim for compensation was filed August 15, 2002. Station paid employee's medical expenses for her treatment rendered on account of her occupational injuries, and also tendered employee temporary total disability benefits through her applicable healing period.

Legal Conclusions

Sections 287.063.1 and 287.063.2 address liability for occupational disease. It provides:

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.

Subsection 7 of section 287.067, to which 287.063.1 refers, states:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

It is undisputed that employee was an employee with Ameristar for a period greater than three months at the time the claim for compensation was filed as well as the amended claim for compensation was filed. The administrative law judge held in her award that she was constrained to follow the reasoning in *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612 (Mo. banc 2002), in applying the last exposure rule pursuant to section 287.063 and section 287.067, and concluded that in so doing, the responsible employer was Ameristar and not Station. The administrative law judge concluded that she must look to the date the employee filed her claim and whether more than three months had passed since working for Ameristar. Then, if so, there must be a determination that there was extremity intensive employment for a greater period of three months during the subsequent period of employment and if the employment were repetitive in nature liability should attach and be imposed on the last employer.

However, the Commission is convinced that a closer reading of *Endicott, supra*, requires, as a matter of law, that the liability and responsibility for workers' compensation benefits in this case be imposed on Station, in lieu of Ameristar. *Endicott* states the last exposure rule is not a rule of causation. "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.* at 615. The Commission is of the opinion that for the holding in *Endicott* to apply to the instant case, employee must have had employment with Ameristar for more than three months before her claim was filed and

employee must have been exposed to the hazard of the occupational disease she contracted, i.e. bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome.

The evidence is uncontradicted that employee's employment and exposure to repetitive motion while an employee with Station, was the substantial contributing factor to the injury contracted. Prior to her employment with Ameristar, which began December 20, 2000, the employee was diagnosed with both bilateral carpal tunnel syndrome and bilateral cubital syndrome, and Dr. Sudekum was of the opinion that she had contracted these diseases due to her occupation as a dealer at Station. On December 11, 2000, Dr. Sudekum removed her from her work capacity as a dealer, and imposed light duty restrictions, removing her from her injurious exposure. When Ameristar became her employer on December 20, 2000, her light duty restrictions were still in effect, and she did not expose herself to the hazards of the disease between December 20, 2000 and her surgeries undergone in January, 2001. Thus, there was no substantial, competent or credible evidence that employee, while employed with Ameristar between December 20, 2000 and her initial surgery of January 5, 2001, was exposed to the hazard of the occupational disease she contracted. It is the opinion of the Commission that for the liability for the employee's occupational disease to be the responsibility of the subsequent employer, Ameristar, the employee would have to have been employed in an occupation or process at Ameristar in which the hazard of the disease exists.

Emphasizing paragraph 7 of section 287.067 RSMo, it is clear that "if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease".

In the instant case the evidence clearly indicates that employee was not exposed to the hazard of the occupational disease she contracted between December 20, 2000 and January 5, 2001, and even if there were exposures, they were not for a period greater than three months; and, it is unequivocal that the employee's prior employment with Station was the substantial contributing factor to her injuries.

As of January 5, 2001, the employee became incapacitated for work due to her occupational injuries, and it is disability after exposure in the employer's business that creates the obligation to compensation and the employer's liability is fixed as of that time. *King v. St. Louis Steel Casting Co.*, 182 S.W.2d 560 (Mo. 1944).

It is true that employee eventually returned to employment as a dealer with Ameristar, commencing full time approximately June 2001. It is true that, at the time the claim for compensation was filed on January 3, 2002, employee had served in that work capacity for a time period greater than three months. It is also true that employee's work for Ameristar exposed employee to a hazard (repetitive motion) capable of causing carpal tunnel syndrome and cubital tunnel syndrome. However, the hazard to which Ameristar exposed employee did not cause employee's conditions of carpal tunnel syndrome and cubital tunnel syndrome that are the subject of this claim.

Before she was ever exposed to any hazard of her disease with Ameristar, employee had completed medical treatment for the disease, had achieved maximum medical improvement from the disease, had been released by her physician to full duty work without restrictions, and had actually returned to performing full duty work. Common sense convinces us that it is not possible that employee's later employment activities with Ameristar caused a disease from which employee had already maximally recovered. Not coincidentally, there is no medical opinion before us that supports a finding or conclusion that employee's later work for Ameristar involved repetitive motion capable of retroactively causing the injuries from which employee had already maximally recovered before she began repetitive duties in Ameristar's employ.

The Commission further relies on the case of *Maynard v. Lester E. Cox Medical Center*, 111 S.W.3d 487 (Mo. App. S.D. 2003). In the *Maynard* case, *supra*, the court was faced with a situation very similar to the case at bar. Specifically the employee had two consecutive employers; the Labor Commission held that the second employer was liable for benefits pursuant to the last exposure rule; the Court of Appeals reversed holding the first employer liable pursuant to the last exposure rule; the Court stated that its decision was based upon the lack of any evidence showing that the second employer exposed the employee to hazards that could cause further injury. The appellate court specifically found on review of the record that there was no medical opinion and evidence supporting a finding that the subsequent employment exposed employee to repetitive motions capable of

producing the injuries for which benefits were sought.

The court further explained the mere fact that at the time the claim for compensation was filed the employee was employed for a period greater than three months performing repetitive tasks, was not in and of itself enough to impose liability on the second employer. In other words, although the last exposure rule requires that the employer at the time the claim was filed may have liability for the occupational disease, there must also be some finding that the subsequent employer exposed the employee to repetitive motions capable of producing the injuries for which the employee seeks benefits.

In the instant case, the Commission is convinced that to impose liability on Ameristar, in lieu of Station, would be a misapplication of both *Endicott* and *Maynard*. An employer is not liable as a matter of law simply because employee was subsequently employed for a period of more than three months at the time the claim was filed, without requiring proof that the subsequent employment exposed the employee to a repetitive motion capable of causing her claimed injuries.

In the instant case, there was no injurious exposure to the employee contributing to the contraction of her occupational disease between December 20, 2000 and the date she initially became incapacitated for work, January 5, 2001; and, any possible injurious exposure could not have occurred until she was released from medical care and treatment, and returned to her normal employment as a dealer.

However, liability for compensation benefits was fixed as of January 5, 2001, as employee had become incapacitated for work due to her occupational disease. Employee's disability was due to her occupational exposure while employed by Station, not Ameristar. The exposure to the repetitive motion while employed with Station was the substantial contributing factor to the injury for which the claim was made.

Based on the foregoing, the Commission modifies the decision of the administrative law judge by concluding that Station is the employer liable for payment of workers' compensation benefits to employee, due to the contraction of her occupational disease.

The award and decision of Administrative Law Judge Leslie E. H. Brown, issued August 23, 2005, as modified, is attached and incorporated by reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 19th day of January 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

FINAL AWARD

Employee: Marlene O'Donnell

Injury No. 00-164824

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Employer: 1. Station Casino
2. Ameristar Casino

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund (Open)

Insurer: 1. Zurich North America Insurance Company; Legion Insurance
2. Self-Insured adjusted by Specialty Risks Services

Hearing Date: 5/24/05 (finally submitted 7/1/05)

Checked by: LEHB:df

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
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: November 30, 2000
5. State location where accident occurred or occupational disease was contracted: St. Charles 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? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was dealing cards.
12. Did accident or occupational disease cause death? No Date of death? ---
13. Part(s) of body injured by accident or occupational disease: Left wrist and elbow, and right wrist and elbow.
14. Nature and extent of any permanent disability: 15%PPD of each wrist and 20% PPD of each elbow at 210 level, and 10% load on all, and 5 weeks disfigurement
15. Compensation paid to-date for temporary disability: \$2,915.78
16. Value necessary medical aid paid to date by employer/insurer? \$21,332.50
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Maximum
19. Weekly compensation rate: \$599.96/\$314.26
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: ---

---weeks of temporary total disability (or temporary partial disability)

Permanent partial disability from Employer, or.....\$ 47,186.16

5 weeks of disfigurement from Employer.....\$ 1,571.30

Permanent total disability benefits from Employer beginning , for
Claimant's lifetime

22. Second Injury Fund liability: Open

TOTAL: \$48,757.46

23. Future requirements awarded: None

Said payments to begin as of date of this Award 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Thomas Burke, Attorney for Claimant

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Marlene O'Donnell

Injury No: 00-164824

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Employer: 1. Station Casino
2. Ameristar Casino

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund (Open)

Insurer: 1. Zurich North America Insurance Company; Legion Insurance
2. Self-Insured adjusted by Specialty Risks Services

Checked by: LEHB:df

This is a hearing in Injury Number 00-164824. The claimant, Marlene O'Donnell, appeared in person and by counsel, attorney Thomas Burke. The employer/ insurer, Ameristar/self-insured, appeared by and through counsel, Attorney J. Bradley Young. The employer/insurer, Station Casino/Zurich North America Insurance Company, appeared by and through counsel, Attorney Craig Hanson. The claim against the Second Injury Fund is to remain open, and the Second Injury Fund is not present at this hearing.

The parties entered into certain stipulations, and agreements as to the issues and evidence to be presented in this hearing.

STIPULATIONS:

On or about November 30, 2000^[1]: a. the claimant was in the employment of Station Casino; b. the claimed injury of occupational disease arose out of and in the course of the claimant's employment in St. Charles County, Missouri; c. all employers and the employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law; d. the employee's average weekly wage was at the maximum, the rate on the date in issue was \$599.96 over \$314.26.

e. Ameristar's liability was self-insured^[2], and the employer Station Casino's liability was insured by Zurich North America Insurance Company. f. On December 20, 2000 Ameristar Casino bought Station Casino, and effective on December 20, 2000 the facility changed ownership from what was Station Casino to then what became Ameristar Casino.

g. A Claim for Compensation was filed within the time prescribed by law.

g. Temporary total disability benefits have been paid to the claimant in the total amount of \$2,915.78; those payments represent 4 6/7 weeks of benefits covering two periods – the first period being January 5, 2001 through January 11, 2001, and the second period being January 19, 2001 through February 14, 2001. h. Medical aid has been provided in the total amount of \$21,332.50.

i. Permanent partial disability the claimant has is: 15% of each wrist and 20% of each elbow at the 210 level, with a 10% load on all of those PPD amounts; and also, there is 5 weeks of disfigurement. The total PPD benefit dollar amount is \$48,757.46.

ISSUE:

1. Liability for permanent partial disability, who was responsible for it between the two employers per the Endicott case

EXHIBITS:

The following exhibits were admitted into evidence without objection.

Claimant's Exhibits:

No. A: Original Claim for Compensation filed with the Division on or about January 30, 2002

No. B: Amended Claim for Compensation filed with the Division on or about August 15, 2002

No. C: Medical records of Dr. Anthony Sudekum (These are treatment records relating to Marlene O'Donnell commencing December 4, 2000 continuing through June 11, 2001. The records include Dr. Sudekum's office notes as well as the operative notes relating to surgeries he performed and some records from Pro Rehab regarding physical therapy that he prescribed)

No. D: Rating report of Dr. Shawn Berkin, dated February 26, 2002

No. E: Certified copy of the deposition of the claimant, Marlene O'Donnell taken on July 21, 2003 (Deposition of the claimant is being offered in lieu of her live testimony today)

Ameristar's Exhibits:

No. 1: Letter from Station Casino's attorney at the time, Chris Crank, dated July 10, 2003 which outlines the benefits that were paid by Zurich Insurance on behalf of Station Casino

No. 2: Letter of July 10, 2001 from Zurich Insurance Company extending a settlement offer to the employee

Station Casino's Exhibits:

No exhibits were offered by Station Casino

FINDINGS OF FACTS AND RULINGS OF LAW

Marlene O'Donnell, the claimant, testified by deposition on July 21, 2003. She was questioned by Ameristar, and O'Donnell stated that she was born on 11/13/56, and she is 46 years old. The claimant stated that she served in the military, Air Force, and was honorably discharged in November, 1980. I was not injured in the military, O'Donnell said.

Agreeing that the turnover from Station Casino to Ameristar Casino was in about December of 2000, O'Donnell testified: "It was during, like, December and January. They did all the changeover of the layouts and the checks, we call them the gaming chips, in January because they did that while I was on light duty." (O'Donnell Dp. Pg. 7)

O'Donnell agreed that when she started working at the casino it was Station Casino. She was asked when she started there, and O'Donnell answered: "The first time I began in June of 1996. I worked until 1997. And then I went to Players Island for one year and then came back to Station Casino in May of 1998." (O'Donnell Dp. Pg. 7) When I was at Station from June 1996 until 1997 my job title was dealer, O'Donnell said, I dealt every game they had. I left Station in 1997 because I was considered part-time, an extra board dealer, O'Donnell said, and when I went to Players Island they offered me a full-time position. "So I went to Players Island for one year until I could come back to Station as a full-time dealer", the claimant said. (O'Donnell Dp. Pg. 8) My last month of employment at Players was May of 1998, O'Donnell said. She agreed that she was also a dealer at Players, and that it was essentially the same type of job that she had at Station. I went back to Station on May 21, 1998 and was there through the changeover from Station to Ameristar, O'Donnell stated. She agreed that from the time of the turnover in December of 2000 until July 2002 she was working as a dealer.

My position today is not the same as it was on May 21, 1998, O'Donnell stated, "(O)ne year ago I was promoted to dual rate supervisor". (O'Donnell Dp. Pg. 9) This happened in July of 2002, she said. As a dual rate supervisor sometimes I deal, sometimes I am supervisor, she said. Estimating how much time during the past year she spent dealing as opposed to working as a supervisor, O'Donnell testified: "Until February of (2003), I would say 95 percent of my time, if not even more, was supervisory. And then in February they promoted some more supervisors so it went about half and half." (O'Donnell Dp. Pg. 9) My duties as a supervisor include observing the dealers and the players on the games, make sure there's enough gaming checks on the games to pay all the dealers and to change the cares when necessary; mostly just observing, the claimant stated. The repetitive activity with my hands/wrists with being a supervisor is writing with a pen or pencil, O'Donnell said, "(W)e fill out a lot of rating cards". (O'Donnell Dp. Pg. 10) I am left-handed, so this writing is limited to my left hand, she agreed.

During the period when I was working exclusively as a dealer from the time I returned to Station on May 21, 1998 through the time of my promotion in July of 2002, a normal shift for me was eight hours, O'Donnell stated. During that time I actually performed the act of dealing at a table for six and a half hours, the rest of the time was break time, she said. During this time frame, May of 1998 through July of 2002, I did not have any other jobs on the side, O'Donnell said.

O'Donnell agreed that initially she filed a claim for compensation on January 3, 2002. She agreed that at the time this claim was filed with the Division she had listed her employer as Station Casino. O'Donnell agreed that this claim alleged problems to both wrists and both hands.

The claimant was asked when was the first time she recalled having problems with either of her wrists or elbows. O'Donnell answered: "I am not sure exactly when they started to bother me. I know it was earlier in that year (2000), I had gone to my doctor and told her I was having problems." (O'Donnell Dp. Pg. 13) The doctor I went to was Dr. Wendy Meyer-Cherry, my personal physician, the claimant said. No one from Station or Ameristar or any of their insurance carriers directed me to my personal physician at that time, the claimant said. I went on my own; Dr. Meyer-Cherry was my own choice, O'Donnell said. The first time I went to Dr. Meyer-Cherry she set me up an appointment to have a nerve conduction study, the claimant stated. O'Donnell testified as to what she had told Dr. Meyer-Cherry her problems were: "I told her I was having trouble sleeping at night because my hands were falling asleep. I was waking up and my hands would be numb." (O'Donnell Dp. Pg. 14) O'Donnell stated that she did not remember when she saw Dr. Meyer-Cherry the first time. Testifying as to how long she had been having problems with her hands going numb before she saw Dr. Meyer-Cherry, O'Donnell stated: "It had been several months. It had been, like, six months, I think." (O'Donnell Dp. Pg. 14) When asked if she had experienced similar problems in her hands prior to this, O'Donnell answered:

“Some years before that, I had tingling in my feelings, not like this, not like my hand going to sleep.”

“In my fingertips. And I went to my doctor, and he said it was because I was sleeping with my hands twisted under my head. So I quit doing that and the tingling went away and didn’t come back.” (O’Donnell Dp. Pg. 15)

This occurred quite a while ago, O’Donnell said, probably more than ten years ago. The doctor was Dr. Joseph Thompson, she said, and he is now located in the DePaul Medical Building, I think, he moved from when I went to see him. She was asked if she had had any other treatment of any kind other than going to this doctor, and O’Donnell answered – “No”. (O’Donnell Dp. Pg. 33) She stated that she did not have any physical therapy at that time, and the doctor had not prescribed any medication. O’Donnell testified: “He just told me, Don’t sleep on my hands. So I put them around a pillow and quit.” (O’Donnell Dp. Pg. 34)

Discussing the result of the nerve conduction study that Dr. Meyers-Cherry sent her to, O’Donnell stated that she had to go see a neurologist, Dr. Stanley Martin, and he told her she had carpal tunnel and that she needed to have surgery immediately. O’Donnell agreed that the first time she notified anyone, she was at Station Casino at the time. The claimant testified about when she first notified Station Casino:

“Right after I got the results back from Dr. Meyer, I went to my supervisor and said, My doctor says I have carpal tunnel and I am going to have to go out and have surgery, so I kind of want to wait until after the first of the year or after the – whenever it was, like, the busy season we were coming up against – and then I’ll put in for a leave to have my hands operated on. And he said okay.” (O’Donnell Dp. Pg. 16)

O’Donnell agreed that she was still talking about the year 2000. The claimant further testified:

“And then I went to human resources to tell them that I needed to take some time off to have my hands operated on because I had carpal tunnel, and I was not given an answer that I was happy with, so I went to the director of human resources and told her, I have to go out and have my hands operated on because I have been told I have carpal tunnel, and I am a little scared about this, and I don’t know what to do. I don’t want to file a Workman’s Comp claim but Tony won’t tell me what I have to do to fill out the paperwork to go on leave to have this done. And that’s when I was told be Jainee Libby that I had to file a Workman’s Comp claim because it wasn’t an option anymore, if there was any chance it was work related, that my insurance would not pay. And she directed me to Melanie Leonard, who I talked to her and told her what was going on, and she said, Go by the security desk today and fill out an accident report, tell them, you know, that this is – take a guess at when you think it started bothering you, and I will make an appointment for you to see Dr. Sudekum.” (O’Donnell Dp. pp. 16-17)

Explaining again, O’Donnell stated that the first person she talked to at Station Casino was Bernie Well, her supervisor. She testified: “I said, Bernie, my doctor said I have carpal tunnel, I have to have surgery, I need to take some time off. And he said, let me know what you need.” (O’Donnell Dp. Pg. 18) I did not have a discussion with Bernie at that point in time as to whether or not I thought my carpal tunnel was related to my employment, O’Donnell said. (O’Donnell Dp. Pg. 14) This discussion with Bernie was within a day or two after I had gotten the results of the nerve conduction study back from the neurologist, the claimant said. “My first day back to work, I went straight to the office and said, Bernie, here’s the deal”, O’Donnell stated. (O’Donnell Dp. Pg. 18) Bernie sent me to no one, he said let me know what you need, the claimant stated. “And I went into human resources to get the paperwork to take a leave of absence or whatever I needed to do to take some time off to have the surgery done”, she said. (O’Donnell Dp. Pg. 18) The lady in human resources, I don’t know what she said but it upset me because I was scared, the claimant stated. That’s when I went to the director of human resources, Janiee Libby, O’Donnell said, and further testified:

“I told Jainee that I was afraid because I found out I had carpal tunnel and they were going to cut my hands and I was very nervous about that. I told her that I wasn’t filing any claims, I just needed to have my hand operated on, and she told me that I had no choice, I had to file a Workman’s Comp claim because it was considered work related and that our insurance wouldn’t pay for the surgery if I did it.” (O’Donnell Dp. Pg. 19)

Janiee did not give me forms to fill out, the claimant said, “(S)he directed me to Melody Leonard who was the Workman’s Comp person for our company”. (O’Donnell Dp. Pg. 19) All of this did not occur in one day; she said, the time between my conversation with Bernie and the conversation with Janiee was about a three month time frame. I had the conversation with Jainee Libby and Melody in the same day, the claimant stated. Melody told me to go to the security

desk where I filled out the accident report, then Melody directed me to Dr. Sudekum, O'Donnell said.

The claimant agreed that she had bilateral carpal tunnel surgery eventually with Dr. Sudekum. She agreed she also had nerve entrapment at the elbows and had surgery on her elbows. I have scars on my wrists and elbows, the claimant stated.

O'Donnell agreed that when she first sought treatment with her private physician, Dr. Meyer-Cherry, all of her work activities up to that point had been with Station Casino. I believe the first time I went to Dr. Sudekum was in 2000, the claimant said, "because it took a few months, I think, before we actually scheduled the surgery". (O'Donnell Dp. Pg. 30) A December 4, 2000 report by Dr. Sudekum in which he wrote that O'Donnell was at the office that day for evaluation for bilateral upper extremities, and O'Donnell stated that that might have been the first time she saw Dr. Sudekum. It was noted that her Claim for Compensation indicated she had an occupational disease and that it started on January 1, 2000; O'Donnell stated that that was a pretty good guess.

The claimant was questioned at the deposition by Station Casino and stated that her surgeries were to the right side on January 5, 2001 and on the left side on January 19, 2001. I'm not certain the first time I missed work, O'Donnell said. She testified: "I went on light duty before I saw Dr. Sudekum. I think Melody put me on light duty and I don't know the exact dates, but I think we were still in the middle of the transition." (O'Donnell Dp. Pg. 37) The claimant agreed that after the surgeries she returned to work in a full-time dealer capacity, and that now with a promotion she works in the dual rate position.

O'Donnell stated that she was aware an amended claim was filed, and agreed that in that time frame she was employed by Ameristar.

When I initially reported the problem to my supervisor I also had pain in my left elbow, O'Donnell said. She was asked if she remembered when she first experienced pain in her right elbow, and O'Donnell answered – No. She further testified: "Actually, I didn't experience any pain in my right elbow. I didn't know he was going to operate on it until I showed up for surgery." (O'Donnell Dp. Pg. 40) O'Donnell testified about any continuing problems:

"I have had a few problems with my left elbow and my left worst, but it's a little scary because after my hands quit working, every little ache and pain I kind of panic because I think, Oh, God, here it comes again. But I've had sharp pains, but not the same type of pains. No numbness." (O'Donnell Dp. pp. 40-41)

Medical records of Dr. Anthony Sudekum, M.D. (Cl's. C) began with a December 4, 2000 examination report; the report reflected that Marlene O'Donnell was the patient, and Station Casino was the employer. Dr. Sudekum wrote the following:

I saw Ms. O'Donnell in the office today for evaluation of her bilateral upper extremities. She is a 44-year-old left-handed woman who is employed as a dealer at Station Casino where she has worked for approximately two and a half years. Prior to that, she worked as a dealer at Player's Island for a year and before that, she worked at Station Casino as a dealer for a year. Total length of employment at Station Casino has been approximately three and a half years. She states that approximately one year ago, she began to experience nocturnal pain and paresthesias in both hands. She was first evaluated by her primary physician, Dr. Wendy-Meir-Cherry, who felt she had carpal tunnel syndrome and ordered a nerve conduction study, which was performed by Dr. Yanover on 6/29/2000. This study revealed evidence of moderate bilateral carpal tunnel syndrome. She was recently seen by Dr. Martin who recommended a trial of conservative treatment including splints and anti-inflammatory medications. Despite this treatment, her symptoms have not improved significantly. Approximately one year ago, Ms. O'Donnell had been diagnosed and treated for left medial epicondylitis, but these symptoms have failed to resolve. Her past medical history is significant for hypothyroidism and gastroesophageal reflux. Current medications include Synthroid, hypothyroidism and gastroesophageal reflux.

Exam findings on December 4, 2000 were discussed by Dr. Sudekum. The doctor wrote:

Ms. O'Donnell has clinical symptoms consistent with bilateral carpal and cubital tunnel syndromes. Her nerve conduction studies revealed compression of the median nerves but the ulnar nerves were normal. It should be noted that ulnar neuropathies are not as reliably predicted with nerve conduction studies as those of the median nerves. She has failed an appropriate course of conservative treatment, and at this time, I would recommend

that she undergo staged, bilateral endoscopic carpal tunnel releases and open cubital tunnel releases. If she has these procedures performed two weeks apart, she would need to be off work for approximately six weeks followed by another four weeks of light duty.

Due to the nature and duration of her employment at Station Casino, I feel that this is a work-related condition. Ms. O'Donnell does suffer from hypothyroidism, which may have also contributed to the development of this condition. I do not feel, however, that the hypothyroidism is a predominant cause of this condition.

A Work Release form completed by Dr. Sudekum, dated 12/4/00, indicated a date of injury of 11/30/00, and indicated that O'Donnell was released to full unrestricted duty on 12/4/00; it was noted that O'Donnell's next appointment would be surgery. The next document in the record was a second Work Release form completed by Dr. Sudekum, dated 12/11/00; again an injury date was noted as 11/30/00; it was written that O'Donnell was placed on two-handed light duty beginning on 12/11/00 with restrictions of "No craps or hand shuffling. Otherwise full duty"; it was noted that the next appointment was - pending surgery approval.

The record included two operative reports which reflected that Dr. Sudekum had performed on O'Donnell the following procedures: a. 01/05/01 – right endoscopic carpal tunnel release and right open cubital tunnel release for the diagnoses of right carpal tunnel syndrome and right cubital tunnel syndrome; and b. 01/19/01 – left endoscopic carpal tunnel release and left open cubital tunnel release for the diagnoses of left carpal tunnel syndrome and left cubital tunnel syndrome. Physical therapy notes were in Dr. Sudekum's record, and indicated that O'Donnell was treated after each surgery, the last treatment being on January 22, 2001. In the January 22, 2001 note it was written that O'Donnell was currently off work until further orders from the doctor, who she was to see on February 1, 2001. Dr. Sudekum wrote in a February 1, 2001 treatment note that he had seen O'Donnell on that date post-bilateral endoscopic carpal tunnel and open cubital tunnel releases; the doctor further wrote:

She states that the pain, numbness and tingling she had been experiencing in both upper extremities have improved significantly. She still has some paresthesia in the distal tip of the left middle finger and soreness of both palms and medial elbows. The incisions are all healing well and there is not evidence of infection and only minimal swelling. She has been seen by the therapist twice and been given exercises, splints and elbow pads to use as needed.

In a Work Release form, dated 02/01/01, it was indicated that O'Donnell would be unable to return to work until 02/15/01, and the return to work on 02/15/05 was to light duty with a one-handed duty restriction of no use of the left hand; it was indicated that O'Donnell would be released to full duty on 03/01/01.

The record indicated that Dr. Sudekum next saw O'Donnell on or about March 7 or 8, 2001 for reevaluation of her bilateral upper extremities. The doctor further wrote in the 03/08/01 entry:

Ms. O'Donnell returned to full, unrestricted duty on 3/1/2001 and she states that since returning to the blackjack table, she has been experiencing burning pain on the volar aspects of both hands. This includes while dealing. She states that she also deals on the craps table and has no difficulty because of the relatively slower pace of the game. She denies any recurrent numbness or tingling in either hand and feels that her strength is gradually returning to normal.

On physical examination, her surgical incisions are healing well and there is no significant swelling or deformity noted. At this time, I am recommending that she return to work on full duty with the only exception being no blackjack dealing for the next to weeks. She may resume full, unrestricted duty including dealing blackjack on 3/22/01. She will follow up with me for final evaluation on 8/6/2001.

A Work Release form, dated 03/07/01, reflected that O'Donnell was released to restricted duty of "No Blackjack dealing X 2 wks" and then full unrestricted full duties on 03/22/01.

The record included a 06/11/01 referral by Dr. Sudekum for a one-time physical therapy evaluation of both upper extremities. In a Final Evaluation form completed by a physical therapist and dated 06/1/01, included was that O'Donnell had no significant complaints, all testing (i.e. wrist and elbow Tinel's and Phalen's) were negative, wrist and elbow scars were measured.

In his final examination report of June 11, 2001, Dr. Sudekum. The doctor wrote:

I saw Ms. O'Donnell in the office today for final evaluation and permanent partial disability rating relating to her bilateral carpal tunnel and cubital tunnel syndrome. She underwent staged bilateral endoscopic carpal tunnel releases and open cubital tunnel releases on 1/5/2001 and 1/19/2001. She has been back at work on full, unrestricted duty since 3/8/2001. She was employed as a dealer at Ameristar Casino and reports no significant difficulties performing her assigned tasks and duties at work. She states that the pain, numbness and tingling in both upper extremities has resolve completely, but she does have an occasional dull ache at the base of both palms when direct pressure is applied to this area. (sic)

Dr. Sudekum discussed noted the findings of the detailed examination of both upper extremities as well as his physical examinations for O'Donnell on June 11, 2001. The doctor finally wrote: "I find that Ms. O'Donnell has sustained 0% permanent partial disability of either upper extremity due to her carpal and cubital tunnel syndrome, which will resolve completely after surgical treatment. I do not anticipate that she will require any further treatment or therapy for these conditions."

Dr. Shawn Berkin, D.O., prepared a report, dated February 26, 2002, after evaluation of O'Donnell on 02/19/02. (Cl's. D) History of Injury noted by Dr. Berkin was:

The patient stated that in January of 2000 she developed symptoms of numbness and tingling to her hands. She had difficulty sleeping at night because of her symptoms. The patient related her symptoms to her job working as a dealer at the Station Casino. The patient worked at the blackjack and crap tables, and roulette. She indicated that her hands were always moving. The patient was evaluated for her symptoms by her personal physician, Dr. Wendy Meyer-Cherry, who obtained EMG and nerve conduction studies of both upper extremities that revealed bilateral carpal tunnel syndrome.

In September of 2000, Dr. Meyer-Cherry referred the patient to Dr. Stanley Martin, a neurosurgeon. He discussed treatment options with the patient and she elected to be treated conservatively. The patient was treated with wrist splints and anti-inflammatory medication but her symptoms did not improve.

In December of 2000, the patient was referred to Dr. Anthony Sudekum, a hand surgeon. Dr. Sudekum diagnosed bilateral carpal tunnel syndrome and bilateral cubital syndrome, and recommended surgical treatment as the patient had not responded to conservative measures. According to a surgery report from the HealthSouth Outpatient Surgery Center dated 01/05/01, Dr. Sudekum performed a right endoscopic carpal tunnel release and a right cubital tunnel release. On 01/19/01, Dr. Sudekum performed surgery for a left endoscopic carpal tunnel release and a left cubital tunnel release. Following the patient's surgery, she was referred for physical therapy and was re-examined by Dr. Sudekum on 02/01/01. He permitted the patient to return to work to one-handed duty on 02/15/01 and released the patient to full duty on 03/01/01. Dr. Sudekum continued to treat the patient through mid-June of 2001, at which time he released the patient from medical care. She continues to work for her previous employer and is receiving no treatment for her injury at this time.

Dr. Berkin noted reviewing the following reports as part of his evaluation: medical records of Dr. Stanley Martin, dated 09/14/00; Dr. Anthony Sudekum dated 12/04/00 through 06/11/01; surgical reports from HealthSouth Outpatient Surgery Center dated 01/05/01 and 01/19/01; and ProRehab physical therapy records through 06/11/01. Dr. Berkin noted that O'Donnell had a past medical history of hyperthyroidism. The doctor discussed O'Donnell's complaints at the time of the evaluation, and his examination findings. Dr. Berkin's wrote the following opinion:

Based on the medical history provided to me by the patient, a review of the medical records that were furnished to me and my physical examination, I feel within a reasonable degree of medical certainty that the work activities the patient performed in January of 2000 while in the course of her employment at Station Casino were a substantial factor causing her bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome.

The doctor further wrote that as a result of her injury, O'Donnell had sustained 35% permanent partial disability of each upper extremity at the level of the elbow for the bilateral cubital tunnel syndrome, and 40% permanent partial disability of each upper extremity at the level of the wrist for the bilateral carpal tunnel syndrome. Because her disabilities involve both of her arms, I feel that he patient's overall disability is greater than the sum of her individual disabilities when added together.

ISSUE: Liability for permanent partial disability, who was responsible for it between the two

employers per the **Endicott** case

At issue is the liability for permanent partial disability between two employers – Station Casino and Ameristar Casino.

There is no dispute in the evidence that the claimant, O'Donnell (a credible witness), began working for Station Casino as a dealer in June 1996 as a part-time dealer and continued in this position until 1997 when she left and worked for Players Island as a full-time dealer for one year, or until May 1998. O'Donnell then returned to Station Casino on May 21, 1998 as a full-time dealer and continued to work in this capacity through the buyout of Station Casino by Ameristar Casino and the change of ownership of Station Casino to Ameristar Casino on December 20, 2000. I was working exclusively as a dealer from the time I returned to Station on May 21, 1998 through the time of my promotion in July of 2002, O'Donnell said, and a normal shift for me was eight hours. During that time I actually performed the act of dealing at a table for six and a half hours, the rest of the time was break time, she said. During this time frame, May of 1998 through July of 2002, I did not have any other jobs on the side, O'Donnell said. At the point of July 2002 I received a promotion to dual rate supervisor where my job then became 95 percent supervisor until February 2003 when my duties went to half supervisor and half dealing, the claimant said. The repetitive activity with my hands/wrists as a supervisor would be filling out a lot of rating cards, O'Donnell testified, and I am left-handed, so this writing was limited to my left hand.

The claimant testified that the first time she had problems with her hands, wrists or elbows was earlier in the year 2000, about six months prior to when she went to her personal doctor, Dr. Meyer-Cherry who she saw for the problem the first time, the evidence indicates, in mid-to-late 2000. My problems when I saw Dr. Meyer-Cherry was that I was having trouble sleeping at night because my hands were falling asleep, and I was waking up and my hands would be numb. The claimant testified that Dr. Meyer-Cherry sent her for a nerve conduction study which was performed, the evidence indicates (see Dr. Sudekum's records), on 06/29/2000. When I got the results back about the nerve conduction study that I had carpal tunnel syndrome and that I needed surgery, I notified my employer at that time, Station Casino, O'Donnell said.

The claimant testified that Station Casino sent her to Dr. Sudekum. Dr. Sudekum's records reflect that he saw O'Donnell the first time on December 4, 2000 for evaluation of her bilateral upper extremities. The doctor noted that O'Donnell's work history was as a dealer; the doctor's opinion after examination was that O'Donnell "has clinical symptoms consistent with bilateral carpal and cubital tunnel syndromes". Dr. Sudekum wrote in the December 4, 2000 report – "Due to the nature and duration of her employment at Station Casino, I feel that this is a work-related condition." The doctor noted that O'Donnell suffered from hypothyroidism which may have also contributed to the development of this condition, but he did not feel that the hypothyroidism was a predominant cause of this condition. Dr. Sudekum's record indicated that on 12/11/00 he placed O'Donnell on two-handed light duty of "No craps or hand shuffling. Otherwise full duty" pending surgery. There is no dispute that Ameristar bought Station Casino on December 20, 2000 and effective December 20, 2000 the facility changed ownership from what was Station Casino to then what became Ameristar Casino. The medical evidence reveals that Dr. Sudekum performed surgery on O'Donnell's right and then left upper extremities on 01/05/01 and on 01/19/01, respectively. The medical evidence indicates that O'Donnell was first released to return to work after the surgeries on 02/15/01 on one-handed duty with no use of the left hand, and was then released to full duty, no restrictions on or about 03/1/01. Dr. Sudekum's records indicate that O'Donnell was then tested, evaluated and examined on 06/11/01 with negative clinical findings such as wrist and elbow Tinell's and Phalen's, and at that time Dr. Sudekum felt O'Donnell had no permanent disability as a result of these conditions and would not need any further treatment. Dr. Berkin evaluated O'Donnell on 02/19/02, noting that O'Donnell relayed to him that in January of 2000 she developed symptoms of numbness and tingling in her hands as well as difficulty sleeping at night because of her symptoms, and that she related her symptoms to her job working as a dealer at the Station Casino; Dr. Berkin discussed the treatment of O'Donnell and listed the medical records he had reviewed which covered the period of 09/14/00 – 06/11/01. Dr. Berkin's written opinion was:

Based on the medical history provided to me by the patient, a review of the medical records that were furnished to me and my physical examination, I feel within a reasonable degree of medical certainty that the work activities the patient performed in January of 2000 while in the course of her employment at Station Casino were a substantial factor causing her bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome.

There is no dispute that the claimant filed with the Division a Claim for Compensation, date-stamped by the Division on January 3, 2002. (Cl's, A). This claim indicates O'Donnell suffered injuries to her right elbow and wrist, and her left elbow and wrist on November 30, 2000 (date of injury amended by claimant at the beginning of the hearing); the Claim reflects Station Casino as the employer. There is no dispute that the claimant filed an Amended Claim For

Compensation^[3] (Cl's. B), dated 08/15/02^[4], the Amended Claim adds Ameristar Casino as an employer. It was agreed and stipulated to by the parties on or about November 30, 2000 O'Donnell's claimed injury of occupational disease arose out of and in the course of the her employment; it is found that the evidence indicates the occupational disease suffered by the claimant was bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome.

At issue are subsections 1 and 2 of Section 287 RSMo 1993, as well as subsection 7 of Section 287 RSMo. 1993 per the Missouri Supreme Court case – *Endicott v. Display Technologies, Inc*, 77 S.W.3d 612 (Mo. banc 2002):

287.063. 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.

287.067.7. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

In *Endicott*, the Court held that under the last exposure rule of Section 287.063, RSMo 1994, the last employer before the date of the claim is liable if that employer exposed the employee to the hazard of the occupational disease. In reaching this decision the *Endicott* Court noted the employee's work duties at the five different employers, when the employee's occupational disease problems began, that Endicott filed his Claim for Compensation while having been employed with GTI for 4 months, and noted that the employee's doctor testified that Endicott's employment at three of the five employments were each capable of causing the problems that he exhibited. The *Endicott* Court wrote that the last exposure rule (Section 287.063.1 and 2) is not "a rule of causation", but "(R)ather, 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". *Endicott*, 77 S.W.3d at 615. The Court in *Endicott* went on to state:

"At GTI, Endicott's duties included repetitive motion, the hazard of his occupational diseases. Because GTI was the last employer to expose him to this hazard, GTI is solely liable.

GTI attempts to invoke the exception in subsection 287.067.7:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

As a turning point, this provision shifts liability to a prior employer *only* if the employee's exposure at a later employer is less than three months *and* exposure with a prior employer was the substantial contributing factor to the injury.

GTI asserts that because two of Endicott's diseases were diagnosed during (and shortly after) employment with Display Tech, Display Tech is liable for them. GTI interprets the phrase "which is found to be the cause of the injury" to fix liability at the time the disease is diagnosed.

In fact, the phrase 'which is found to be the cause of the injury' modifies the subject 'the exposure to the repetitive motion.' If this exposure with an employer is for more than three months, that employer--as in this case--may not invoke the exception in section 287.067.7. *Endicott*, 77 S.W.3d at 615.

In its Memorandum of Law, Ameristar, the later employer herein, acknowledges that *Endicott* is the leading case in this area, and further writes:

"However, more recently, the Court of Appeals has had several opportunities to apply the reasoning in Endicott to other circumstances. For example, in Maynard v. Lester E. Cox Medical Center 111 S.W.3d 487 (Mo.App. SD

2003), the Court was faced with a situation very similar to the present case. Specifically, the employee had two consecutive employers. The Industrial Commission initially held that second employer was liable for benefits under the Last Exposure Rule. The Court of Appeals reversed, holding that only the first employer was liable despite The Last Exposure Rule. In reaching this decision, the Court stated: 'This court discovered no medical opinion in its review of the evidence that states the subsequent employment exposed claimant to repetitive motions capable of producing the injuries for which she sought benefits.' Id. at 492.

In other words, although The Exposure Rule requires that employer at the time the claim was filed has liability for the occupational disease, there must be some finding that the subsequent employer exposed the employee to repetitive motions capable of producing the injuries for which the employee seeks benefits. In the present case, there is also no such evidence.

The employee was diagnosed with bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome by Dr. Sudekum on December 4, 2000. At this time, the employee still worked for Station Casino. She then started active medical treatment culminating with surgeries at both wrists.

All of the evidence presented in this case speaks of the conditions of her employment prior to December 4, 2000, which caused her carpal tunnel and cubital syndromes. There is no evidence from any physician, or from the employee for that matter, that any of her work activities following Ameristar's purchase of Station Casino on December 20, 2000, caused or contributed to cause her condition. None. The Court in Maynard adopted the following language, which is equally applicable in the present case:

'the Commission's decision (holding the second employer liable) misinterprets and misapplies the decision in Endicott in that the opinion concludes that (the first) employer is not liable as a matter of law simply because employee was subsequently employed for a period of more than three months without requiring the employer to prove that the subsequent employment exposed her to a repetitive motion capable of causing her injuries, and that the motion was the 'substantial contributing factor to the injury', as is further required by § 287.063.' Id. at 491-492."

In its Memorandum of Law, Station Casino argues:

"Under the exception set forth in § 287.067.7, the 'ninety-day rule,' 'shifts liability to a prior employer *only* if the employee's exposure at a later employer is less than three months *and* exposure with a prior employer was the substantial contributing factor to the injury.' Endicott, 77 S.W.3d at 615, emphasis in original. See, also, Oswald et al. v. Southern National Fabco Manufacturing, Inc., 77 S.W.3d 611, 612, (Mo. banc 2002). In Endicott, the Missouri Supreme Court found that the exception did not apply based on claimant's employment with Graphic Technologies, Inc. for over three months. Id. at 616.

In the case at bar, claimant's employment began with Ameristar in December, 2000. She continued to work full time as a dealer through July 2002, long after the original Claim for Compensation was filed in January, 2002. Based on the 13 months of employment prior to the filing of the claim, the exception set forth in § 287.067.7 would not apply to shift the liability for permanent partial disability back to Station Casino. As such, liability for permanent partial disability shall be placed solely on Ameristar.

It is found that at the time the claimant filed her Claim for Compensation with the Division on January 3, 2002, she was working for Ameristar Casino (who bought out and took over ownership of Station Casino on December 20, 2000). The claimant, therefore, had been working for Ameristar for over three months when the claim was filed. Thus, per the Last Exposure Rule and exception as well as Endicott and Maynard, the first determination is whether or not the claimant's employment with Ameristar exposed her to the hazard which produced the claimed occupation diseases. There is evidence which establishes that while O'Donnell was working for Station Casino: a. she developed the occupational disease problems with her upper extremities in early 2000; b she was diagnosed with bilateral carpal and cubital tunnel syndromes on December 4, 2000; and c. Dr. Sudekum on December 4, 2000 noted that the claimant's occupation was a dealer and opined – "Due to the nature and duration of her employment at Station Casino, I feel that this is a work-related condition". The evidence indicates that at the point when Ameristar became the employer, December 20, 2000, the claimant was already working in a light duty capacity, per Dr. Sudekum as of December 11, 2000, with restrictions from performing the duties noted by the doctors as the cause of the claimant's occupational disease, namely dealing cards. Surgery was performed by Dr. Sudekum on January 5, 2001 and on January 19, 2001, and the claimant was initially returned to work on light duty and not released to full duty until March, 2001. Dr. Sudekum's record indicated that he continued post-surgical follow-up treatment through June 11, 2001, and in his final examination report of June 11, 2001, Dr. Sudekum wrote that O'Donnell had been back at work on full, unrestricted duty since

3/8/2001 and was employed as a dealer at Ameristar Casino.

The claimant testified that after the two January 2001 surgeries she returned to work in a full-time dealer capacity. O'Donnell testified that she was working exclusively as a dealer from the time she returned to Station Casino on May 21, 1998 through the time of her promotion in July of 2002. During this time a normal shift for me was eight hours, she said, during that time I actually performed the act of dealing at a table for six and a half hours, and the rest of the time was break time. Dr. Berkin, who evaluated O'Donnell on 02/19/02, gave a somewhat confusing opinion in that he opined that O'Donnell's work activities in January of 2000 at Station Casino were a substantial factor in causing her bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome; the evidence indicates that in January 2000, the claimant was working for Ameristar. Nevertheless, Dr. Berkin noted that O'Donnell developed her symptoms working as a dealer at the Station Casino.

It is found that the competent and substantial evidence establishes that the hazard of the occupational disease was working in the capacity of a dealer, which the claimant did for both Station Casino and Ameristar Casino. It is found that the competent and substantial evidence establishes that the claimant had worked in the capacity of a full-time dealer for at least nine months with Ameristar at the time of filing her claim for the occupational disease. It is found that in applying the Last Exposure Rule, the competent and substantial evidence establishes that Ameristar was the last employer to expose the employee to the occupational hazard prior to the filing of the claim, and had so exposed the claimant to such hazard for at least nine months. As the exposure with the employer Ameristar was for more than three months, Ameristar may not invoke the exception in section 287.067.7. Ameristar is found to be liable for the compensation in issue in this case, namely permanent partial disability

* * *

The Second Injury Fund remains open.

Date: _____

Made by: _____
LESLIE E. H. BROWN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia Secrest
Director
Division of Workers' Compensation

[1] The Division file is showing a date of injury of January 1 of 2000 based on the Claims filed by the claimant, but according to Claimant's Attorney Thomas Burke, he is hereby amending the Claim for Compensation at the beginning of this hearing to reflect the date of injury as November 30, 2000.

[2] THE COURT: Attorney Young, please give an explanation comment as the Division file is showing for two insurance companies for Ameristar; one, Legion Insurance, which we all know is dissolved by bankruptcy, but is also showing St. Paul Fire & Marine Insurance Company adjusted by GAB Robbins North America.

MR. YOUNG: The buyout of Station Casino by Ameristar occurred on December 20, 2000 and effective December 20, 2000 the facility changed ownership from what was Station Casino to then what became Ameristar Casino. At the time of the buyout Station Casino was insured by Legion Insurance, after Legion Insurance went into bankruptcy Ameristar became self-insured and their liability is adjusted through Specialty Risk Services. I do not know of any involvement of any other insurance carriers or TPA's on behalf of Ameristar.

[3] This Amended Claim for Compensation is found to meet the test and relates back to the filing of the original Claim for Compensation. *See, generally, Halaus v. Wm. Zickell Co.*, 958 S.W.2d 97, 80 (Mo.App. E.D. 1997).

[4] The Division file reflects that the Amended Claim was filed with the Division on 08/19/02.