

## TEMPORARY AWARD ALLOWING COMPENSATION

Injury No.: 06-072434

Employee: Deborah Reale  
Employer: Ameristar Casino  
Insurer: Hartford Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

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. We have reviewed the evidence, read the briefs, heard oral arguments and considered the entire record. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the Administrative Law Judge Kevin Dinwiddie dated August 3, 2009. We adopt the administrative law judge's findings, conclusions, award and decision, except as modified herein. The August 3, 2009, award and decision is attached and incorporated to the extent it is not inconsistent with our reasoning and conclusions herein.

### **I. Procedural Matters**

The Commission affirms all findings of fact and rulings of law concerning the instant claim other than the conclusion of the administrative law judge that employee failed to comply with the statutory notice provisions of section 287.420 RSMo. The administrative law judge ultimately resolved the notice issue in favor of the employee, due to a finding that the employer did not suffer prejudice for the alleged failure to receive the requisite notice of injury in satisfaction of section 287.420 RSMo.

The Commission in the instant award finds that the employee did satisfy the notice provision of section 287.420 RSMo in addition to affirming all remaining aspects of the award issued by the administrative law judge.

### **II. Facts Pertinent to the Issue of Statutory Notice, Section 287.420 RSMo**

Employee was employed by employer from August, 2002, up to the date of separation, June 17, 2006. Employee's last day at work for employer was June 8, 2006. On June 10, 2006, employee was suspended for personnel reasons, and was eventually discharged by employer June 17, 2006, thus employee's date of separation from employment.

Employee filed a claim for compensation on July 24, 2006, alleging the date of an occupational disease/injury, to be June 13, 2006.

The evidence is clear that employee was not diagnosed with the condition of an occupational disease due to repetitive trauma until June 30, 2008.

Employee: Deborah Reale

- 2 -

### III. Rulings and Conclusions of Law

Section 287.420 RSMo has six requirements that must be satisfied by an employee notifying an employer of an occupational disease or repetitive trauma: (1) written notice; (2) of the time; (3) place; (4) nature of the injury; (5) the name and address of the person injured; and (6) given to the employer no later than 30 days after the diagnosis of the condition. *Allcorn v. Tap Enterprises, Inc., et. al.*, 277 S.W.3d 823 (Mo.App. S.D. 2009).

The Commission finds the Claim for Compensation filed July 24, 2006, satisfies all notice requirements of section 287.420 RSMo. In its Application for Review, employer/insurer principally contends there was non-compliance with the statutory notice requirements contained in section 287.420 RSMo, in that the time of injury listed as being June 13, 2006, was insufficient to satisfy the statutory requisite.

Employer/insurer cites the Commission to the recent case of *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823 (Mo.App. S.D. 2009), in which the appellate court determined that the initial claim for compensation did not meet the time requirement contained in the statute. In that particular case, the employee's first day of employment was February 1, 2004. However, the employee's initial claim for compensation listed January 31, 2004, as the time of the injury. The employee's medical expert opined and the court concluded, that the work exposure with the employer, from February 1, 2004 through April, 2006, was the prevailing factor resulting in employee's complained of condition. Accordingly, the appellate court found that the employee failed to satisfy the time requirement since the allegation in the claim for compensation preceded the employee's initial date of employment and subsequent work exposure.

In fact, employee's separation date is June 17, 2006. The date of injury, listed as June 13, 2006, is a date during employee's period of employment and exposure to her resultant occupational disease. Occupational diseases are insidious in their development and may well pass through a number of years before the disease manifests itself. Accordingly, there is no reason to search for any one period of exposure when the disease commenced or developed or to pin point an exact date of accident. The time of injury for an occupational disease relates to the relevant period of exposure within which the employee was injured due to the employment, not to an exact date.

The instant case is distinguishable from the *Allcorn* case, *supra*, as unlike the employee in *Allcorn*, *supra*, the employee in the instant case notified the employer of the time of injury that fell within the dates of her employment and occupational exposure. The employee's allegation in her claim for compensation placed employer on notice that the employee's time of injury occurred within her relevant period within which she was employed and exposed to the alleged injury.

The *Allcorn*, case *supra*, is distinguishable because the employee alleged a date of injury prior to employee's employment and exposure to the contraction of any deleterious occupational disease.

Employee: Deborah Reale

- 3 -

In the case at bar, there is no evidence of a causation opinion until the evaluation of Dr. Schlafly on June 30, 2008. Therefore, employee was not diagnosed with a condition of an occupational disease or repetitive trauma until June 30, 2008. At that time, as in the *Allcorn* case, *supra*, employee had previously filed a claim for compensation. Consequently, under the *Allcorn* analysis, employee gave notice to the employer within the time requirements of section 287.420.

Accordingly, the Commission finds employee met all six notice requirements pursuant to section 287.420 RSMo, and consequently her claim for compensation is not barred due to a lack of notice.

This award is only temporary or partial. It 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 § 287.510 RSMo.

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 1<sup>st</sup> day of December 2009.

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

Employee: Deborah Reale

Injury No.: 06-072434

Dependents: N/A

Employer: Ameristar Casino

Additional Party: State Treasurer, as Custodian of the  
Second Injury Fund

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

Insurer: Hartford Insurance Company

Hearing Date: Tuesday, May 19, 2009

Checked by: KD/Isn

### 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 alleged accident or onset of occupational disease: last date of exposure on or about 6/10/06
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? See award.
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 is alleged to have occurred: Claimant sustained a bilateral carpal tunnel syndrome as the result of the repetitive use of her upper extremities at work
12. Did accident or occupational disease cause death? No Date of death: N/A
13. Part(s) of body alleged to be injured by accident or occupational disease: right and left upper extremities at the wrists
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A

Employee: Deborah Reale

Injury Number 06-072434

- 18. Employee's average weekly wages: \$334.20
- 19. Weekly compensation rate: \$222.80/\$222.80
- 20. Method wages computation: by agreement of the parties

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: The issues as to notice, medical causation, injury by occupational disease arising out of and in the course of employment, and future medical care are found in favor of the employee. The employer is to provide medical treatment as necessary to cure and relieve of the effects of the injury. See award.

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.

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

Employee: Deborah Reale

Injury No: 06-072434

Dependents: N/A

Employer: Ameristar Casino

Additional Party State Treasurer, as Custodian of the  
Second Injury Fund

Insurer: Hartford Insurance Company

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

Checked by: KD/lsn

The claimant, Ms. Deborah Reale, appeared at hearing in person and by her counsel, Dawn Marlow. The employer, Ameristar Casino and its insurer, Hartford Insurance Company,

Employee: Deborah Reale

Injury Number 06-072434

appeared by its counsel, J. Bradley Young. The claimant seeks a temporary or partial award for benefits due after an injury by occupational disease alleged to have occurred on or about 6/13/06. The employer and insurer dispute whether the claimant suffered a compensable injury, and seek a final award denying any benefits. The parties stipulated at hearing that the issues to be resolved in the matter are as follows:

Injury by occupational disease arising out of and in the course of employment  
Notice:  
Medical causation; and  
Future medical care.

The employer also specifically disputes whether there was an exposure to the hazard of injury at work on 6/13/06, believing that the proof will indicate that the claimant was suspended from her employment a matter of days prior to 6/13/06, and had her employment subsequently terminated on 6/13/06.

Ms. Reale appeared at hearing and testified on her own behalf. Ms. Reale also submitted the deposition testimony of Dr. Bruce Schlafly. The employer and insurer solicited the testimony of Ms. Debra Wojtulski, and also submitted the deposition testimony of Dr. David Brown.

### **EXHIBITS**

The following exhibits are in evidence:

#### Claimant's Exhibits

- A. Certified medical records of Dave A. Rengachary, M.D.
- B. Certified medical records of Hand Surgery Associates, Inc. (Dr. Bruce Schlafly)
- C. Deposition of Dr. Bruce Schlafly, taken on January 15, 2009
- D. Letter dated 6/13/06 from Margaret Reiker, MD , BJC Medical Group

#### Employer and Insurer's Exhibits

1. Ameristar Casino Suspension pending Management Review, with attachments
2. Two page narrative by William Nelson, Team Member Relations Manager
3. Ameristar Casino Personnel Action Form
4. Ameristar Casino Coaching Summary
5. Deposition of Dr. David Brown taken on October 13, 2008
6. Claim for Compensation in Injury Number 06-072434 date stamp 7/24/06

Employee: Deborah Reale

Injury Number 06-072434

### **FINDINGS OF FACT AND RULINGS OF LAW**

The claimant, Ms. Deborah Reale, 55 years old as of the date of hearing in this matter, was employed by Ameristar Casino (hereinafter referred to as “employer”) for approximately four years as a waitress. From August of 2002 to June of 2006 Ms. Reale was a food server at the employer’s “Falcon Diner”. The claimant performed a variety of duties, including serving at tables; delivering food orders; clearing tables; and stacking and restocking glass racks. Claimant would also accept payment from customers and process the payments, making the necessary change or other disposition of the check for services. Ms. Reale worked anywhere from 30 to 50 hours per week.

Ms. Reale testified that Falcon Diner used extremely heavy dinner plates, weighing as much as 3 to 5 pounds when empty, and that a tray of dishes with food orders could weigh as much as 20 to 25 pounds. The claimant would wait on anywhere from six to 12 tables at a time, with anywhere from 2 to as many as 10-15 parties at a table

Ameristar Casino has a practice of offering to its customers certain coupons, made out specifically to the name of the customer, that provide a credit of up to \$20 on a food order. Both Ms. Reale and Ms. Wojtulski, an associate manager for the employer with knowledge of certain of the pertinent facts, acknowledged at hearing that an ongoing concern of the employer was the practice of having waitresses misappropriating or “manipulating” coupons by putting the coupons on checks for which the guest actually paid the full price; the waitress would then pocket the cash difference between the amount paid in cash and the value provided by the coupon. Both witnesses acknowledged that the employer encouraged waitresses to close out their checks in a timely fashion so as to discourage the misuse of coupons, and that on a couple of instances the claimant had been coached or admonished for having been slow to close out her checks.

The evidence at hearing persuades that on or about 6/08/06 Ms. Reale had the occasion to provide service to a large group of senior citizens who were on a group outing to the casino from Del Mar Gardens. The evidence further persuades that all of the meals were paid for by an employee of Del Mar Gardens, who subsequently contacted the casino to advise that she had failed to get a receipt for the meal to use for her expense accounting. In the course of responding to a request for a receipt for the meal, management for the employer concluded that a coupon or coupons had been misapplied to the involved check. Ms. Reale was suspended from her employment pending an investigation, and subsequently had her employment terminated for violating employer policy and for suspected manipulation of coupons. Prior to her termination from employment the claimant last worked as a waitress on or about 6/10/06.

Ms. Reale testified that she split the original order into two checks; one check at the request of a couple that were a part of the group, and another for the balance of the individuals in the group. She further acknowledged that she applied a coupon to each of the checks. Ms. Reale further testified that although she applied a separate coupon to each of the checks, she states that she applied a coupon to the larger of the two checks by mistake. Ms. Reale testified that the restaurant was short handed and busy that day; the implication from her testimony is that she let her checks pile up without closing them out, lost track of which coupon went with which check, and by accident misapplied the coupon to the check applicable to the larger group from Del Mar Gardens.

Employee: Deborah Reale

Injury Number 06-072434

Within days of the events of 6/8/06, Ms. Reale attended an appointment with her personal physician, Dr. Reiker, who recommended the claimant have a nerve conduction study for complaints of hand tingling and numbness. On 6/13/06 Dr. Rengachary completed an evaluation of nerve conduction velocity, and on the basis of prolonged sensory latencies in the median nerve distribution bilaterally, concluded that there was “evidence of a severe bilateral carpal tunnel syndrome” (see Claimant’s Exhibit A).

All of the medical findings in evidence support a finding of bilateral carpal tunnel syndrome. Drs. Brown and Schlafly had the opportunity to review the medical and to perform an examination of the upper extremities. Both doctors noted positive clinical findings and diagnosed Ms. Reale as suffering from a bilateral carpal tunnel syndrome. Dr. Brown concluded that his examination of the wrists on 2/19/08 revealed a chronic and severe bilateral carpal tunnel syndrome, and he recommended carpal tunnel release. Dr. Schlafly performed his examination of the wrists on 6/30/08, and likewise recommended that the claimant undergo carpal tunnel releases. The doctors disagree, however, on the issue as to medical causal relationship between the carpal tunnel syndrome and the work performed by Ms. Reale as a waitress at the Falcon Diner.

### **NOTICE**

The notice requirement of Section 287.420 RSMo was amended effective August 28, 2005 to include injuries by occupational disease, and is applicable to the claim of Ms. Reale. The statute provides that in proceedings for compensation for any occupational disease or repetitive trauma, failure to give notice to the employer as to time, place, and nature of the injury, and the name and address of the person injured “no later than thirty days after the diagnosis of the condition” operates as a bar to prosecuting a claim for compensation, unless the employee can prove the employer was not prejudiced by the failure to receive the notice.

An employee cannot be expected to provide notice of injury by occupational disease to the employer until there is a medical diagnosis, and the claimant has reason to believe the condition to be work related. Allcorn v. Tap Enterprises, Inc., 277 S.W. 823, 829-830 (Mo. App. S.D. 2009). The evidence persuades that the first diagnosis of carpal tunnel syndrome was made by Dr. Rengachary on 6/13/06 post his electrodiagnostic studies of the same date. A formal claim for compensation for repetitive trauma- bilateral wrists was filed by Ms. Reale and date stamped on 7/24/06 (See Employer and Insurer’s Exhibit No. 6). Ms. Reale was subsequently evaluated by Dr. Brown on 2/19/08, and by Dr. Schlafly on June 30, 2008. There is no medical record or report in evidence to indicate that prior to 2008 the claimant was provided with any expert medical opinion as to the cause of her bilateral wrist complaints.

The records in evidence, coupled with the testimony of Ms. Reale and of Ms. Wojtulski, persuade that prior to her termination from employment Ms. Reale did not provide any actual notice of her claim of injury to her employer. The employer and insurer were put on notice of a carpal tunnel syndrome claim by the filing of the claim on July 24<sup>th</sup> of 2006, more than thirty days after the formal diagnosis of a carpal tunnel syndrome by Dr. Rengachary on June 13, 2006. However, there is nothing in evidence to indicate that the claimant was medically advised as to the cause of her bilateral carpal tunnel syndrome prior to her visits to Drs. Brown and Schlafly in 2008.

Employee: Deborah Reale

Injury Number 06-072434

From all of the evidence, by the filing of a claim for compensation in July of 2006 the employer and insurer were put on notice that Ms. Reale was making a work related claim for carpal tunnel syndrome by repetitive use. That claim for compensation was filed some 21 months prior to any medical evaluation to determine whether there was a medical causal relationship between the diagnosis of carpal tunnel syndrome and the claimant's work as a waitress at the Falcon Diner. The employer received notice of the claim of injury well before the statutory notice period had the opportunity to run, inasmuch as the employer had notice well in advance of thirty days after the diagnosis of the condition.

The issue still remains as to the sufficiency of the notice provided. The employee is to provide notice of the "time" of injury. In Allcorn, at p.830, the Southern District Court of Appeals determined that strict construction of statute as provided in Section 287.800 required a very literal interpretation of the requirement that the employee provide notice of the "time" of injury. In Allcorn the Southern District determined that proper notice had not been given in circumstances where the claimant provided the date of injury as January 31, 2004, but the Labor and Industrial Relations Commission had found that the first day of employment had been February 1, 2004. As part and parcel of its finding that the employee had failed to provide the requisite notice of the time of injury by a matter of a single day, the Southern District acknowledged that strict construction led to an apparent harsh result, and further noted that such a result was nonetheless consistent with the legislative changes made in 2005, including the provision in Section 287.800 that evidence is to be weighed "impartially without giving the benefit of the doubt to either party".

The claim for compensation filed on 7/24/06 (Employer and Insurer's Exhibit No.6) contains a section 3 entitled DATE OF ACCIDENT OR OCCUPATIONAL DISEASE. In the relevant box, it states "6/13/06 (date of diagnosis)". There is nothing else contained within the claim for compensation relating to the time of injury. The evidence in the matter persuades that the relevant employment period ran from August of 2002 to on or about 6/10/06. There is nothing in evidence to demonstrate that the claimant notified the employer as to the time of her injury. Following Allcorn, Ms. Reale failed to provide notice as to the time of injury as required pursuant to Section 287.420 RSMo.

Section 287.420 RSMO further states that the failure to provide the statutorily prescribed notice shall not be a bar to compensation in the event the employee can prove the employer was not prejudiced by failure to receive the required notice. Ms. Reale, the claimant, bears the burden of demonstrating that the employer was not prejudiced by the claimant's failure to provide the statutory notice. See Willis v. Jewish Hospital, 854 S.W.2d 85 (Mo.App. 1993); Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo.App. 2000).

Prior to the amendment of Section 287.420 RSMo in 2005, there was no statutory notice provision specifically applicable to employees suffering from injury by occupational disease, and the notice provisions as to injury by accident did not apply to claimants who suffered from the effects of an injury by occupational disease or by repetitive motion. See Elgersma v. DePaul Health Ctr., 829 S.W.2d 35, 37 (Mo.App. 1992). Prior to the 2005 amendment to Section 287.420, the courts determined that the purpose of the statute was to give the employer timely opportunity to investigate the facts as to the allegation of injury by accident, and to give the employee medical attention to minimize the disability. Brown v. Douglas Candy Co., 277 S.W.2d 657 (Mo. App. 1955). Arguably, the legislature, by amending Section 287.420 RSMo so as to provide the same notice requirement for injuries by occupational disease and by repetitive trauma, sought to accomplish the same purpose served by notice in cases of injury by accident;

Employee: Deborah Reale

Injury Number 06-072434

to allow for a timely investigation of the facts, and to allow the employer to minimize disability by providing the necessary medical treatment.

There is nothing in the record to suggest that the employer was prejudiced by the failure of the claimant to identify the “time” of her injury. The evidence reveals that to the extent Ms. Reale was terminated from her employment, it is apparent that her last day of work, and her last day of exposure to the risk of harm as a waitress for the employer, was on or about 6/10/06. Ms. Reale has remained unemployed as of that date, and has not been subject to potential injury by repetitive use of her upper extremities with a subsequent employer. The employer was provided notice of the claim for compensation in late July of 2006, just over a month after Ms. Reale had her employment terminated, and just over a month from the date that electrodiagnostics were interpreted as positive for carpal tunnel syndrome. The employer did not get an expert medical evaluation as to the condition and as to causation until Dr. Brown performed his evaluation on February 19, 2008, some 20 or so months after the claim filing. The employee followed up with her own evaluation with Dr. Schlafly in June of 2008. There is ample evidence to conclude that the employer did not suffer a prejudice for its failure to receive the requisite “time” of injury. The issue as to notice is found in favor of the employee, Ms. Reale.

### **MEDICAL CAUSATION/INJURY BY OCCUPATIONAL DISEASE ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT**

The claimant has the burden of proving all the essential elements of the claim for compensation. Proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. “Probable” means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986).

“Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause”. Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

Effective August 28, 2005, SB 1 & 130 changed the standard for determining whether an injury by traumatic event, cumulative trauma, or disease process was sufficiently work related as to come under the provisions of the workers’ compensation act. In Lawson v. Ford Motor Co., 217 S.W.3d 345 (Mo.App. E.D., 2007), at pp. 348-349, the court notes as follows with respect to the change in the legal standard:

As Ford correctly notes, in 2005 the legislature amended several sections of the Workers' Compensation Act. In particular, portions of [section 287.067](#) and [287.020](#) were rewritten. Specifically, section 287.067.2 discusses when an injury by occupational disease

Employee: Deborah Reale

Injury Number 06-072434

is considered compensable. Prior to 2005, the section stated that such an injury will be compensable if it “is clearly work related and meets the requirements of an injury which is compensable as provided in [subsections 2 and 3 of section 287.020](#).”

[Subsections 2 and 3 of section 287.020](#) previously contained definitions for “accident” and “injury.” Prior to 2005, those definitions included language which concluded that an injury was compensable if it is work related, which occurs \*349 if work was a “substantial factor” in the cause of the disability.

As Ford correctly notes, in 2005 the legislature amended several sections of the Workers' Compensation Act. In particular, portions of [section 287.067](#) and [287.020](#) were rewritten. Specifically, section 287.067.2 discusses when an injury by occupational disease is considered compensable. Prior to 2005, the section stated that such an injury will be compensable if it “is clearly work related and meets the requirements of an injury which is compensable as provided in [subsections 2 and 3 of section 287.020](#).” [Subsections 2 and 3 of section 287.020](#) previously contained definitions for “accident” and “injury.” Prior to 2005, those definitions included language which concluded that an injury was compensable if it is work related, which occurs \*349 if work was a “substantial factor” in the cause of the disability.

After the 2005 amendments to the statutes, the definition of a compensable injury by occupational disease was changed to use the language “prevailing factor” in relation to causation. Specifically, section 287.067.2 states:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.

The ‘prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.020.3 defines “injury” using similar terms.

Section 287.808 RSMo. Cum. Supp. 2008 provides that “The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.” Further, Section 287.800 RSMo. Cum. Supp. 2008 provides as follows:

1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Dr. Schlafly concludes that the claimant’s repetitive use of her hands to serve food and to perform her waitress duties was the prevailing factor in the resultant condition known as bilateral carpal tunnel syndrome. To the contrary, Dr. Brown concludes that the job description provided by Ms. Reale and his own understanding generally as to the repetitive nature of the duties of a waitress lead him to believe that her work as a waitress for the employer was not the prevailing or primary causative factor with regard to the carpal tunnel syndrome. Dr. Brown acknowledges that in the past he has had the occasion to conclude that work performed while waitressing can be a contributing factor to the development of carpal tunnel. In response to the question whether waitressing can be an occupational risk factor, he states “It’s possible. I’ve rendered

Employee: Deborah Reale

Injury Number 06-072434

opinions in cases where a waitress, a busy waitress over a long period of time --- it's possible that could be a contributing factor to symptoms or carpal tunnel syndrome. But in this case, I think it's clear it's not the most important factor." (Employer and Insurer's Exhibit No. 5, at p. 25).

Dr. Brown notes that he weighs both occupational and non-occupational risk factors on a case by case basis when determining causation with respect to a carpal tunnel diagnosis. With regard to Ms. Reale, Dr. Brown identifies four non-occupational risk factors that he believes to be involved in the analysis as to causation, and ranks them in the following order of importance: 1) increased body mass index; 2) osteoarthritis of the base of the thumbs; 3) age; and 4) female gender. Dr. Brown cites various empirical studies in *The Journal of Hand Surgery* that he believes to be authoritative, and cites those studies in support of his conclusion as to the relative importance of the nonoccupational risk factors. In sum, Dr. Brown affirms that repetitive flexion of the wrists while carrying food trays can be a cause of carpal tunnel syndrome. However, based on his understanding of the nonoccupational risk factors involved, and given his understanding of the frequency and extent of the use of the upper extremities by Ms. Reale in the course of a work day, he concludes that work is a possible causative factor but not the most important factor.

As a part of his conclusion as to causation Dr. Schlafly was able to rule out hand intensive hobbies and diabetes as possible nonoccupational risk factors. He acknowledges that carpal tunnel syndrome is statistically more common in females 40 to 60 years old (Ms. Reale was 52 years old as of her last day of work as a waitress for the employer). Dr. Schlafly further notes that he does not consider *The Journal of Hand Surgery* to be authoritative; that he is aware of studies as to body mass index and carpal tunnel syndrome; and that he has no opinion on the theory that there is a causal association between obesity and carpal tunnel syndrome. Dr. Schlafly acknowledges that osteoarthritis at the base of the thumb and carpal tunnel syndrome are fairly common and coexist; acknowledges that there is medical literature that suggests a possible causal connection between the two; and agrees that it is possible that there could be some causal connection between carpal tunnel, osteoarthritis at the base of the thumb, or some third factor causing both. Dr. Schlafly did not have the opportunity to review the x-rays of the hands performed by Dr. Brown; was not aware of the diagnosis of osteoarthritis of the base of the thumbs at the trapeziometacarpal joints; and was not asked to render any opinion as to the significance, if any, of such a finding.

The claimant is obliged to show that cumulative trauma suffered to the right and left wrists while performing her duties at the Falcon Diner was the prevailing factor in causing the bilateral carpal tunnel syndrome. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability, Section 287.067.3 RSMo.

Drs. Schlafly and Brown disagree as to whether the work performed by Ms. Reale was the prevailing factor. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App.1984). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990).

At issue, then, is whether the opinion of Dr. Schlafly or of Dr. Brown is the most persuasive on the question whether the claimant's work as a waitress was sufficiently repetitive

Employee: Deborah Reale

Injury Number 06-072434

to be deemed the primary factor in the development of a disabling bilateral carpal tunnel syndrome.

Dr. Schlafly was impressed that the claimant's use of her hands at work was sufficiently repetitive as to be the primary cause of her carpal tunnel syndrome, whereas Dr. Brown was not. The apparent difference is in the perceptions of the two physicians as to the nature of the repetitive use involved in the waitressing performed by Ms. Reale, and the relative weight to be given to nonoccupational factors. Dr. Brown acknowledges that he has rendered past opinions where he believed that busy waitressing over a long period of time could be a contributing factor to carpal tunnel syndrome, yet frames his opinion by describing waitressing as having busy and slow times, and by distinguishing waitressing from assembly line type of jobs that require constant and repetitive hand and wrist activity without rest intervals. Dr. Brown does not dispute the possibility of a causal relationship; he concludes that given the various nonoccupational risk factors, he is confident to state that work was not the prevailing factor.

Ms. Reale testified that she was always busy at work, serving the breakfast and lunch crowd from 6:00 a.m. to 2:00 p.m.; working six to twelve tables, with anywhere from two to 10 or as many as 15 people to a table; and staying busy during some of the down time by restocking the glass racks. Ms. Reale was the only witness to provide testimony as to the nature of her waitressing duties and the degree to which she was kept busy serving, cleaning tables, and restocking glass racks. Ms. Wojtulski, an associate manager, testified on behalf of the employer, and the entire focus of her testimony was on the circumstances surrounding the decision to terminate the employment of the claimant for suspicion of manipulating coupons, and on the question whether prior to her termination Ms. Reale had ever mentioned to Ms. Wojtulski her diagnosis of carpal tunnel syndrome.

The testimony of Dr. Schlafly as to causal relationship is found to be consistent with the claimant's work history of repetitive use of the hands over a long period of time while employed by Ameristar Casino as a waitress, and is deemed worthy of belief. The testimony of Dr. Brown as to the import of nonoccupational risk factors merits consideration, but fails to persuade in this matter. The claimant is found to have shown, as a matter of a reasonable degree of probability, that repetitive use of her upper extremities as a waitress was the prevailing factor in causing her bilateral carpal tunnel syndrome, disability, and need for treatment. The issues as to medical causation and injury by occupational disease arising out of and in the course of employment are found in favor of the claimant, Ms. Reale.

### **FUTURE MEDICAL CARE**

Employee: Deborah Reale

Injury Number 06-072434

Section 287.140 RSMo states that the employer is to provide such medical treatment as is necessary to cure and relieve from the effects of the injury. Both Drs. Schlafly and Brown have diagnosed a bilateral carpal tunnel syndrome, and both recommend carpal tunnel release. The issue as to future medical care is found in favor of the claimant. The employer is to provide medical treatment to cure and relieve of the effects of a bilateral carpal tunnel syndrome, consistent with the recommendations of Drs. Schlafly and Brown.

This award is temporary or partial in nature, and the matter to be reset upon notice from the parties as to issues ripe for adjudication.

Date: August 3, 2009

Made by: /s/ KEVIN DINWIDDIE  
KEVIN DINWIDDIE  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
Division of Workers' Compensation