

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

Injury No.: 02-154036

Employee: Jeannine Reed
Employer: W. W. Grainger (Settled)
Insurer: Travelers Indemnity Company of America (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: 1997, date of onset
Place and County of Accident: Kansas City, Jackson 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 17, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Paula A. McKeon, issued January 17, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

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I submit this concurring opinion in which I join in and adopt the award and decision of the administrative law judge.

In the instant claim the employee alleges that she sustained an injury due to an occupational disease arising out of and in the course of her employment, i.e., injuries to her bilateral upper extremities due to repetitive trauma at work.

Employee alleges her occupational disease was resultant of her repetitive activities at work between 1997 and 2002.

Employee's medical expert, Dr. Koprivica, opined that employee's resultant injuries to her bilateral upper extremities were directly attributable to her occupation which entailed repetitive trauma activity between 1997 and 2002. Due to employee's occupational disease and injury to her bilateral upper extremities, employee underwent several surgical procedures in 1997 and 1998, which concomitantly affected the employee's ability to perform her ordinary tasks at work and also harmed her earning ability, i.e., employee was required to take time off from work and receive temporary total disability during all appropriate time frames away from work and receive medical treatment necessary to cure and relieve her from the effects of her injury.

Paraphrasing Garrone v. Treasurer of the State of Missouri, 157 S.W.3d, 237 (Mo.App. E.D. 2004), an occupational disease does not become a compensable injury until the disease causes an employee to become disabled by affecting the employee's ability to perform ordinary tasks and harming an employee's earning ability. An employee can be diagnosed with an occupational disease and experience symptoms of the disease prior to the time that it becomes disabling. An employee can suffer an injurious exposure prior to becoming disabled. The injurious exposure does not become a compensable injury until it becomes disabling.

In the instant case, this injury became disabling and affected the employee's ability to perform her ordinary tasks and harmed her earning ability initially in 1997 and following subsequent surgeries occurring in 1998. The date of employee's first surgery in 1997 was the date of disability for this injury and occupational disease, and is the date which must be used in determining Second Injury Fund liability. Employee's occupational disease became a compensable injury in 1997. Employee neither alleged nor proved a disability preexisting the first surgery date. Subsequently, employee and employer entered into a compromise lump sum settlement of this injury pursuant to the provisions of §287.390 RSMo in 2003.

Employee has not made allegation of any additional injury occurring between 1997 and 2002, and there is no evidence from any medical records or medical opinion that would support any determination or conclusion by the Commission that an additional injury occurred especially between employee's return to work date in 1999, and her termination of employment in 2002.

Accordingly, I agree with the conclusion of the administrative law judge that there was no evidence to support a finding that there was a pre-existing disability to combine with the disability attributable to the primary injury at the time the primary injury became compensable in order to determine the possibility of any Second Injury Fund liability.

FINAL AWARD

Employee: JEANNINE REED Injury No. 02-154036
Dependents: N/A
Employer: W. W. GRAINGER
Insurer: TRAVELERS INDEMNITY COMPANY OF AMERICA
Additional Party: MISSOURI STATE TREASURER as CUSTODIAN OF THE SECOND INJURY FUND
Hearing Date: NOVEMBER 14, 2007 Checked by: PAM/pd

FINDINGS OF FACT AND RULINGS OF LAW

- Are any benefits awarded herein? No.
- 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: 1997, date of onset.
- 5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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? 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 employee was doing and how accident occurred or occupational disease contracted: Claimant Reed performed repetitive tasks in the course and scope of her employment resulting in bilateral upper extremity injuries.
- 12. Did accident or occupational disease cause death? No. Date of death? N/A
- 13. Part(s) of body injured by accident or occupational disease: Bilateral wrists and fingers.
- 14. Nature and extent of any permanent disability: Stipulated.

15. Compensation paid to-date for temporary total disability: \$4,594.93.
16. Value necessary medical aid paid to date by employer/insurer? \$17,531.75.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$278.42.

- Weekly compensation rate: \$278.42.

- Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: N/A

TOTAL: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: JEANNINE REED Injury No. 02-154036

Dependents: N/A

Employer: W. W. GRAINGER, INC.

Insurer: TRAVELERS INDEMNITY COMPANY OF AMERICA

Additional Party: MISSOURI STATE TREASURER as CUSTODIAN of the SECOND INJURY FUND

Hearing Date: November 14, 2007 Checked by: PAM/pd

On November 14, 2007, the parties appeared for hearing. The Employee, Jeannine Reed, appeared in person and with Counsel Christopher Smith. The Employer and its Insurer had previously settled their liability with Employee. The Missouri Second Injury Fund appeared by Assistant Attorney General Benita Seliga.

STIPULATIONS

At the hearing, the parties stipulated to the following:

- that Employer and Employee were operating under and subject to the provisions of the Missouri Workers' Compensation law;
- that Employer had notice of the claim and timely claim for compensation was filed;
- that Employee's compensation rate is \$278.42/\$278.42;
- that Employer's liability was previously settled for 15 percent of the body as a whole referable to both upper extremities;
- that prior to settlement, Employer paid compensation in the amount of \$4,597.14 and medical expenses in the amount of \$17,531.75.

ISSUES

The parties have requested the Division to determine the following issues:

- whether Employee sustained accidental injury arising out of and in the scope and course of her employment with W. W. Grainger beginning in 1997 through October 7, 2002;
- whether Employee was permanently totally disabled by the combined effects of the injuries through October 7, 2002 and pre-existing disabilities.

FINDINGS AND RULINGS

Jeannine Reed worked for W. W. Grainger, Inc., an industrial warehouse, from 1994 through October 7, 2002. Her job title was order filler, and her duties included repetitive use of her hands, wrists and arms in taking items from shelves, placing them in boxes and carrying the boxes (weighing up to 50 pounds each) to a conveyor belt. She generally did this 8 hours per day, 5 days per week. On occasion, she would fill orders for 5 to 6 hours per day and would spend the rest of the day cleaning and stocking shelves.

In 1997, Ms. Reed started experiencing numbness in her hands. She reported this as a work-related condition to Employer and received authorized medical care. Specifically, between October of 1997 and October of 1999, she underwent surgery on three occasions which included bilateral carpal tunnel releases, bilateral trigger thumb release and excision of a cyst of the right wrist. Dr. Harris performed all of the procedures. He released Ms. Reed to full duty and from medical care on December 6, 1999.

Upon returning to work in 1999 as an order filler, Ms. Reed's job duties and work schedule were the same as they had been prior to 1997 when she first developed the numbness in her hands. Although she did not seek further treatment for the hands, she continued to have problems with them. She also experienced problems with her vision, knees and feet. Reed stopped working on October 7, 2002 due to all of these conditions but particularly for her foot condition.

Ms. Reed has a number of significant disabilities. Ms. Reed claims she is permanently totally disabled. Dr. Koprivica opines Reed is permanently totally disabled. Mary Titterington, vocational expert, believes Reed is permanently totally disabled and unemployable in the open labor market. I find based on her testimony, medical records and reports and credible expert testimony that Jeannine Reed is permanently totally disabled and unemployable in the open labor market.

Reed asserts that she is permanently totally disabled as a result of her current disability in combination with her pre-existing disabilities. She seeks an award of permanent total disability benefits from the Second Injury Fund.

Ms. Reed must prove the following: (1) that she has permanent disability as a result of a compensable work-related injury; and (2) that she has permanent disability predating the compensable work-related injury which is of “such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if employee becomes unemployable,” Section 287.220.1 RSMo 1994; Garribay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1996); Rose v. Treasurer, 899 S.W.2d 563 (Mo.App. 1995); Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); and Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. 1995); and (3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained results in permanent total disability.

In this claim, there is no dispute that Ms. Reed sustained bilateral carpal tunnel syndrome and trigger finger in the course and scope of her employment with W. W. Grainger. The issue is whether Reed’s disability became permanent on December 6, 1999 when released by Dr. Harris or whether she continued to be injured throughout her employment ending October 7, 2002. If Reed is not continuously injured following her release from medical treatment through her last date of employment, then the vision, knee and foot injuries which combined with her hands to render Reed permanently totally disabled do not predate her primary claim and, therefore, cannot be considered in determining Second Injury Fund liability. Reed would not be considered permanently totally disabled at the time of the current or primary injury. The date of permanent disability on the primary claim becomes the main issue in whether the Second Injury Fund has liability for permanent total disability benefits.

Ms. Reed alleges she suffered an injury each and every day she worked until her last day on October 7, 2002. But the evidence shows after she reached maximum medical improvement on December 6, 1999, Ms. Reed returned to her regular job and continued to perform the same job duties. No evidence was submitted that Ms. Reed’s earning capacity was impaired during the alleged time period.

Ms. Reed began medical treatment in 1997. She was released in 1999 and did not request nor seek any further medical treatment after being released. The evidence establishes Ms. Reed worked the same job, performing the same duties, until she resigned due to her left foot. No evidence was submitted showing her earning capacity was impaired between the time she was released in 1999 and when she resigned in 2002.

Ms. Reed is attempting to bootstrap her wrist injuries into a 2002 work claim to allow recovery against the Second Injury Fund for her subsequent non-work injuries. But she has failed to submit substantial and competent evidence to establish a work injury after her recovery and release from her wrist injuries in December 1999.

In Garrone v. State of Missouri, the Court held “[a]n occupational disease does not become a compensable injury until the disease causes the employee to become disabled by affecting the employee’s ability to perform his ordinary tasks and harming his earning ability.” 157 S.W.3d 327, 242 (Mo. App. E.D. 2004). Citing Feltrop v. Eskens Drywall and Insulation, 957 S.W.2d 408, 413 (Mo. App. 1997); Colony v. Accurate Superior Scale Co., 952 S.W. 755, 759-60 (Mo. App. 1997).

In Garrone, the Court said Mr. Garrone’s carpal tunnel syndrome did not become a disability until after his wrist surgery when he was first unable to perform his ordinary work **duties**. *Id.* In holding that the date of injury was the date of surgery, the Court noted there was not evidence Mr. Garrone’s earning capacity was impaired prior to the surgery date. *Id.*

In the present case, Ms. Reed’s testimony was she went back to her same job duties after being released in 1999 without medical restrictions. She testified she worked the same job during the remainder of her tenure at Grainger until she resigned on October 2, 2002. By Ms. Reed’s own testimony, her earning capacity was not impacted between 1998 and 2002 due to her bilateral wrist and thumbs. Under the Garrone standard, she has not suffered a work injury each and every day as alleged because at no time was she or her work impacted.

Ms. Reed testified that her wrists hurt during work but she did not seek medical treatment for over three years. According to the records submitted, Ms. Reed sought medical attention when she was in pain or she had problems. She sought medical attention when she had problems with her eyes in 2000. She sought medical attention for her knee in 2001. She sought medical attention for her feet in April, May and October 2002. She also sought

medical attention for relief of pain for her hip and cervical area in 2001 and 2002. The record is clear Ms. Reed did not request or seek any medical attention between 1999 and 2002 for her wrists.

Ms. Reed testified her production was slowed by her wrists. Reed also said her production was slowed by other problems such as her vision, foot and knee injuries. Her testimony to slower production due to her wrists is not supported by the medical records and is self-serving.

Ms. Reed offers her surgery on her right dorsal hand/wrist on February 11, 2004 as evidence of "an injury," but a review of the notes of Dr. Nouhan shows this was not a ganglion cyst but, rather, tenosynovial thickening. Her medical records state one-and-one-half months after the surgery, the area was excised again because Ms. Reed developed recurrent fluid on the same site. None of Ms. Reed's 2004 treating surgeons state the 2004 wrist surgery was substantially related to her 2002 work. The treating doctors concluded the condition was a result of degenerative arthritis, especially in light of the recurrent fluid. I find that the medical opinions contained in the records of Ms. Reed's treating physicians are credible.

Dr. Koprivica testified that Reed's vocational activities did cause injury to her wrists between December 1999 and October 2002. Dr. Koprivica opined that her work condition contributed to her need for treatment in 2004. I do not find Dr. Koprivica's testimony persuasive on this issue.

I find that based on the medical records and expert testimony that Ms. Reed's bilateral upper extremity disability became permanent on December 6, 1999. I further find Ms. Reed did not incur a work injury after reaching maximum medical improvement on December 6, 1999 when she continued to work at the same job performing her ordinary job duties without work restrictions and did not seek any medical treatment between 1999 and her last day of employment.

Since I have found Ms. Reed's disability became permanent on December 6, 1999, the injuries considered by Dr. Koprivica and Mary Titterington do not predate December 6, 1999 and are not pre-existing. Ms. Reed did not sustain her burden of proof regarding pre-existing disability. Accordingly, Reed's claim for permanent total disability benefits are denied.

Date: _____

Made by: _____

Paula A. McKeon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation