

TEMPORARY OR PARTIAL AWARD  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-085227

Employee: Antonino Pereira  
Employer: John Volpi Co.  
Insurer: Missouri Retailers Insurance  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: April 15, 2005  
Place and County of Accident: St. Louis City, 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, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated September 19, 2006.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued September 19, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5<sup>th</sup> day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## TEMPORARY OR PARTIAL AWARD

Claimant: Antonino Pereira Injury No.: 05-085227  
Dependents: N/A Before the  
Employer: John Volpi Co. **Division of Workers'**  
Additional Party: Second Injury Fund **Compensation**  
Insurer: Missouri Retailers Insurance Department of Labor and Industrial  
Hearing Date: June 27, 2006 Relations of Missouri  
Checked by: JED:tr Jefferson City, Missouri

### 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: April 15, 2005
5. State location where accident occurred or occupational disease contracted: St. Louis City, Mo.
6. Was above Claimant 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? Yes
10. Was employer insured by above insurer? Yes
11. Describe work Claimant was doing and how accident happened or occupational disease contracted: Employee  
sustained repetitive trauma from overhead and lateral lifting of product.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: upper spine, upper extremities
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? None

Claimant: Antonino Pereira Injury No.: 05-085227

- 16. Value necessary medical aid not furnished by employer/insurer? Indefinite
- 17. Claimant's average weekly wages: \$370.00
- 18. Weekly compensation rate: \$246.66/\$246.66
- 19. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

20. Amount of compensation payable:

Unpaid medical expenses:	\$16,164.80
59 and 3/7ths weeks of temporary total disability benefits	14,658.65

21. Second Injury Fund liability: Open

TOTAL:	\$30,823.45
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22. Future requirements awarded: Open

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

**IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.**

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% which is awarded herein on all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jill Bollwerk

**FINDINGS OF FACT and RULINGS OF LAW:**

Claimant: Antonino Periera

Injury No.: 05-085227

Dependents: N/A

Before the  
**Division of Workers'**  
**Compensation**

Employer: John Volpi Co.

Department of Labor and Industrial

*This case involves a disputed repetitive trauma injury resulting to Claimant with the reported onset date of April 15, 2005. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund is a party to this claim but remains open for a determination of liability at a future date. Both parties are represented by counsel. This matter proceeds pursuant to Hardship Petition.*

### Issues for Trial

1. notice;
2. incidence of occupational disease (medical causation & exposure);
3. liability for unpaid medical expenses (stipulated at \$16,164.80);
4. authorization of medical care;
5. nature and extent of temporary total disability.

## **FINDINGS OF FACT**

### Dispositive Evidence

#### Workplace Background

1. Claimant's work experience with Employer begins December 2004 and ends May 6, 2005.
2. Claimant testified with the assistance of a Spanish interpreter. Upon hire, he was placed in each of three departments of Employer's salami plant. Claimant was hired to be a team leader for Spanish-speaking employees. During his first two weeks of employment, he worked in the department where pork legs were salted. And included unloading 20-25 pound pork legs from a bin for salting, and then hanging the pork legs on a trolley and pushing them into a refrigeration unit. He moved eight (wheeled) tubs per shift each holding sixty legs.
3. Claimant next worked in the salami department for two months. His principle job was slicing and cutting salami. The salami came from a cart, or trolley, where two moveable rods or sticks hung each holding five or six salamis. Each salami weighed five or six pounds, or 25-26 pounds per stick. These sticks had to be carried a few steps from the cart to a slicing table where 100 sticks of salamis were sliced in half each day. Claimant is notably shorter than average height, he was apparently unable to reach the sticks at the higher level (82 inches) of the cart (Exhibit 6). On occasion, another worker lifted the salamis sticks off the higher level and gave them to Claimant. Approximately 100 rods of hanging salami was moved to the slicing table each shift. While working in the salami department on this first occasion, Claimant was having no difficulties with his upper extremities or back.
4. After the salami department, Claimant spent about three weeks in the shipping department. This task involved placing salamis into boxes for packaging and scanning the boxes. Five five-pound salamis were placed in each box with a reported heaviest weight sampling of 26.92 pounds (Exhibit 6).

## Symptom Onset

5. From the middle of March 2005 to the end of his employment on May 6, 2005, Claimant worked in the salami department. Shortly after returning to that department, Claimant began to have pain arms and hands.

6. Claimant had carpal tunnel syndrome (CTS) surgery more than a year earlier, prior to work with Employer. Claimant testified the symptoms were similar to his pre-existing CTS. Claimant told several co-workers and his supervisor that this pain was not related to this job. Claimant's supervisor, "Tim," did not testify at trial but apparently told Claimant to go see a doctor on his own.

7. In approximately the first or second week of April 2005, Claimant was lifting pork legs when he felt a new symptom in his neck and more pain in his arms. Claimant apparently told "Tim" that he had symptoms in his neck while lifting pork legs, and Tim told him to see his family doctor. Claimant continued to work until he could see a doctor.

8. Claimant treated with Dr. Scherer and returned to work after this appointment with a brace on his hand, and later, his arm in a sling. Claimant continued to work, but limited his duties as needed due to the pain. In May 2000, Claimant again complained of symptoms to his supervisor who referred him to the president of the company. Employer's president told Claimant to take a thirty day leave of absence (without pay). Claimant never returned to work thereafter. The timesheet shows Claimant's last day of work as May 6, 2005 (Exhibit 3). The president testified that she instructed Claimant to keep her updated during this leave and that he failed to do so.<sup>[1]</sup> Employer did not elect to undertake medical investigation at this time or beforehand.<sup>[2]</sup>

9. Employer's president testified that she saw Claimant bring in the medical status/off work slip of May 27, 2005 from Dr. Scherer (Exhibit B). The medical status report/off work slip indicated right shoulder and arm pain and ongoing treatment plan for the next week. Although communicated within her required thirty days, her testimony nevertheless consisted largely of Claimant's lapses in communication regarding his status. She apparently had no knowledge of Claimant's reports of injury (or symptoms) to his supervisor, "Tim." Subsequently, on June 9, 2005, she sent Claimant a letter terminating his employment (Exhibit M). On cross-examination she admitted she made no attempt to determine Claimant's medical status prior to his termination.

## Preliminary Treatment

10. Treatment and nerve conduction study per Dr. Scherer was performed on May 6, 2006—the last day Claimant worked at Volpi. Dr. Scherer interpreted the nerve conduction studies as showing much improvement in his right carpal tunnel syndrome and only mild carpal tunnel on the left, but not having any clinical significance. Dr. Scherer noted Claimant had developed severe tenderness of the right shoulder and weakness in abduction, plus radiation of pain down his hand with stress on his shoulder. He also noted that Claimant had spasms in his fifth finger. Dr. Scherer indicated in his notes, "His consolation (sic) of symptoms is a little unusual and I am not certain we have a full understanding yet of the source of his symptoms." (Ex. B). He placed Claimant off work on May 27, 2006 (Ex. B). Claimant never returned to work.

11. An MRI of the right shoulder was performed which appeared normal. Dr. Scherer expressed confusion in his office note of June 10, 2005. He thought now that the symptoms might be radiating from his neck, so he ordered a cervical spine MRI. He continued to keep Claimant off work (Ex. B, see off work slip of 6/10/05). The MRI revealed impingement at T2-T3 level was noted. The radiologist recommended neurological consultation (Ex. B). Dr. Scherer called Claimant on 6/21/05 and they discussed his debilitating pain. Dr. Scherer recommended that Claimant be evaluated by Dr. Paul Young or his associate, Dr. Armond Levy.

12. On 6/21/05, Dr. Levy noted pain in the neck radiating into the shoulder and right arm. Dr. Levy reviewed the MRI and noted that there was a severe spondylotic stenosis at T2-3 with possible cord signal change. Dr. Levy felt that Claimant required urgent attention to the T2-T3 level of the spine before his symptoms worsened. He ordered a full thoracic spine MRI to exclude other affected areas (Ex. H).

### *Thoracic Surgery and Hematoma Complication*

13. Claimant saw Dr. Levy at St. Anthony's on 6/23/05 with bilateral leg weakness. He was sent home on steroids and scheduled for thoracic spine surgery with Dr. Levy on 6/27/05 (Ex. A). The surgery performed by Dr. Levy was a decompressive laminectomy at T1, T2 and T3. He found a "wad of sublaminar soft tissue consistent with hypertrophied ligamentum flavum at a very focal point which may very well have been at what was felt to be T1-T2 and this may have been correctly T2-3" In the recovery room, Claimant began to have left and then right parasthesia of his lower extremities, and he was taken on an emergency basis to the operating room for re-exploration. He was diagnosed with a large hematoma, which was removed, and he was taken to the intensive care unit (Exhibit A).

14. Claimant was transferred on July 1, 2005 to the rehabilitation unit at St. Anthony's for aggressive physical and occupational therapy (Ex. A). Upon release from the hospital, Claimant still required catheterization. On 7/25/05, he was readmitted to St. Anthony's for five days, due to the development of chills, fever, achiness, nausea and vomiting. He was found to have a urinary tract infection, quadriparesis, and a neurogenic bladder (Ex. A).

15. Claimant followed up with his family physician, Dr. Schueler, on August 11, 2005. Claimant was walking with a cane, having problems with urinary incontinence (he was still self-catheterizing) and bowel difficulties. Dr. Schueler referred Claimant to a neurologist for the bowel and bladder incontinence (Ex. F). Eleven days later, Claimant was back in Dr. Schueler's office due to continued abdominal pain, and it was determined that he had a urinary tract infection. Dr. Schueler then referred Claimant to Dr. Jeffrey Parres, a neurologist (Ex. F, office note of 8/22/05).

16. Other neurologic deficits plagued Claimant during his recovery. On October 3, 2005, Claimant was hospitalized for two days at Anderson Hospital in Maryville, Illinois for recurrent urinary tract infections and prostates (Ex. C). He required a catheter, on and off, for months (see notes of Dr. Parres, Ex. C). Claimant had problems with constipation. He developed erectile dysfunction late in the fall of 2005 (Ex. C, note of 11/8/05). In January of 2006, Claimant once again had fever, burning on urination and incontinence (Ex. C, note of 1/18/06). In March 2006, Dr. Levy wrote to Dr. Parres, suggesting that Claimant has myelomalacia and may need treatment with penile implantation (Exhibit C, note of 3/6/06).

17. Thereafter, on March 22, 2006, the surgeon felt Claimant was suffering from thoracic outlet syndrome and recommended additional therapy, pain management and trigger point injections.

### **Medical Expenses**

18. Claimant's medical bills to date have been paid by Illinois Healthcare and Family Services (Medicaid), who has placed a lien on this case (Exhibit K). The record reflects a Medicaid lien in the amount of \$16,164.80 that Claimant owes on past medical bills to date. However, Claimant testified that he requires therapy that Medicaid will not cover.

*Dr. Simowitz*

19. Dr. Simowitz examined Claimant and testified on his behalf. He testified as to a very detailed history he took from Mr. Pereira, and that won't be repeated here (see pages 8-11 of Exhibit L). As far as symptomology, he said that Claimant told him that for about two weeks the pain was confined to Claimant's arms, but on one occasion when he was lifting a stick of meat, he had a sudden onset of pain in his mid to lower neck. Claimant pointed to the area of pain, and Dr. Simowitz explained that Claimant pointed to the cervicothoracic junction, where the neck meets the back

(Ex. L, p. 12, lines 8-17). He explained that the level at which Claimant pointed is very near the level where the high-grade stenosis was found at T2-3. Dr. Simowitz also described the progression of Claimant's symptoms leading up to his surgery (Ex. L, p. 13, lines 4-14).

20. Dr. Simowitz then went on to explain the findings of Dr. Levy while in surgery, i.e., that a wad of soft tissue consistent with hypertrophy of the ligamentum flavum was found. The anatomy of the spine and the significance of the ligament flavum were described by Dr. Simowitz at page 15 and 16 of his deposition (Ex. L). It was his opinion that the work Claimant was doing for Volpi was a substantial factor in the cause of the hypertrophy of the ligamentum flavum, which necessitated the surgery, resulting in the many complications after surgery. It was his opinion that all of the medical care Claimant has had since the surgery was related to the work at Volpi and the complications from surgery. It was also his opinion that, at the time of his deposition on March 24, 2006, Claimant was not at maximum medical improvement and that he was still unable to work due to the injury. Dr. Simowitz felt that maximum medical improvement won't be reached until 12 –18 months from surgery (Ex. L., p 25, line 22 – p. 28, line 3).

1. 21. Dr. Simowitz testified that the work Claimant performed with Employer was a substantial factor in the cause of the focal hypertrophy of the ligamentum flavum, which necessitated the initial upper back surgery, followed by all the complications encountered as a result of that surgery. It was further his opinion that all medical care since the surgery, plus care for his upper back, neck and arms, are related to the work with Employer (Exhibit L, p. 26-27). Dr. Chabot, on the other hand, testified that the problems encountered by Claimant were degenerative in nature and not resultant from work.

2.

3.

#### 4. *Dr. Chabot*

5.

22. Dr. Chabot testified on behalf of employer and insurer. The history he took from Claimant was that Claimant felt a pull in his neck, and there was not a discussion of a repetitive trauma (Ex. 7, p. 6, lines 6-19). He reviewed the medical record. He also reviewed the written statements of the three employees as well Claimant's deposition (Ex. 7, p. 7, lines 6-22). Dr. Chabot came to the opinion that none of the diagnoses he rendered were due to the Claimant's work at Volpi. He stated that the records did not specifically mention a work injury, and Mr. Pereira's complaints changed over time.

23. Dr. Chabot diagnosed Claimant's condition was degenerative in nature (Exhibit 7, pp. 11-13). This was his opinion, even though Dr. Chabot acknowledged that degenerative thoracic spinal canal stenosis is rather uncommon. That is due to the fact that the thoracic spine's movement is restricted by the rib cage and the muscles and ligaments of the back. In other words, regions that are more mobile may be subjected to earlier degeneration than areas protected by the rib cage (Exhibit 7).

#### *Victor Zuccarello – Ergonomic Evidence*

24. Employer presented testimony from an occupational therapist, Victor Zuccarello. He visited the worksite for the purposes videotaping and photographing Claimant's workplace. He also took measurements of the physical demands of that job and talked to some of the employees (Exhibit 6). He made a variety of ergonomic measurements.

25. Mr. Zuccarello videotaped in two separate sessions. The activities performed in the first session were those that the employer agreed that Claimant performed. On March 30, the second session, activities performed were those that the Claimant said he performed, but the employer denied he performed (Ex. 6, p. 8, lines 14-22). The principal task that the employer disputed as being performed by Claimant and that was depicted on the tape was the lifting of the salami sticks. Mr. Zuccarello apparently was told by employer that Claimant was not directed to do this job, due to his size (Exhibit 6, *Deposition Ex. 3, p. 4*).

26. Mr. Zuccarello's first conclusion was that if Claimant did only the work that employer agrees that he did during

the last two to three months of his employment, the “triggers were exceeded for the neck, dominant shoulder, forearm and hand, and both elbows. And under normal circumstances if somebody was still working in that job, that would indicate a need for further ergonomic assessment to try to abate some of those exposures for the individuals doing the job, you know.” (Ex. 6, p. 15, lines 3-18).

27. The second conclusion made by Mr. Zuccarello is to address the triggers if Claimant did the job he claims to have performed, but the employer disputes, as well as the job handling pork legs (which everyone agrees he performed for the first two weeks of employment). His conclusion with respect to those tasks is that the “exposures increased or changed dramatically upon calculation.” He explained that exposures exceeded triggers by a greater margin for the neck and both elbows, shoulder, forearms and hands, and back. He also concluded that the tasks in dispute carried what is known as a “lifting index” of 1.9, which dramatically increases the risk of back injury. (Exhibit 6, pp. 25-26).

## RULINGS OF LAW

### *Notice of Injury or Condition*

The purpose of Section 287.420 is to give the employer timely opportunity to investigate the facts pertaining to whether the accident occurred and if so, to give the employee medical attention to minimize the disability. The requirement of written notice may be circumvented if the Claimant makes a showing of good cause or that the employer is not prejudiced by the lack of such notice.

The courts have held a claimant must specifically prove the employer was not prejudiced by the lack of notice. A prima facie case of no prejudice is made upon a showing that employer had actual notice. No prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact-finder. The purpose of the thirty-day period is to allow the employer opportunity for timely investigation. These policies are discussed in Willis v. Jewish Hospital, 854 S.W.2d 82 (Mo.App. 1993). Although Section 287.420 does not expressly apply in occupational disease cases, an employer is nevertheless, entitled to some notice. Elgersma v. DePaul Health Center, 829 S.W.2d 35 (Mo.App.E.D. 1992).

Here, Claimant did not provide Employer with written notice at anytime of the alleged incident but testified he gave oral notice to “Tim” on several occasions one or more of which required curtailment of duties. Claimant’s testimony on reports of symptom onset to his supervisor are more credible than Employer’s rebuttal evidence. It appears Employer’s immediate supervisor of Claimant (“Tim”) failed to relate Claimant’s reports of disabling symptoms and prevented Employer from timely investigating in order to “minimize the effects of the injury.”

Claimant further identifies Employer’s president who admits her knowledge of disabling symptoms for which a need for treatment inheres. Employer’s president was fully aware of Claimant’s language barrier and his disabling pain symptoms and inability to perform full duty. These facts are sufficient to put any employer on notice of a potential work related injury. Employer failed to investigate the reported injury as provided under Section 287.420 RSMo (2000).

6. Claimant was a below average medical treatment historian and appears to have been unsuccessful in communicating complete and cogent symptoms to various physicians, including his own expert. It is reasonable to suggest he may not have communicated clearly with Employer with regard to causation itself. However, it cannot be reasonably disputed that he clearly communicated pain symptoms while at the workplace which were unheeded by his supervisor and by Employer’s president.

7.

While Claimant’s assertion of oral notice to Employer of an *injury* is not corroborated by medical records but is consistent with (admitted) detrimental ergonomic exposures and eventual inability to perform any work, i.e.

necessitating "leave of absence." This is actual notice. *Willis, supra*. Separately, the symptom complex entails a complex medical question, *concurrent* diagnosis of which is not a prerequisite of compensability. When both the employer and the claimant similarly lack knowledge about the medical causation of the injury, the claim may not be denied due to lack of notice. *Bryant v. Ireco, Inc.*, 963 S.W.2d 346 (Mo.App. 1997). It is also reasonable to suggest the delivery of the written medical report on May 27, 2006 may be deemed a written notice of Claimant's discovery that his medical condition might be work related; in no event can it be concluded that Employer was prejudiced.

The threshold inquiry of whether Employer had an opportunity to investigate the accident and seek to minimize the effects of the injury is one of proper notice, not whether a work related injury occurred. Rather than investigate the report, Employer's president endeavored an unorthodox solution culminating in termination for communication lapses. This is true despite receipt of a medical report from Claimant on May 27, 2005. Employer failed to tender benefits under Section 287.210.1 RSMo (2000).

8.

9. Employer's knowledge of disabling symptoms and receipt of a medical report and subsequent inaction constitute a non-tender. Claimant eventually sought treatment privately as a consequence of this non-tender.

10.

11.

### ***Incidence of Occupational Disease***

In summary, the record contains substantial evidence is that Claimant performed a significant amount of repetitive overhead and lateral lifting during his six month employment. Claimant's testimony and Employer's videotape evidence provide substantial basis to conclude an ergonomic exposure consistent with the ergonomic measurements found in the report of Mr. Zuccarello, occupational therapist.

While Mr. Zuccarello has no graduate training, his measurements of basic features of the work place such as salami and package weights and daily shift production is probably reliable. Missouri courts recognize that medical personnel, other than medical doctors, may be qualified to testify to matters "within the limited and precise range of their medical specialties." *Sigrist By and Through Sigrist v. Clarke*, 935 S.W.2d 350, 357 (Mo. App. 1996).

Employer's witness, Mr. Zucarrello admitted ergonomic stress points in several of the jobs in the plant performed by Claimant. Lifting the salami sticks and laying them forward on the slicing table (requiring full extension of the upper extremities) and lifting the sealed packages (as depicted in the videotape) are sufficient ergonomic forces to predicate medical causation when combined with Claimant's symptom complex, curtailment of assignments, lost time and his medical treatment.

Claimant was previously treated surgically for bilateral CTS and, not unusual, apparently had some symptoms proximal to the wrist which is consistent with multi-aspected repetitive trauma. Dr. Scherer prepared the report delivered to Employer on May 2, 2005. Subsequently, Dr. Scherer referred Claimant to Dr. Levy who performed urgent surgery just below the cervical spine at the T-2 level which is well within the shoulder girdle and directly relevant to lifting at chest height and above. The evidence compels a finding of work related causation if only aggravation.

Dr. Simowitz testified that Claimant sustained a work related repetitive trauma to the spine and upper extremities. Despite defects in his foundation and testimony, analysis permits the observation that his opinions reconcile with the balance of the record, specifically, the ergonomic evidence from Claimant and the videotape.

However, Dr. Chabot's testimony was less persuasive than Dr. Simowitz for several reasons. Dr. Chabot's opinions lack conventional foundation. For instance, he did not take a detailed history of Claimant's work environment. Also, doubt exists whether he performed an independent medical records review. (Exhibit 7, *Deposition Ex. B*). Nevertheless, he seemed to weigh the oversights in prior medical records against details of Claimant's responses to him. This is important given the complicated nature of upper extremity disabilities, i.e. cervical, peripheral, or thoracic, and the language barrier that underlies all of the patient records of Claimant.

Apparently, Dr. Chabot saw the Report of Injury filed by the employer, but not the Claim for Compensation filed by the Claimant, which clearly alleges a repetitive lifting injury over time, and not an acute injury (see court file). Neither of these is a medical record properly before a physician. It is interesting to note that, the one time when the treating surgeon, Dr. Levy, met with Claimant in the presence of an interpreter and his attorney on August 24, 2005, Dr. Levy stated that, within a reasonable degree of medical certainty, “the repetitive component and acute injury component derived from lifting were substantial factors in causing the patient’s condition that required surgery.” (Exhibit. 7, *Deposition Ex. 2, p. 4*).

The facts of this case are very similar to the facts in Bryant where the court held that the claim was compensable regardless of the claimed lack of notice. In Bryant, the claimant experienced hand pain and informed his immediate supervisor. He did not tell the supervisor that he felt it was work-related. The supervisor informed him to submit the claim through his health insurance. He got the treatment he needed through his health insurance and filed a claim for compensation before he had any opinion from a doctor that his problem was related to work. Despite these facts, the court found a compensable injury, citing the fact that the claimant’s medical complaints were known to the employer, as were the Claimant’s daily work duties. Furthermore the court noted that no other Claimant with the same job at Ireco developed carpal tunnel syndrome, so neither the employer or Claimant had experience that would constitute actual knowledge of causation. Bryant at 38.

### ***Treatment and Incurrence of Medical Expenses***

An employer has the right to select the provider of medical and other services but this right may be waived by the employer if they refuse or neglect to provide necessary medical care. Sheehan v. Springfield Seed & Floral, 733 S.W. 2d 795 (Mo.App.1987). Here, Employer provided no treatment, nor did Employer schedule an independent medical examination despite receipt of a medical status report/off work slip on May 27, 2005.<sup>[3]</sup> Employer’s president’s level of awareness in May 2005 of Claimant communications issues, imposition of a “leave of absence” during a period of temporary total disability, and Mr. Zuccarello’s admissions in a report (nine months later - March 2006) about what “employer” told him about Claimant’s work creates a set of circumstances to conclude the non-tender of benefits was willful if only non-negotiable.<sup>[4]</sup>

Employer waived its right to control medical treatment when it failed to exercise that right. The court in Hendricks v. Motor Freight Co., 570 S.W.2d 702 (Mo.App. 1978), held employers must actively assert the right to control medical treatment.

Employer clearly failed to assert its right to select the medical care provider under Section 287.140.1 RSMo (2000). Claimant subsequently sought treatment with Dr. Scherer and Dr. Levy, the surgeon. Expenses incurred by an employee in this context may be reimbursed. Hammett v. Nooter Corporation, 264 S.W.2d 915 (Mo.App. 1954). In any event, Employer suffered no prejudice as the result of Claimant’s action. Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo.App. 1983).

Dr. Simowitz testified that all bills incurred by Claimant since his surgery, including prior bills related to the arm and upper back problems, were necessitated by the work he was engaged in with Employer. Claimant has already shown that the claim should not be denied because of an alleged lack of notice.

For the foregoing reasons, all past medical expenses for examinations, testing physical therapy and surgery, from Drs. Scherer and Levy, is the responsibility of Employer. Claimant only presented the most recent lien from Illinois Healthcare and Family Services (IHFS). The parties stipulated this exhibit represents the relevant amounts for which Claimant was responsible. This lien should be paid by Employer in the stated amount of \$16,164.80. It is explicitly understood that there may be additional amounts paid by IHFS, as well as other medical bills not covered by IHFS that may be submitted at a final hearing of this matter.

***Temporary Total Disability Benefits***

An award of temporary total disability benefits is intended to cover the Claimant’s period of time during which he is healing from his occupational disease. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App. E.D. 2002) (overruled on other grounds). These benefits are due Claimant until he is at a point where an employer would reasonably be expected to employ the Claimant in his current physical condition, or until the Claimant’s condition has reached “maximum medical improvement.” Boyles v. USA Rebar Replacement, Inc., 26 S.W.3d 418, 424 (Mo.App. W.D. 2000). Claimant has not been placed at maximum medical improvement by any doctors in this case, including both treating as well as examining physicians. Claimant was taken off of work completely by Dr. Scherer after May 27, 2005 (Exhibit 5). Employer had no work for Claimant after May 6, 2005. His purported leave of absence began May 7. Nothing in the records indicates that any physician has released Claimant.

A note from Dr. Levy, dated February 22, 2006, which states, “I hope he can retrain for new occupation (he strongly desires to return to work). I will support this effort in whatever way possible. We will see him in three months.” (Exhibit H). Thus, Claimant is entitled to TTD benefits at the stipulated rate from May 7, 2005 through date of trial and thereafter, until such time as he is able to return to work or reaches maximum medical improvement.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the record as a whole, Claimant is found to have sustained disabling work related symptoms from repetitive trauma. Claimant is found to be entitled to reimbursement of both medical benefits and TTD benefits in the amounts stated above. Claimant has not attained maximum medical improvement. Claimant is entitled to additional medical benefits hereafter, and any accompanying TTD benefits, until competent medical authority suggests otherwise. A change in provider to Dr. Armond Levy is ordered pursuant to Section 287.140.2 RSMo (2000).

Claimant may submit additional medical expenses at a final hearing of this matter. The issue of permanent disability (i.e. attribution) remains undetermined.

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

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia “Pat” Secrest  
*Director*  
*Division of Workers' Compensation*

Claimant: Antonino Pereira

Injury No.:

05-085227

\_\_\_\_\_

[1] Chapter 287 makes no provision for leaves of absence or progress reports from injured employees.

[2] Chapter 287 provides an opportunity to investigate an injury report to minimize the effects of any injury, an obligation on employers to cure and relieve the effects of a reported injury and, even in disputed claims, provides for reasonable periodic medical examination by a physician of the employer's choice.

[3] Inaction at this point seems to render non-tender of benefits into a willful non-tender which conduct is proscribed by Section 287.128.2(1) RSMo (2000). The inaction is significant since it is not reasonable to suggest that a claim administrator of either the employer or the insurer can reasonably deny a claim without fully informing itself (by way of an independent medical evaluation with a qualified physician) since the allegation involves a complex medical question beyond the scope of lay understanding.

[4] Although unnecessary to a determination of exposure and medical causation herein, the failure to call a key witness, i.e. Claimant's supervisor ("Tim"), may permit an adverse inference to be drawn as to what his testimony would reveal about notice of injury or condition under Chapter 287. It is noteworthy that the supervisor's last name could not be discovered and, thus, he cannot be said to be equally available to both parties. Claimant diligently deposed many of Employer's agents pre-trial. See Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993).