

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

Injury No.: 94-204948

Employee: Raymond Russell
Employer: Wagner Electric Corp.
Insurer: Travelers Indemnity Co. of America
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged January 4, 1994
Place and County of Accident: Not determined

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 entire 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 July 22, 2005, as supplemented herein, and awards no compensation in the above-captioned case.

The dispositive issue is whether or not the claim for the January 4, 1994, injury, was barred by the statute of limitations. The administrative law judge concluded that the claim was barred and the Commission agrees.

The statute of limitations for occupational diseases is found in two statutes. Section 287.430 RSMo states:

...no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, ...except that if the report of the injury or the death 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, death or last payment... The statute of limitations contained in this section is one of extinction and not of repose.

Section 287.063.3 RSMo, provides an additional definition with respect to occupational disease:

The statute of limitation 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 ...

The statute of limitations does not begin to run in an occupational disease case until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. Section 287.06.3 RSMo; and *Sellers v. TWA*, 752 S.W.2d 413 (Mo. App. W.D. 1988). In the case of an occupational disease, this is the time when the disease has produced a compensable disability. *Sellers*, 752 S.W.2d at 416. This has been interpreted, as the time when some degree of disability results that can be the subject of compensation. *Enyard v. Consolidated Underwriters*, 390 S.W.2d 417 (Mo. App. E.D. 1965). The standard for the beginning of the running of the statute of limitations requires: (1) a disability or injury; (2) that is compensable. *Mann v. Supreme Express*, 851 S.W.2d 690 (Mo. App. E.D. 1993).

The question as to when a compensable injury becomes reasonably discoverable and apparent is a question of fact to be determined by the Commission. *Mann*, 851 S.W.2d at 692. 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. W.D. 2003).

Within this context, a disability is the inability to do something; the deprivation or lack of physical, intellectual, or emotional capacity or fitness; the inability to pursue an occupation or perform services for wages because of physical or mental impairment. *Loven v. Greene County*, 63 S.W.3d 278 (Mo. App. S.D. 2001). It is not necessary for an employee to miss work before that employee can recover on an occupational disease claim. *Coloney v. Accurate Superior Scale*, 952 S.W.2d 755 (Mo. App. W.D. 1997). Rather, an employee with an occupational disease is compensably injured when the employee suffers a demonstrated loss of earning capacity, such as an inability to perform various vocational tasks. *Loven*, 63 S.W.3d at 284-285; *Coloney*, 952 S.W.2d at 760. Requiring that the harm tangibly affect the employee's earning ability upholds the intent of the Act, which is to provide indemnity for loss of earning power and disability to work. *Coloney*, 952 S.W.2d at 760.

Generally, such a condition becomes apparent when an employee is medically advised that he or she 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. E.D. 1997).

An employee is not expected to file a workers' compensation claim until the employee has reliable information that his or her condition is the result of his or her employment. The employee is entitled to rely on a physician's diagnosis of the employee's condition rather than his or her own impressions. This rule is not, however, absolute. Under certain circumstances, it can be foreseen the time should begin to run without having an expert's opinion in the employee's hands. The facts of each case will have to be determined on a case-by-case basis in this uncertain area, all under the existing doctrine of construing the workers' compensation law liberally. *Rupard*, 114 S.W.3d at 396-397.

In the instant case, the administrative law judge properly found the statute of limitations began to run no later than January 4, 1994. This conclusion is consistent with the medical evidence as well as the employee's own testimony. Employee worked for employer between 1991 and 1994. The employee's last day at work was January 4, 1994. Employee is not alleging or contending that the injury sustained during this tenure of employment is due to an accident or a singular event. Rather, employee contends that he sustained injury due to an occupational disease arising out of and in the course of his employment due to repetitive activities at work.

The employee began to notice neck pain in 1991 and was diagnosed with arthritis. While continuing to work for employer through 1992 and 1993, employee's neck pain expanded to shoulder complaints and also low back pain.

In 1993, the complaints and symptomatology had progressed to such a degree that they impeded employee's ability to work due to aggravation of his arthritic condition. Employee consulted Dr. Karsh indicating that the work duties were aggravating his arthritis and employee requested Dr. Karsh excuse him from certain job duties, i.e., excusing him from the rotor cell line No. 1. This job duty and the work activities it entailed aggravated the employee's arthritic condition. Dr. Karsh excused the employee from work for four days. Responding to the request of employee, Dr. Karsh imposed a work restriction that employee was unable to work on rotor cell line No. 1 because of his arthritic condition and the aggravation the job duties were causing.

Upon returning to work the employer attempted to accommodate the employee by assigning employee work on cells or activities that required less lifting and lighter parts.

Employee, during the calendar year 1993, continued to experience complaints and symptomatology, i.e., pain in his neck, left shoulder and hand and the diagnosis of Dr. Karsh was osteoarthritis of the neck, left shoulder and bi-lateral carpal tunnel syndrome.

On January 4, 1994, the company physician, Dr. Huetel, examined employee. Dr. Huetel concurred with the diagnosis of arthritis of the left shoulder, neck and hands. Dr. Huetel imposed the following work restrictions: no lifting greater than 25 pounds; no use of the left upper extremity above the mid-chest level; and no overhead work.

On January 4, 1994, the employee also treated with his family physician, Dr. Lucas. The employee related

complaints of degenerative joint disease in his neck, shoulder and hands. Employee informed Dr. Lucas that he lifted extensively at work and the company doctor, Dr. Huetel, was imposing work restrictions. After examining the employee, the diagnosis of Dr. Lucas was degenerative joint disease. Dr. Lucas also imposed restrictions, which were temporary in nature: no lifting over ten pounds; and no repetitive motion with the shoulders, arms and hands. These restrictions were to remain in place until February 4, 1994.

Due to the work restrictions imposed employee presented to the employer January 4, 1994, requesting that he be assigned light duty. The employee requested a job as an inspector; however, the employee did not possess sufficient seniority to be assigned that position. The employee then applied for, and was granted, a medical leave of absence from employer for the time frame January 6, 1994, to February 5, 1994. In February 1994, Dr. Lucas placed employee under permanent work restrictions.

Employee has never returned to work.

On cross-examination the employee admitted that he was well aware that his problems concerning his neck and upper extremity were being made worse and being aggravated by his job duties. He was aware that his arthritic pain was worsening on account of his job activities. He admitted that his arthritis had become aggravated to the extent that he requested light duty accommodation on a permanent basis, i.e., requesting the job of inspector due to his pain.

The undisputed medical evidence, along with employee's testimony, leads to the conclusion that employee was compensably injured no later than January 4, 1994. Throughout 1992 and 1993 culminating in January 1994, the employee was required to seek medical treatment and advice due to his arthritis being aggravated by job duties and activities. The employee was experiencing disability due to this condition. Employee was requesting work restrictions from his physicians due to the aggravation of his arthritic condition on account of his job. Due to these complaints and work restrictions imposed on the employee, employee was unable to perform certain tasks for the employer in his capacity as a machinist, such as working with heavier parts, and lighter duty was requested. The work restrictions imposed demonstrated that the employee could no longer work in all aspects of his employment as a machinist, that he was unable to work in that capacity without restriction, and that he had suffered a loss of earning capacity.

By January 4, 1994, the employee's condition clearly became disabling and caused him to miss work due to employee's alleged incidence of occupational disease. The complaints that employee made to Dr. Karsh, Dr. Huetel and Dr. Lucas, his request for work restrictions due to the aggravation of his arthritis, the fact that he took time off from work and requested lighter duty because of the complained of condition leads to only one conclusion, i.e., that it was reasonably discoverable and apparent to the employee, no later than January 4, 1994, that an alleged compensable injury or disability had resulted to him because of the aggravation of his arthritis while performing his job duties.

In the instant case, the Commission does not accept employee's contention that his injury did not become reasonably discoverable and readily apparent until employee was definitively medically advised that his injury was work related. By his own testimony, medical treatment, and conduct, employee clearly attributed his injury to the work he was performing as of January 4, 1994. At that time the employee's condition was immediately disabling. Employee became unable to work by reason of a job related injury occurring no later than January 4, 1994, which is the basis of his present claim.

Under the facts of the instant case, to hold that employee was unable to and did not reasonably discover that his January 4, 1994, injury was work related until much later, when a physician told employee what he already knew, is inconsistent with the plain language of section 287.063.3 RSMo. *Hinton v. National Lock Corp.*, 879 S.W.2d 713 (Mo. App. S.D. 1994).

The Commission agrees with the administrative law judge that employee's alleged occupational disease was reasonably discoverable and apparent as of January 4, 1994. Since the claim for compensation was not filed until July 15, 1997, said claim is barred by the provisions of section 287.430 RSMo.

Employer/insurer filed an Application for Review alleging the administrative law judge erred in concluding that the

three-year rather than the two-year statute of limitations applied in this case. Because we conclude that employee failed to file his claim within three-years after his alleged occupational disease was reasonably discoverable and apparent, we need not decide whether the two-year or three-year statute of limitations applies. We specifically set aside the administrative law judge's findings and conclusions relative to that issue (Finding of Fact 5 and 6, Conclusions of Law 2 and 3).

The award and decision of Administrative Law Judge Joseph E. Denigan, issued July 22, 2005, is attached and incorporated by this reference to the extent it is not inconsistent with the findings, conclusions, award and decision herein.

Given at Jefferson City, State of Missouri, this 25th day of April 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

William F. Ringer, Chairman

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 is in error.

The administrative law judge concluded that employee filed his claim for compensation after the expiration of the statutory filing period and, thus, is barred by the statute of limitations. I disagree.

The standard for beginning the running of the statute of limitations, as developed in the cases, requires (1) a disability or injury, (2) that is compensable. Compensability, as noted, turns on establishing a direct causal connection between the disease or injury and the conditions under when the work is performed. Logically, an employee cannot be expected and certainly cannot be required to institute claim until he has reliable information that his condition is the result of his employment. Just as logically, given that there must be competent and substantial evidence of this link, the claimant is entitled to rely on a physician's diagnosis of his condition rather than his own impressions.

Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 416 (Mo. App. 1988) (emphasis added).

In *Sellers*, the court concluded that an employee's duty to pursue a workers' compensation claim is not triggered until an employee has *reliable* information that his or her condition is work-related. An employee is entitled to rely on a physician's diagnosis of the employee's condition rather than his own impressions. These conclusions follows naturally from the general principle that an employee's opinion regarding medical causation is deemed not reliable on the theory that medical causation is not within the realm of lay understanding. The administrative law judge's conclusion that employee should have known in 1994 that his work caused his arthritis without the benefit of an opinion from a physician flies in the face of this long-standing principle.

On January 4, 1994, employee knew that certain job duties caused his arthritis to ache. However, employee did not believe his arthritis was work-related. No physician advised employee his arthritis might be work-related until 1997. It was undoubtedly apparent to employee that he suffered a state of ill-being in 1994. The first prong of the *Sellers* test – injury -- was satisfied in 1994. It was not reasonably apparent to employee that the state of ill-being was caused by his employment until 1997. The second prong of the *Sellers* test – compensability -- was not satisfied until 1997. The period for filing the occupational disease claim did not begin to run until 1997. Employee's claim is timely.

I would reverse the award of the administrative law judge and issue a temporary award finding the claim is not barred by the statute of limitations. This claim should proceed to a final hearing. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee:	Raymond Russell	Injury No.:	94-204948
Dependents:	N/A		
Employer:	Wagner Electric Corp.		
Additional Party:	Second Injury Fund		
Insurer:	Travelers Indemnity Co. of America		
Hearing Date:	May 2, 2005	Checked by:	JED:tr

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? Not determined

3. Was there an accident or incident of occupational disease under the Law? Not determined
4. Date of accident or onset of occupational disease: Not determined
5. State location where accident occurred or occupational disease was contracted: Not determined
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Not determined
8. Did accident or occupational disease arise out of and in the course of the employment? Not determined
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: Not determined
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Raymond Russell Injury No.: 94-204948

17. Value necessary medical aid not furnished by employer/insurer? Not determined
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$388.91 TTD/PPD
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No
- TOTAL: -0-
23. Future requirements awarded: N/A

Said payments to begin N/A 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:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Raymond Russell	Injury No.: 94-204948
Dependents:	N/A	Before the
Employer:	Wagner Electric Corp.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Travelers Indemnity Co. of America	Checked by: JED

This case involves a disputed spine condition resulting to Claimant with the reported onset date of January 4, 1994. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund ("SIF") is a party to this claim. All parties are represented by counsel. A bifurcated hearing was commenced on threshold issues of liability.

Issues for Trial

1. Statute of Limitations;
2. Collateral Agreement as Bar to Actions under Chapter 287 (in derogation of §287.390.1 RSMo (2000)).

FINDINGS OF FACT

Dispositive Evidence

1. Claimant worked for Employer from 1991 to 1994.
2. Claimant never returned to work after January 4, 1994 because of disabling back pain and discomfort.
3. Claimant was sufficiently aware of his condition that, with assistance of counsel, he filed an Americans with Disabilities Act lawsuit contemplating same on September 15, 1995 and subsequently settled that lawsuit on March 10, 1997.
4. On July 15, 1997, Claimant filed a Claim for Compensation alleging an onset date of January 1994. His Second and Third Amended Claims allege this same date.
5. Attorneys for Employer filed a brief asserting Employer filed its Report of Injury, Form 1, on July 25, 1997. This is not found in the record of evidence.
6. Division minutes reflect a Report of Injury filing date of August 6, 1997.

RULINGS OF LAW

1. Claimant's condition became reasonably discoverable and apparent on or before January 4, 1994 which date commenced the two-year statute of limitations. §287.063.1 RSMo (2000).
2. Employer failed to timely file its Report of Injury within ten (10) days after knowledge of the claim. §287.380.1 RSMo (2000).
3. Claimant was, thus, entitled to an additional one year in which to file his Claim for Compensation due to Employer's omission. §287.430.1 RSMo (2000).
4. Employer filed an affirmative defense of statute of limitations in its Answer to Claim for Compensation.
5. Claimant's filing date of July 15, 1997 exceeded by over six months the permissible three-year period in which to file his Claim for Compensation.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, the Claim is denied on the basis of the affirmative defense of statute of limitations. The other issue is moot.

Date: _____

Made by: _____

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

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation