

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

Injury No.: 98-174908

Employee: Mark Reese

Employers: 1) Murphy Co. Mechanical
2) Rock Hill Mechanical

Insurers: 1) Missouri Property & Casualty Insurance Guaranty Association
2) ACING 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. 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 8, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued January 8, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Mark Reese

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Murphy Company did not expose employee to the hazards of contracting his occupational diseases of carpal tunnel syndrome and exercise induced compartment syndrome until after the initial claim for compensation was filed in this matter. Accordingly, the last exposure rule is not applicable in this case. Under § 287.063.3, "[m]ere exposure is not enough to shift liability to a subsequent employer. Instead, the subsequent employer must expose the employee to repetitive motion capable of producing [claimant's ailment]." *Maxon v. Leggett & Platt*, 9 S.W.3d 725, 730 (Mo. App. 2000), citing *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 763 (Mo. App. 1997).

Employee's duties at Rock Hill were sufficiently repetitive as to create a risk that employee might develop repetitive use injuries. At Rock Hill, employee was constantly using his hands in repetitive motion. Employee had to use a torquer to install couplings. This activity involved repetitive twisting and grinding with his hands. Employee also drilled anchors into concrete. This activity exposed employee to constant vibration forces.

By contrast, at Murphy Company, employee did not perform any hand activities with sufficient frequency that the activities created a risk of developing the repetitive use injuries. For the first six months he was with Murphy Company – through May 1999 – employee was working on a project requiring the installation of push joint cast iron pipes. This activity only required that employee push the pipe together with a tool. The activity did not expose employee to the constant hand twisting and vibration to which he was exposed at Rock Hill. The hand involvement used to make the push joint pipe connection was not repetitive motion capable of producing employee's bilateral carpal tunnel syndrome and compartment syndrome.

Employee underwent right carpal tunnel release on May 21, 1999, and left carpal tunnel release on June 14, 1999. Employee was off work for 3 months, meaning he returned to work around August 21, 1999. It was not until after employee returned to Murphy Company after August 21, 1999, that employee engaged in repetitive activities capable of producing carpal tunnel syndrome and compartment syndrome.

Employee's initial claim was filed on August 12, 1999. Rock Hill was the last employer to expose employee to the hazards of developing carpal tunnel syndrome and compartment syndrome before the filing of the claim for compensation. Rock Hill is liable to employee for compensation for his bilateral carpal tunnel syndrome and compartment syndrome and their resultant disabilities.

For the foregoing reasons, I respectfully dissent from the majority's award denying employee's claim for benefits from Rock Hill.

John J. Hickey, Member

AWARD

Employee: Mark Reese Injury No.: 98-174908
Dependents: N/A Before the
Employer 1: Murphy Co. Mechanical **Division of Workers'**
Employer 2: Rock Hill Mechanical **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Additional Party: Second Injury Fund (Open)
Insurer 1: Missouri Property & Casualty Insurance
Guaranty Association
Insurer 2: ACING Insurance Company
Hearing Date: October 6, 2008 Checked by: SC:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: December 21, 1998
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant developed injuries from repetitive activities as a plumber.
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: Bi-lateral wrists and forearms
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$9,886.90
16. Value necessary medical aid paid to date by employer/insurer? \$14,606.47 (By Rock Hill)

Employee: Mark Reese

Injury No.:98-174908

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for maximum rates of compensation
- 19. Weekly compensation rate: \$562.67/\$294.73
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: Open

TOTAL: NONE

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Michael Shelton

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mark Reese	Injury No.: 98-174908
Dependents:	N/A	Before the
Employer 1:	Murphy Co. Mechanical	Division of Workers'
Employer 2:	Rock Hill Mechanical Corp.	Compensation
Additional Party:	Second Injury Fund (Open)	Department of Labor and Industrial
Insurer 1:	Missouri Property & Casualty Insurance Guaranty Association	Relations of Missouri
Insurer 2:	ACING Insurance Company	Jefferson City, Missouri
		Checked by: SC:

STATEMENT OF THE CASE

A hearing was held for a final award at the Missouri Division of Workers Compensation ("DWC") St. Louis office at the request of Mark Reese ("Claimant"), on October 6, 2008, pursuant to Section 287.450 RSMo. Attorney Michael Shelton represented Claimant. Attorney Edward Weiss represented Employer 1 Rock Hill Mechanical Corporation ("Rock Hill") and Missouri Property & Casualty Insurance Guaranty Association, successor to Reliance Insurance Company, now bankrupt. ("Insurer-1"). Attorney Jennifer Dickerson represented Employer 2 Murphy Company Mechanical ("Murphy") and ACIG Insurance Company, (Insurer-2)¹. The Second Injury Fund is to remain open and did not participate in the proceeding. Venue is proper and jurisdiction lies with DWC. The record closed after presentation of evidence.

EXHIBITS

Claimant's Exhibits A-M and Rock Hill's Exhibits 1-2 were admitted without objection. Murphy offered no Exhibits. Any notations contained in the Exhibits were present when admitted. Any objections contained in the depositions but not expressly ruled on in this award are overruled.

STIPULATIONS

The parties stipulate that on or about December 21, 1998:

1. Claimant sustained an occupational disease in St. Louis County;
2. Claimant was employed by Murphy;
3. ACIG Insurance Company fully insured Murphy;
4. Claimant and Murphy were operating under the provisions of the Missouri Workers' Compensation Law;

¹ Reference to each employer also refers to their respective Insurers. The named insurer for Rock Hill was changed after the hearing to reflect the Insurer named in Rock Hill's Answer to the Claim for Compensation.

5. Rock Hill's liability was originally insured by Reliance Insurance Company, now an insolvent insurance company;
6. Missouri Property & Casualty Insurance Guaranty Association stepped into the shoes of Reliance Insurance Company and is deemed the insurer as provided in Sections 375.771 to 375.779 RSMo (2000);
7. Missouri Property & Casualty Insurance Guaranty Association paid Temporary Total Disability ("TTD") benefits totaling \$9,886.90 for 17 4/7 weeks and medical benefits totaling \$14,606.47;
8. Claimant's average weekly wage was sufficient for maximum TTD rates of \$562.67 and permanent partial disability ("PPD") of \$294.73; and
9. Zurich North America Insurance Company is dismissed.

ISSUES

The parties identified the following issues for disposition:

1. Did Claimant's occupational disease arise out of and in the course of employment?
2. What is the medical cause of Claimant's occupational disease?
3. Which Employer is liable for benefits?
4. Was the claim timely filed against Murphy?
5. What is the nature and extent of permanent partial disability?
6. If Murphy is liable, is Rock Hill entitled to a credit for medical and TTD benefits paid? Or in the alternative, is Murphy entitled to an order stating Rock Hill is liable for compensation?

SUMMARY OF DECISION

Claimant met his burden to show Murphy and Insurer 2 are liable based on the entire record, including expert testimony, Claimant's testimony, demeanor, medical reports, and the applicable law of the State of Missouri. However, Murphy met its burden to establish the claim against it is barred by the statute of limitations.

FINDINGS OF FACT

All evidence was reviewed, but only evidence supporting this award is considered to establish the following facts based upon competent and substantial evidence.

1. **Claimant** became a union plumber in 1984. He has worked as a plumber for twenty-four years with various employers. Claimant worked with his hands and forearms performing plumbing all duties. Claimant continues to work as a plumber for another company.
2. Prior to working for Rock Hill, Claimant complained of wrist and arm fatigue, but did not seek treatment. He did not have numbness, tingling or pain of the hand, wrist or forearm.
3. Claimant worked for Rock Hill from May 1994 to November 1998. Claimant performed hand intensive work as a plumber/foreman. Claimant used a vibrating hammer drill to drill concrete and a T-torque, placing a socket in a nut and turning until it torqued. Claimant performed twisting wrist movements daily with tools that vibrated. He

- performed overhead work. After two years with Rock Hill, Claimant's hands began to fall asleep and tingle at night.
4. During the last six months of employment with Rock Hill, Claimant worked three projects which caused his symptoms to increase. He twisted his hands, used grinding tools, drilled anchors into concrete, and worked with cast iron.
 5. When Claimant left Rock Hill, his right hand fell asleep constantly, both hands were numb and tingled, and both arms felt fatigued up to the elbows.
 6. Claimant worked as a plumber/foreman for Murphy from November 1998 to 2004. He hung pipe and performed repetitive commercial work, using a variety of tools.
 7. Three weeks after Murphy hired Claimant, he treated with Dr. Beaman, his family physician, for hand and forearm complaints.
 8. Claimant reported the injury to Rock Hill. Rock Hill filed a Report of Injury with DWC on January 7, 1999.
 9. Mr. Tim Tate, Rock Hill's representative, scheduled an appointment with Dr. Strege. Claimant did not provide Dr. Strege with a job description. Also, Claimant did not inform Dr. Strege he currently worked for Murphy.
 10. Dr. Strege diagnosed carpal tunnel syndrome ("CTS") and performed bilateral carpal tunnel releases in May and June 1999.
 11. On August 12, 1999, Claimant filed the original Claim for Compensation ("Claim") and named Rock Hill as the employer for bilateral hand and wrist injury from repetitive activities. The First Amended Claim was filed in September, 1999 to amend the Second Injury Fund claim. On October 12, 2000, a Second Amended Claim was filed to add bilateral elbow injuries to the primary case against Rock Hill.
 12. Dr. Strege performed surgery on Claimant's bilateral forearms in March and April 2001, and released Claimant from care on July 10, 2001. Claimant has received no additional medical care for his upper extremities. Rock Hill paid all TTD and medical benefits.
 13. On August 12, 2004, Claimant filed a Third Amended Claim and named Murphy as the employer for injury to bilateral hands, wrists, and elbows due to repetitive activities.
 14. Claimant's forearm complaints include forearm fatigue, pain (5-10/10), decreased strength, and stiffness, limited range of motion, stiffness, and decreased grip strength. Hand and wrist complaints include decreased grip strength, limited range of motion, and pain. Claimant has a six inch left forearm scar and one and one-half inch palmer scar and on the right, a six and one-quarter inch forearm scar and one and one-half inch palmer scar on the left.

15. **Mr. Dennis Johnson** is Director of Corporate Loss Control for Murphy and Safety Director until 2000. As Safety Director, he received correspondence from DWC and forwarded it to the company's insurer and attorney.
16. Claimant informed Dan Flotran, the plumbing coordinator; that he developed CTS while working for Rock Hill. He needed time off for surgery and Rock Hill would pay for it.
17. Claimant did not report a work injury to Murphy. Murphy found out it was named in May 2005 when it received a Notice of Mediation.² Claimant had an unrelated claim with Murphy between 2002 and 2004, but he did not mention the current claim.

Medical facts

18. On December 15, 1998, Claimant told **Dr. Beaman** he developed bilateral finger numbness, right worse than left, a week earlier. Dr. Beaman diagnosed symptoms consistent with CTS, and prescribed splints, and medication.³
19. Claimant reported a ten year history of occasional hand pain and numbness when **Dr. David Strege** examined him on March 9, 1999. In the prior three months, Claimant reported increased finger numbness and pain in the hand, wrist, and forearm, with strenuous activities.
20. The March 1999 examination revealed decreased strength on the right, and bilateral dysesthesia of the middle and ring fingers, worse on the right. Nerve conduction studies revealed bilateral CTS. On May 21, 1999, Dr. Strege performed a right carpal tunnel release and a left release on June 14, 1999.
21. On December 17, 1999, Claimant returned to Dr. Strege with increased forearm pain, and finger numbness, worse when gripping pipes at work. Dr. Strege prescribed splints and medication. Nerve conduction studies revealed minimal ulnar nerve compression of the left elbow but Dr. Strege recommend no treatment, and released Claimant on March 8, 2000.
22. On April 17, 2000, Claimant gave **Dr. Susan Mackinnon** a history of hand, wrist, and forearm pain for more than ten years. His forearm, wrist and fingers remained symptomatic after carpal tunnel surgery. Dr. Mackinnon diagnosed bilateral cubital tunnel syndrome and prescribed therapy. She recommended a rheumatologist for forearm pain, and possible ulnar nerve transposition and muscle release. She treated Claimant conservatively through January 2001.

² DWC records show Murphy was sent notice of the Third Amended Claim on August 18, 2004 via regular mail. The Claim listed Murphy's zip code as 63031. Later, it was changed to 63132 when Notice of Mediation was sent, dated December 17, 2004. An incorrect zip code may have delayed Murphy's receipt of the Third Amended Claim. However, timely receipt of the amended Claim would not have changed the outcome because the statute of limitation ran prior to the amended Claim being filed.

³ Claimant testified that Dr. Beaman informed him he had work-related CTS on December 15, 1998. However, medical records do not contain this evidence. I find Dr. Beaman did not give a causation opinion during the December 15, 1998 examination.

23. In February 2001, Claimant returned to **Dr. Strege** with unresolved forearm pain. Dr. Strege diagnosed bilateral exercise induced compartment syndrome of the forearms. On March 22, 2001, Dr. Strege performed a fasciotomy of the right forearm and a left forearm fasciotomy on April 27, 2001.

Expert medical opinions

24. On May 21, 1999, **Dr. Strege** related bilateral CTS to Claimant's employment with Rock Hill, based on a ten year history of symptoms. On September 14, 1999, Dr. Strege determined Claimant had reached maximum medical improvement ("MMI") and released him from care with a 5% PPD rating for each wrist.
25. On April 23, 2001, **Dr. Strege** recommended forearm surgery and opined it was needed because of "pain related to his injury and complaints back in 1999." On July 10, 2001, Dr. Strege found Claimant achieved MMI and discharged him from medical care; but did not rate the forearms.
26. **Dr. Raymond Cohen, D.O.**, is a board certified neurologist. Dr. Cohen examined Claimant at his attorney's request on June 7, 2007.
27. Claimant provided a general description of his plumbing duties with various employers over time. Duties included cutting rods and pipes, hauling material, grinding and twisting pipes and parts, turning wrenches, twisting a torque wrench, pushing and pulling, using upper extremities to hang pipes overhead, holding materials overhead to cut cast iron pipe, drilling into concrete, exposure to vibration, and cleaning copper pipes with a brush and sanding them by hand. This was the first detailed job description Claimant provided to a physician in this case.
28. Dr. Cohen opined the job description involved repetitive activities that could cause bilateral CTS and the forearm condition. He concluded the conditions were caused by Claimant's work as a plumber leading up to December 21, 1998.
29. Also, Dr. Cohen concluded Claimant's work for Rock Hill involved activities which exposed him to and caused both bilateral upper extremity conditions. Dr. Cohen opined the work at Murphy was also repetitive and could cause both conditions.
30. Dr. Cohen rated the primary injury as 40% PPD of bilateral forearms, 35% PPD of each wrist, a 20% loading factor, and disfigurement.

ADDITIONAL FINDINGS of FACT and RULINGS OF LAW

1-2. Claimant sustained two occupational diseases which arose out of employment and were caused by his employment as a plumber

The parties stipulated Claimant developed two occupational diseases, bilateral CTS and exercise induced compartment syndrome. Claimant asserts both occupational diseases arose out of and in the course of employment with Rock Hill. Rock Hill contends Murphy exposed Claimant to both occupational diseases after he left Rock Hill's employment. Murphy contends

Claimant's work was less hand intensive than the work he performed at Rock Hill, and raised a statute of limitations defense.

The question of causation is one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999) (*overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo banc).⁴ Claimant bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. *Id.* When a worker seeks compensation for carpal tunnel syndrome, he must submit a medical expert who can establish the probability that working conditions caused the disease. *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. 1998).

Section 287.067.1 defines occupational disease as an identifiable disease arising with or without human fault, out of and in the course of employment. The disease does not need to be foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational basis. 2. An occupational disease is compensable if it is clearly work related; provided the injury meets the requirements stated in Section 287.020.2-3.

Section 287.020.2 states "an injury shall be deemed to arise out of and in the course of the employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury, and (b) It can be seen to have followed as a natural incident of the work, and (c) It can be fairly traced to employment as a proximate cause, and (d) It does not come from a hazard or risk unrelated to employment which workers would have been equally exposed to outside of and unrelated to the employment in normal nonemployment life."

I find Claimant sustained two occupational diseases that arose out of and in the course of his employment as a plumber. I find credible Dr. Cohen's opinion that Claimant's work activities caused the development of both occupational diseases. However, I do not find credible his opinion that the conditions were solely caused by Claimant's work for Rock Hill. Dr. Cohen based his causation opinion on Claimant's entire work history, including work performed for Murphy. Also, Claimant did not report any differences in the type of work he performed for Rock Hill and Murphy. Dr. Cohen found the work for both employers to be repetitive and capable of causing both occupational diseases.

Additionally, the record contains no evidence of other activities or medical conditions that may have caused these conditions. Dr. Strege's opinion is not persuasive because Claimant did not tell him he performed similar work for Murphy after he left Rock Hill and Dr. Strege did not have Claimant's job description.

I find credible Claimant's testimony that he relied heavily on both hands and forearms to perform all plumbing work. He used his hands and forearms to work overhead, use vibrating tools, turn parts with a T-torque, and perform repetitive, twisting movements with his wrists. I

⁴ Several cases herein were overruled by the *Hampton* case on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

find Claimant's injury to be a natural incident of the work, caused by his employment as a plumber.

Based on credible testimony by Dr. Cohen and Claimant, I find both occupational diseases arose out of and in the course of Claimant's work as a plumber. The question is which Employer, if either, is liable for compensation.

3. Murphy is liable under the Last Exposure Rule

Section 287.063 RSMo (1994) states:

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, stated in Section 287.067.7 RSMo (1999).
2. The employer liable for the compensation...shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.

The last exposure rule is not a rule of causation. *Johnson v. Denton Const. Co.* 911 S.W.2d 286, 288 (Mo.1995). As a starting point, the last employer before the date the claim is filed is liable, if that employer exposed the employee to the hazard of the occupational disease. *Id.*

I find Murphy was the last employer to expose Claimant to the occupational hazards prior to filing a claim. Dr. Cohen opined Claimant's work leading up to December 21, 1998 caused both occupational diseases, but on cross examination stated the work for Murphy was repetitive and could have caused both conditions. Dr. Cohen concluded Claimant performed similar work for both employers, because Claimant provided no contrary history.

I find Claimant's testimony not credible that the last six months at Rock Hill were more hand intensive than Murphy. Claimant testified by deposition that he performed similar work for both employers. He told Dr. Beaman his finger numbness started around December 8, 1998. In March 1999, Claimant gave Dr. Strege a history of increased finger numbness starting in December 1998. Dr. Strege reported; "Claimant is employed as a plumber and notes worsening of symptoms with more strenuous activities involving the hands." In December 1999, Claimant reported "intermittent finger numbness, worse with gripping pipes at work." Claimant was employed by Murphy when he gave these histories. But, Claimant never told Dr. Strege he worked for Murphy during fourteen months of treatment over more than two years. I find Claimant performed similar repetitive work for both employers. I find Murphy liable.

If exposure with an employer is for more than three months, that employer ... may not invoke the exception in section 287.067.7. *Endicott v. Display Technologies, Inc.* 77 S.W.3d 612, 615 (Mo banc 2002). All parties agree Claimant worked for Murphy more than three months before the claim was filed. Murphy hired Claimant on November 23, 1998 and Claimant

filed a Claim on August 10, 1999, nearly nine months later. I find Section 287.067.7 does not apply. Furthermore, Dr. Cohen did not find the exposure to repetitive motion with Rock Hill to be the substantial contributing factor in developing the injuries, as required by Section 287.067.7. Dr. Cohen found “the substantial factor in Claimant’s injury was from the occupational disease.” It is not clear what Dr. Cohen meant by this statement.

4. Murphy’s liability is barred by the Statute of limitations

Claimant asserts the August 2004 Third Amended Claim which added Murphy is not barred by the statute of limitations because he had until June 25, 2005 to file a claim.⁵ Murphy contends even if they are liable, the statute of limitations bars recovery.

Section 287.380 RSMo (1999) states in part:

1. Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall within ten days after knowledge of an accident resulting in personal injury to any employee, notify the division...

Section 287.430 RSMo (1999) states in part:

...No proceedings for compensation under this chapter shall be maintained unless a claim ...is filed with the division within two years after the date of injury...or the last payment made under this chapter on account of the injury ..., except that if the report of the injury ...is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury...

Section 287.063.3 RSMo (1999) provides:

The statute of limitations referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained...

In an occupational disease case, the statute of limitations starts to run when: (1) an employee is no longer able to work due to the occupational disease; (2) an employee must seek medical advice and is advised that he can no longer work in the suspected employment; or (3) the employee experiences some type of disability that is compensable. ***Rupard v. Kiesendahl***, 114 S.W.3d 389 (Mo. App. 2003).

Generally, such a condition becomes apparent when an employee is medically advised that he can no longer physically continue in the work environment. A compensable injury occurs when the disease causes the employee to become disabled and unable to work. ***Wiele v. National Super Markets, Inc.*** 948 S.W.2d 142 (Mo. App. 1997)

⁵ Claimant asserts the statute of limitations began to run June 25, 2002 when the ***Endicott*** case was decided. He further asserts ***Endicott*** established that an employer may not invoke the exception in Sec. 287.067.7 if it exposed the employee to the hazard for more than three months. Finally, since Murphy did not file a Report of Injury, Claimant asserts he has until June 25, 2005 to file a claim. (Three years after ***Endicott*** was decided).

An employee is not expected to file a workers' compensation claim until the employee has reliable information that his condition is the result of employment. The employee is entitled to rely on a physician's diagnosis of the employee's condition rather than his own impressions. **Rupard**, 114 S.W.3d at 396-397.

I find the statute of limitations began to run by August 10, 1999 when Claimant filed the claim for both hands against Rock Hill. I find it had become reasonably discoverable and apparent that Claimant had sustained a compensable injury. Claimant filed the claim eight weeks after Dr. Strege performed bilateral CTS surgeries and opined the conditions were caused by his work at Rock Hill. The claim stated; "While in the course and scope of his employment, Claimant was caused to sustain multiple repetitive injuries and traumas to his hands at the wrists, bilaterally, causing injury, as aforesaid." It was signed by Claimant and dated August 10, 1999. At that time, he had worked almost nine months for Murphy. But Claimant told Murphy the diseases were contracted while working for Rock Hill.

I find Claimant had two years starting August 10, 1999 to file a claim against Murphy. Murphy was not required to file a Report of Injury until they had knowledge that an injury occurred. Mr. Johnson testified he learned of the injury when a Notice of Mediation was received in December 2004. I find Claimant had no extension to file a claim. I find Claimant had until August 10, 2001 to file a claim against Murphy. Even if Claimant had three years to file a Claim against Murphy, the statute ran after August 10, 2002 and Claimant filed in 2004.

In addition, Claimant filed a Second Amended Claim against Rock Hill in 2000, adding bilateral elbows, but did not add Murphy. The Second Amended Claim stated "While within the course and scope of his employment, Claimant was caused to sustain multiple repetitive injuries and traumas to his hands at the level of the wrist and elbow, bilaterally, causing injury, as aforesaid." It was signed by Claimant and received by DWC on October 12, 2000.

The first time Claimant filed a claim against Murphy was August 12, 2004. The Third Amended Claim stated "While within the course and scope of his employment, Claimant was caused to sustain multiple repetitive injuries and traumas to his hands at the level of the wrist and elbow, bilaterally, causing injury, as aforesaid."

No proceeding can be maintained against an individual or corporation until a claim is filed. **Martensen v. Schutte Lumber Co.**, 162 S.W.2d 312, 316 (Mo.App. 1942) (*Overruled on other grounds*) (*Citations omitted*). Rock Hill and Murphy are two distinct employers. The filing of a Claim against Rock Hill is not the same as filing a Claim against Murphy. A Claim must be timely filed against Murphy before Claimant can seek a remedy.

Section 287.430 is governed by the law of civil actions other than for the recovery of real property. In civil procedure where a new party defendant is brought into the case by amendment, the statute of limitation continues to run until he is made a party and the action is commenced against him. The established and recognized rule is that, if between the time of the commencement of an action and the time when a new defendant is brought into the case the [statute of limitation] has expired, the new party may plead the statute to bar liability, although the defense may not be available to the original defendant. **Id** at 316-317. (*Citations omitted*).

Claimant's contention that Murphy admitted liability by filing a late Answer is not persuasive. The Claim was barred prior to the filing of the Answer for the reasons stated above. Furthermore, the issue of whether Claimant sustained an occupational disease while working for Murphy is a question of law, not fact. Therefore, it is not deemed admitted. *Watkins v. Bi-State Dev. Agency*, 924 S.W.2d 18, 21 (Mo.App.1996).

I find the Claim against Murphy and Insurer 2 was filed more than two years after it was reasonably discoverable and apparent that Claimant had sustained a compensable injury. I find the claim against Murphy is barred by the statute of limitations.

5. Murphy is not liable for Permanent Partial Disability benefits

Claimant seeks PPD benefits; however, no benefits are awarded because the statute of limitations is a bar to Murphy's liability.

6. Rock Hill is not entitled to a credit for TTD and medical benefits

Rock Hill and Insurer 1 contend they are entitled to a credit totaling \$9,886.90 for TTD benefits and \$14,606.47 for medical benefits paid. Alternatively, Murphy seeks an order stating Rock Hill is liable for compensation.

Section 287.160.2 is the only section that authorizes reimbursement to an employer who paid medical bills or TTD, prior to a determination that the claim was noncompensable. It states; "If the employee's claim is found to be fraudulent or noncompensable, after a hearing, the employee shall reimburse the employer, or the insurer if the insurer has indemnified the employer, for any benefits received..."

I find Rock Hill is not entitled to a credit. I find Claimant sustained a compensable injury; however, Murphy is not liable for the reasons stated above. Rock Hill authorized Dr. Strege's treatment, which included an opinion that Claimant's work at Rock Hill caused both occupational diseases. Claimant relied on Dr. Strege's opinion. All benefits were incurred through Dr. Strege's last report dated July 10, 2001. If Rock Hill questioned Murphy's liability, it could have obtained a medical opinion.

However, if the statute had not run, Murphy would be liable for any unpaid medical and TTD benefits. But, Rock Hill paid all benefits. This Court lacks jurisdiction to order direct reimbursement from Murphy to Rock Hill.

CONCLUSION

Claimant sustained two occupational diseases which arose out of and in the course of employment as a plumber, and are medically causally related to his employment. Murphy was the last employer to expose Claimant to the hazard of the occupational diseases, but the claim is barred by the statute of limitations. Rock Hill is not entitled to a credit. The Second Injury Fund claim remains open.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation