

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

Injury No.: 04-139587

Employee: James Saller
Employer: Willert Home Products, Inc.
Insurer: Employers Insurance Co. of Wausau
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: August 10, 2004
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. 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 dated April 16, 2007, by issuing a separate opinion denying compensation in the above-captioned case.

I. Procedural Matters

8 CSR 20-3.050 outlines the procedure for consolidation of workers' compensation claims, and provides as follows:

- (1) All claims of all persons arising out of the same injury or death shall be filed in the same proceeding.
- (2) The administrative law judge may order the consolidation of two (2) or more related proceedings arising out of the same accident for the purpose of taking evidence. In the event of consolidation, all documentary evidence previously filed or filed after that in any such proceeding shall be filed in the proceeding designated by the administrative law judge as the master proceeding and when so filed shall be considered evidence and part of the record in each of the consolidated proceedings.
- (3) Separate pleadings, however, must be filed and separate findings and awards made in each of the proceedings. Joint transcripts of the evidence may be made and a copy filed in each of the consolidated cases or in the master proceeding.

Injury No. 04-139587 and Injury No. 05-021157 were consolidated for hearing pursuant to 8 CSR 20-3.050. At the conclusion of the hearing and in conformance with 8 CSR 20-3.050, separate awards were issued by the administrative law judge.

Employee filed timely Applications for Review to the Commission as to each award, and the Commission has reviewed the awards on a consolidated basis.

II. Issue

The dispositive issue is whether or not employee, while in the employ of employer, contracted an occupational disease arising out of and in the course of his employment. The applicable statutes are section 287.063 RSMo

and section 287.067 RSMo 2000.

The alleged occupational disease is right bilateral carpal tunnel syndrome.

The Commission ultimately concludes as discussed below that the condition of employee's right upper extremity, carpal tunnel syndrome, is not attributable to an occupational disease arising out of and in the course of his employment with employer.

III. Legal Principles

Under the "last exposure rule", workers' compensation liability for occupational disease of carpal tunnel syndrome fell on employer in whose employment employee was last exposed to hazard of the disease prior to the filing of the claim, and not on subsequent employer. *Johnson v. Denton Const. Co.*, 911 S.W.2d 286 (Mo. 1995).

An informative legal analysis of occupational diseases pursuant to the Missouri statutes is found in *Kelley v. Banta and Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D 1999), from which the following legal principles are cited:

[1,2] In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo. App. 1991). The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo. App. E.D. 1995); *Dawson v. Associated Electric*, 885 S.W.2d 712, 716 (Mo. App. W.D. 1994); *Hayes*, 818 S.W.2d at 300; *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo. App. 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo. App. 1987).

[3-6] Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson* 885 S.W.2d at 716; *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 223 (Mo. App. W.D. 1992); *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Sellers*, 752 S.W.2d at 416; *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo. App. 1978). However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. *Hayes*, 818 S.W.2d at 299; *Sheehan v. Springfield Seed & Floral*, 733 S.W.2d 795, 797-8 (Mo. App. 1987). A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. *Dawson*, 885 S.W.2d at 716; *Sellers*, 776 S.W.2d at 504; *Sheehan*, 733 S.W.2d at 797. The opinion may be based on a doctor's written report alone. *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo. App. 1988). 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). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); *Webber*, 826 S.W.2d at 54; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

Although workers' compensation is a creature of statute, many common law pleading principles apply, such as the rule that whenever a claim asserted in an amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *Holaus v. William J. Zickell Co.*, 958 S.W.2d 72 (Mo. App. E.D. 1997).

The test of whether an amended claim relates back to the date of filing of the original claim is whether the

amendment amplifies the claim in the original pleading or sets up a new cause of action. *Ford v. American Break Shoe Company*, 252 S.W.2d 649 (Mo. App. 1952).

Our courts have repeatedly held that procedural rights are considered as subsidiary and substantive rights are to be enforced at the sacrifice of procedural formality. If a second claim filed is for the same injury, the second claim is tantamount in legal effect to the filing of an amended claim which supersedes the original claim. *Silas v. ACF Industries, Inc.*, 440 S.W.2d 189 (Mo. App. 1969).

IV. Facts

Employee testified as to his employment history with employer. Employee described his job activities and job duties in summary fashion as follows: employment relationship began January 1, 2001; employee initially was hired as a division manager; the first two years of employment he principally worked on establishing a standard operating procedure (SOP) manual; this job duty entailed computer type entry work and employee testified he typed approximately five to six hours per day using his right upper extremity; the SOP manual was completed at the end of calendar year 2002, at which time employee became a supervisor; as a supervisor employee's computer time decreased although employee alleged his work was still somewhat repetitious in movement concerning his right upper extremity; on January 1, 2004, employee was demoted to production supervisor and worked in that capacity until August 10, 2004, when he separated from employment with employer. Employee remained unemployed until March 21, 2005.

Employee acknowledged that he did not experience any right hand symptoms until two months after his separation of employment; and employee did not seek medical attention for his right upper extremity complaints until January, 2005. During his tenure of employment with employer, employee was diagnosed as being diabetic and was morbidly obese.

Employee filed an initial claim for compensation on March 16, 2005, alleging an injury date of January 24, 2005. Employee filed a second claim for compensation on October 17, 2005, alleging an injury date of August 10, 2004, the date of his separation from employment. The second claim for compensation was not styled as an amended claim and the Division of Workers' Compensation set up two separate files assigning two separate injury numbers for the two distinct injury dates. The only difference in the two claims for compensation were the dates of injury.

Joe Adamo testified in behalf of the employer; Mr. Adamo was the plant manager during the employee's employment tenure with employer; Mr. Adamo testified that employee worked on the SOP manual in calendar years 2001 and 2002; Mr. Adamo testified that employee prepared approximately one page per day concerning the SOP manual; after employee was demoted to supervisor on January 1, 2004, 95-98% of employee's time was spent on the floor; in the opinion of Mr. Adamo there is no way employee worked five to six hours per day on a computer; and in his opinion the work did not entail more than one-half hour per day concerning computer type entries.

Dr. Shuter, a board certified neurologist, testified in behalf of the employee; Dr. Shuter was of the opinion that employee's job activities exposed employee to the contraction of right carpal tunnel syndrome and in the opinion of Dr. Shuter the employment was a substantial factor in the resulting injury and disability.

Dr. Shuter assumed that employee's work duties consisted of repetitive activity for "most of the day", and Dr. Shuter assumed that employee was employed in the same capacity throughout his employment; on cross-examination Dr. Shuter acknowledged that obesity is a risk factor for contraction of carpal tunnel syndrome; that diabetes is a risk factor for the contraction of carpal tunnel syndrome; and age can also be a risk factor for the contraction of carpal tunnel syndrome especially being above the age of 30.

On further cross-examination, Dr. Shuter admitted that employee's time spent doing computer data entry was not considered in his report and Dr. Shuter did not do an analysis concerning the number of keystrokes per minute made by employee; and Dr. Shuter assumed that employee's manner of typing was a one-handed method with

one finger and corresponding wrist movement.

Dr. Shuter also admitted that employee's symptoms appeared after his separation from employment and coincided with additional weight gain by employee.

Dr. Ollinger, a board certified plastic surgeon, testified in behalf of employer; Dr. Ollinger testified that he reviewed employee's treating medical records, obtained employee's history from employee as to his job duties and reviewed employee's essential jobs function; Dr. Ollinger had three impressions: (1) employee is diabetic; (2) employee is morbidly obese; and (3) employee has right carpal tunnel syndrome, onset date October, 2004.

Dr. Ollinger was of the opinion that employee's job activities did not expose employee to the contraction of carpal tunnel syndrome; that employee's work duties were not a factor in employee's contraction of carpal tunnel syndrome; Dr. Ollinger's medical report and testimony detailed a specific timeline concerning employee's onset of symptoms and Dr. Ollinger was unequivocal that employee was not exposed to the hazard of contracting carpal tunnel syndrome due to his work activities. Dr. Ollinger was unequivocal in his opinion that employee's contraction of right carpal tunnel syndrome was related to employee's systemic factors and employee's job activities were not a substantial factor in the contraction of carpal tunnel syndrome, and simply put was not a factor whatsoever in his contraction of carpal tunnel syndrome.

V. Findings of Fact and Conclusions of Law

The Commission reviews the record, and, where appropriate, it will also determine the credibility of witnesses and the weight of their testimony, resolve any conflicts in the evidence, and reach its own conclusions on factual issues independent of an administrative law judge. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228 (Mo. App. S.D. 2003).

The ultimate determination of credibility of witnesses rests with the Commission. The Commission should take into consideration the credibility determinations made by an administrative law judge. However, the Commission is not bound to yield to an administrative law judge's findings, including those relating to credibility, and the Commission is authorized to reach its own conclusions. The law only requires the Commission to take into consideration the credibility determinations of an administrative law judge and not give those determinations deference. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo. App. W.D. 2004).

A decision made by an administrative law judge in a workers' compensation proceeding does not in any way bind the Commission and in fact, the Commission is free to disregard an administrative law judge's findings of fact. *Bell v. General Motors Assembly Div.*, 742 S.W. 2d 225 (Mo. App. E.D. 1987).

Employee alleges that his computer data entry activities in 2001 and 2002 exposed him to the hazard of contracting his alleged occupational disease, right carpal tunnel syndrome, and that there was a direct causal connection between the conditions under which he worked and the contraction of his alleged occupational disease.

The employee has failed to convince the Commission or establish by his evidence that there was exposure in the work place sufficient to conclude that his alleged repetitive motion concerning his right upper extremity was capable of producing his resultant medical condition, right carpal tunnel syndrome.

At the time employee initially filed his claim for compensation, March 16, 2005, employee was unemployed. Employee had not been employed since separating from employer August 10, 2004. Employee was diagnosed with right carpal tunnel syndrome on January 24, 2005, and that was the date of injury utilized in the initial claim for compensation.

The second claim for compensation was filed October 17, 2005, alleging an injury date of August 10, 2004, the last date of employment with employer. The only difference concerning the two claims filed is the date of injury. Employee was employed at the time the second claim was filed.

The Commission concludes that this second claim for compensation filed October 17, 2005, with the only change being the date of injury, was tantamount in legal effect to the filing of an amended claim. *Silas v. ACF Industries*,

Inc., 440 S.W.2d 189 (Mo. App. 1969).

The filing of the second claim was made merely to perfect the injury date initially established in the original workers' compensation claim filed. The second claim being an amended claim relates back to the original claim as there was no new and distinct claim or cause of action being alleged. *Holaus v. William J. Zickell Co.*, 958 S.W.2d 72 (Mo. App. E.D. 1997).

Under "last exposure rule", employer liable for compensation for occupational disease is the last employer to expose the employee to occupational hazard prior to the filing of the claim. *Johnson v. Denton Const. Co.*, 911 S.W.2d 286 (Mo. 1995).

Thus, since the second claim for compensation filed was tantamount to an amended claim for compensation, at the time of the filing of the claim, March 16, 2005, the last employer allegedly exposing employee to the hazard of his alleged disease, was Willert Home Products, Inc., the employer in the instant claim.

The Commission finds the testimony of Dr. Ollinger and Mr. Adamo more credible than the testimony of employee and Dr. Shuter as to the issue of whether or not employee contracted an occupational disease, i.e., right carpal tunnel syndrome, due to an injury arising out of and in the course of his employment.

The evidence proffered by the employer and accepted as reliable by the Commission indicates that employee was actually involved in extremely limited typing activities; the evidence offered by the employer reveals that employee was not involved in sustained repetitious keying activities at work exposing employee to the hazard of contracting the occupational disease alleged, carpal tunnel syndrome; the more persuasive evidence indicates to the Commission that in the years 2001 and 2002 employee was involved in establishing an SOP manual, however, repetitious keying activity did not take much more than one-half hour of entries per day; and for the calendar years 2003 and 2004 employee's repetitious or hand intensive activity was almost non-existent.

The Commission finds Dr. Ollinger obtained a more accurate history of employee's job activities while employed with employer; performed a more thorough review of employee's treating medical records; had a better understanding of employee's essential job functions; and constructed a detailed time line as to employee's onset of symptoms and its interplay with employee's systemic factors, which the Commission finds credible and persuasive.

Dr. Ollinger was unequivocal in opining that employee's job activities did not expose him to the contraction of right carpal tunnel syndrome; employee's job activities were not a substantial factor in contraction of carpal tunnel syndrome; and in fact, employee's work activities were not a factor whatsoever in his contraction of carpal tunnel syndrome; rather, employee's carpal tunnel syndrome was related to employee's systemic factors, i.e., morbid obesity as well as diabetes.

VI. Conclusion

In conclusion, based on the more credible and believable evidence proffered by employer concerning employee's actual job related activities, and the credible and persuasive medical opinions rendered by Dr. Ollinger, the Commission finds there was not a significant exposure to activities at work which involved forceful or repetitive movements which might lead to the development of right carpal tunnel syndrome. Employee has failed to establish by his evidence that his right carpal tunnel syndrome was attributable to an injury which arose out of and in the course of his employment. The Commission finds employee's work activities did not expose employee to repetitive motion capable of producing employee's alleged medical condition, as thoroughly explained by Dr. Ollinger.

Consequently, employee did not sustain an injury due to an occupational disease arising out of and in the course of his employment.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued April 16, 2007, is attached, but his findings and conclusions are not to be construed as being incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	James Saller	Injury No.:	04-139587
Dependents:	N/A		
Employer:	Willert Home Products, Inc.		
Additional Party:	Second Injury Fund (Open)		
Insurer:	Employers Insurance Co. of Wausau		
Hearing Date:	February 7, 2007	Checked by:	MDV:tr

Before the
**Division of Workers'
Compensation**

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: August 10, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? No
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: N/A

- 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: Not determined
- 14. Nature and extent of any permanent disability: None
- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: James Saller Injury No.: 04-139587

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: \$860.01
- 19. Weekly compensation rate: \$573.34/\$354.05
- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: Open

TOTAL: -0-

- 23. Future requirements awarded: None

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:	James Saller	Injury No.: 04-139587
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Willert Home Products, Inc.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund (Open)	
Insurer:	Employers Insurance Co. of Wausau	Checked by: MDV:tr

PREFACE

Claimant filed two claims for occupational disease arising out of his employment with Willert Home Products, Inc. The only difference in the claims is the date of the injury and as the testimony below will indicate the Claimant filed the additional claim to conform to the date on Employer's report of injury.

ISSUES PRESENTED

The issues presented for resolution by way of hearing were accident and/or occupational disease, medical causation, past medical benefits, arising out of and in the course of employment, and the nature and extent of disability to include disfigurement.

FINDINGS OF FACT

1. Claimant began work for Employer in January of 2001 as Division Manager of the "Blue Water Division". His primary duties from that date until the fall of 2002 were to compile and type a standard operations procedure ("SOP") manual for Employer. This job involved research and typing several hours per day. When it was completed in the fall of 2002, Claimant had no wrist symptoms. Claimant worked from the fall of 2002 until January 2004 as Division Manager but as the SOP manual was completed, these duties were less hand intensive.
2. Claimant was demoted to production supervisor in January of 2004 and worked in that capacity until August 10, 2004 when his employment with Employer terminated. The work from January 2004 to August 2004 was significantly less hand intensive than from January 2001 to the fall of 2002 when he was working on the SOP manual. It was also less hand intensive than the Division Manager work from fall of 2002 until January 2004.
3. Claimant had no wrist complaints in January of 2004 when he was demoted to the less hand intensive work.
4. Claimant had no hand or wrist symptoms when his employment terminated on August 10, 2004.
5. Claimant testified his wrist complaints first began in October of 2004, two months after he left the employment of the Employer.
6. Claimant testified he sought medical treatment five months after leaving Employer in January of 2005 with Dr. Dripps. Dr. Dripps' records however reflect a hyperextension injury, not what could be considered an overuse syndrome or an occupational disease.
7. Claimant filed two claims for the same injury, one filed on March 16, 2005 alleging an injury date of January 24, 2005 and the second claim on October 17, 2005 alleging an injury date of August 10, 2004, the last date worked. He testified he is not attempting a double recovery but wanted to perfect his claim with a relevant date conforming to the Employer's report of injury.
8. Claimant was employed by Jefferson Smurfit in March of 2005 and October of 2005 when he filed both of his claims. Claimant performed the same level of hand intensive duties at Smurfit as he did for the last two years of employment at Willert.
9. Surgery was performed in July of 2005 to release the right median nerve. Claimant lost two days of work following this surgery.

10. Claimant has diabetes and is overweight.
11. Dr. Shuter believes the carpal tunnel syndrome is work related and explains that a process began when Claimant was working at Employer that caused the transverse carpal ligament to thicken and culminated two months after he left employment when Claimant first began experiencing complaints.
12. Dr. Ollinger does not believe the carpal tunnel syndrome is work related and believes that it is related to Claimant's age, obesity and diabetes.

RULINGS OF LAW

Occupational Disease

This case turns on the application of the pre 2005 version of §287.063 and §287.067.7. The former reads:

- 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, as is set forth in subsection 7 of section 287.067, RSMo.
- 2) the employer liable for the compensation in this section provided 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.

Section 287.067.7 provides:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

Section 287.067.7 clearly exempts from my jurisdiction claims for repetitive motion occupational disease against prior employers after three months separation from the employment. Further, even though employer did not specifically raise the "Last Exposure Rule" as an issue, it did raise "occupational disease" as an issue. Thus, the issue is justiciable because either: 1) "last exposure" is jurisdictional and not subject to waiver or agreement or consent or 2) it was raised when the employer indicated "occupational disease" was an issue.

The Commission exercises limited jurisdiction, and if the legislature exempts any cases from the Commission's purview, then the claim falls outside the Commission's jurisdiction. Sodipo v. University Copiers, 23 S.W.3d 807, 810 (Mo.App. E.D. 2000). Jurisdiction is never waived, cannot be conferred by consent, agreement, appearance, answer or estoppel. Id. at 809. Thus, even though the last exposure rule was not specifically named as an issue, it is a jurisdictional issue that must be addressed. I find I do not have jurisdiction over this Employer.

In addition, the Employer did raise occupational disease as an issue. The "last exposure rule" certainly is a part of that occupational disease analysis. The last exposure rule is not a rule of causation. Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 615 (Mo.banc 2002). "Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease." Id.

Section 287.067.7 has been recognized as a turning point to shift liability away from the last employer in certain circumstances involving employment for less than three months. Copeland v. Associated Wholesale Grocers, ___ S.W.3d ___ 2006 W.L. 2940746 (Mo.App. S.D.). Such is not the case here. While Claimant had not been working for Smurfit for three months when he filed the first claim, he had been working for Smurfit for seven months when he filed the second claim. This second claim operates to negate the first claim. The "three month exception" is not applicable in the second claim because it was filed more than three months after Claimant began working for Smurfit.

The Southern District noted another turning point shifting liability away from the last employer in Maynard v. Lester E. Cox Medical Center/Oxford Health Care, 111 S.W.3d 487 (Mo.App. 2003). For the liability for claimant's occupational disease to [accrue to] subsequent employers, claimant would have to have been employed in an occupation or process in which the hazard of the disease exists. Id. at 491 citing §287.063.1. This concept can be thought of as a "no exposure rule". Thus if claimant is not exposed to the hazard of an occupational disease in the subsequent employment, that employer is not liable.

Reviewing the substantial, competent and credible evidence in this case, it is clear that Claimant was exposed to the hazard of the occupational diseases complained of in his subsequent employment with Jefferson Smurfit. Since the controlling or second claim was filed while Claimant was employed with Jefferson Smurfit, and after he had been there for

three months, the last exposure rule operates to absolve Willert from liability for Claimant's occupational disease. The rule operates to place that liability on the subsequent employer. Thus, whether I specifically denominate the issue "last exposure rule" or as a sub-issue inherent in the issue "occupational disease," this claim is not viable against the named employer.

The Supreme Court recently reaffirmed the application of the last exposure rule:

"The exception to the last exposure rule is usually invoked by downstream employers seeking to deny benefits to a new employee with a pre-existing condition and shift liability back upstream to a prior employer. Here, [employee] interpreted the statute as an instruction to bypass the ordinary procedure of filing the claim against his then-current employer and instead file his claim against [previous employer]. [Employee] contends that [the subsequent employer] did not expose him to the hazard of the occupational disease that caused his injury because his repetitive activities at [subsequent employer] were different and less strenuous than those he performed at [former employer]. [Employee] identifies swinging a sledgehammer as the specific "hazard of the occupational disease" referenced in section 287.063 and as the "substantial contributing factor" referenced in section 287.067.7.

It is undisputed that [employee] had been performing repetitive work using his upper extremities throughout his tenure at [subsequent employer]. ... The ALJ weighed the evidence and concluded that [employee] was exposed to the hazard of his occupational disease for more than three months at [subsequent employer].

The ALJ properly noted that grading the level of activity is not a factor once the employee has been exposed to repetitive activity for three months. The relevant statutes along with this Court's holding in Endicott create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws. [Employee's] medical records document his shoulder pain during several months of employment at [subsequent employer] before he filed the present claim. The last exposure rule of section 287.063 requires only that the employee be exposed to the "hazard of the occupational disease." It does not require that the hazard to which he was exposed be the "substantial contributing factor" to the injury. In other words, as to ... the most recent employer, [employee] need only show that he was exposed to the same type of hazard.

Pierce v. BSC, Inc., SC87689, _____ S.W.3d _____ (Mo.banc. December 5, 2006).

Likewise, I need not distinguish between the levels of activity at the different employers. I merely determine that Claimant was exposed to the same hazard of the occupational disease complained of while at subsequent Employer. The last exposure rule operates here as a bright line test to absolve Willert of any liability and deprive me of jurisdiction.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Employee: James Saller
Employer: Willert Home Products, Inc.
Insurer: Employers Insurance Co. of Wausau
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: January 24, 2005
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. 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 dated April 16, 2007, by issuing a separate opinion denying compensation in the above-captioned case.

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Employee filed timely Applications for Review to the Commission as to each award, and the Commission has reviewed the awards on a consolidated basis.

II. Findings of Fact and Conclusions of Law

In the instant case, employee filed his initial claim for compensation on March 16, 2005, alleging an injury date of January 24, 2005. Subsequently, employee filed a second claim for compensation on October 17, 2005, alleging an injury date of August 10, 2004, the date of his separation from employment and the actual correct injury date. The second claim for compensation was not styled as an amended claim and the Division of Workers' Compensation set up two separate files assigning two separate injury numbers for the two distinct injury dates. The only difference in the two claims for compensation were the dates of injury.

The Commission concludes that employee's second claim for compensation filed October 17, 2005, with the only change being the date of injury, was tantamount in legal effect to the filing of an amended claim. *Silas v. ACF Industries, Inc.*, 440 S.W.2d 189 (Mo. App. 1969). The filing of the amended claim, also supersedes the original claim. *Silas v. ACF Industries, Inc.*, 440 S.W.2d 189 (Mo. App. 1969).

The filing of the second claim, or the amended claim, was made merely to perfect the injury date initially established in

the original workers' compensation claim filed. No new and distinct claim or cause of action was alleged. The parties concede and agree that the correct injury date is August 10, 2004, and the two claims were consolidated pursuant to 8 CSR 20-3.050.

Due to the consolidation of the claims as agreed to by the parties and the administrative law judge, all justiciable issues were presented to the administrative law judge in the master proceeding, date of accident August 10, 2004, Injury No. 04-139587.

Accordingly, there are no justiciable issues before the Commission concerning any alleged date of injury occurring January 24, 2005, Injury No. 05-021157. All issues and disputes were presented to the Division as well as to the Commission pursuant to the date of accident occurring August 10, 2004, Injury No. 04-139587.

III. Conclusion

In conclusion, no compensation is awarded employee as there is no justiciable issue before the Commission concerning alleged date of injury January 24, 2005, and its corresponding injury number assigned, Injury No. 05-021157.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued April 16, 2007, is attached, but his findings and conclusions are not to be construed as being incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	James Saller	Injury No.: 05-021157
Dependents:	N/A	Before the
Employer:	Willert Home Products, Inc.	Division of Workers'
Additional Party:	Second Injury Fund (Open)	Compensation
Insurer:	Employers Insurance Co. of Wausau	Department of Labor and Industrial
Hearing Date:	February 7, 2007	Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDV:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
3. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No

- 6. Date of accident or onset of occupational disease: January 24, 2005
- 7. State location where accident occurred or occupational disease was contracted: St. Louis City
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No
- 7. Did employer receive proper notice? No
- 8. Did accident or occupational disease arise out of and in the course of the employment? No
- 10. 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: N/A
- 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: Not determined
- 15. Nature and extent of any permanent disability: None
- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: James Saller Injury No.: 05-021157

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 19. Employee's average weekly wages: \$860.01
- 19. Weekly compensation rate: \$573.34/\$354.05
- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: Open
- TOTAL: -0-
- 23. Future requirements awarded: None

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:	James Saller	Injury No.: 05-021157
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Willert Home Products, Inc.	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund (Open)	Jefferson City, Missouri
Insurer:	Employers Insurance Co. of Wausau	Checked by: MDV:tr

PREFACE

Claimant filed two claims for occupational disease arising out of his employment with Willert Home Products, Inc. The only difference in the claims is the date of the injury and as the testimony below will indicate the Claimant filed the additional claim to conform to the date on Employer's report of injury.

ISSUES PRESENTED

The issues presented for resolution by way of hearing were accident and/or occupational disease, medical causation, past medical benefits, arising out of and in the course of employment, and the nature and extent of disability to include disfigurement.

FINDINGS OF FACT

13. Claimant began work for Employer in January of 2001 as Division Manager of the "Blue Water Division". His primary duties from that date until the fall of 2002 were to compile and type a standard operations procedure ("SOP") manual for Employer. This job involved research and typing several hours per day. When it was completed in the fall of 2002, Claimant had no wrist symptoms. Claimant worked from the fall of 2002 until January 2004 as Division Manager but as the SOP manual was completed, these duties were less hand intensive.
14. Claimant was demoted to production supervisor in January of 2004 and worked in that capacity until August 10, 2004 when his employment with Employer terminated. The work from January 2004 to August 2004 was significantly less hand intensive than from January 2001 to the fall of 2002 when he was working on the SOP manual. It was also less hand intensive than the Division Manager work from fall of 2002 until January 2004.

15. Claimant had no wrist complaints in January of 2004 when he was demoted to the less hand intensive work.
16. Claimant had no hand or wrist symptoms when his employment terminated on August 10, 2004.
17. Claimant testified his wrist complaints first began in October of 2004, two months after he left the employment of the Employer.
18. Claimant testified he sought medical treatment five months after leaving Employer in January of 2005 with Dr. Dripps. Dr. Dripps' records however reflect a hyperextension injury, not what could be considered an overuse syndrome or an occupational disease.
19. Claimant filed two claims for the same injury, one filed on March 16, 2005 alleging an injury date of January 24, 2005 and the second claim on October 17, 2005 alleging an injury date of August 10, 2004, the last date worked. He testified he is not attempting a double recovery but wanted to perfect his claim with a relevant date conforming to the Employer's report of injury.
20. Claimant was employed by Jefferson Smurfit in March of 2005 and October of 2005 when he filed both of his claims. Claimant performed the same level of hand intensive duties at Smurfit as he did for the last two years of employment at Willert.
21. Surgery was performed in July of 2005 to release the right median nerve. Claimant lost two days of work following this surgery.
22. Claimant has diabetes and is overweight.
23. Dr. Shuter believes the carpal tunnel syndrome is work related and explains that a process began when Claimant was working at Employer that caused the transverse carpal ligament to thicken and culminated two months after he left employment when Claimant first began experiencing complaints.
24. Dr. Ollinger does not believe the carpal tunnel syndrome is work related and believes that it is related to Claimant's age, obesity and diabetes.

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RULINGS OF LAW

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Occupational Disease

This case turns on the application of the pre 2005 version of §287.063 and §287.067.7. The former reads:

- 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, as is set forth in subsection 7 of section 287.067, RSMo.
- 2) the employer liable for the compensation in this section provided 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.

Section 287.067.7 provides:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

Section 287.067.7 clearly exempts from my jurisdiction claims for repetitive motion occupational disease against prior employers after three months separation from the employment. Further, even though employer did not specifically raise the "Last Exposure Rule" as an issue, it did raise "occupational disease" as an issue. Thus, the issue is justiciable because either: 1) "last exposure" is jurisdictional and not subject to waiver or agreement or consent or 2) it was raised when the employer indicated "occupational disease" was an issue.

The Commission exercises limited jurisdiction, and if the legislature exempts any cases from the Commission's purview, then the claim falls outside the Commission's jurisdiction. Sodipo v. University Copiers, 23 S.W.3d 807, 810 (Mo.App. E.D. 2000). Jurisdiction is never waived, cannot be conferred by consent, agreement, appearance, answer or estoppel. Id. at 809. Thus, even though the last exposure rule was not specifically named as an issue, it is a jurisdictional issue that must be addressed. I find I do not have jurisdiction over this Employer.

In addition, the Employer did raise occupational disease as an issue. The “last exposure rule” certainly is a part of that occupational disease analysis. The last exposure rule is not a rule of causation. Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 615 (Mo.banc 2002). “Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease.” Id.

Section 287.067.7 has been recognized as a turning point to shift liability away from the last employer in certain circumstances involving employment for less than three months. Copeland v. Associated Wholesale Grocers, ____ S.W.3d ____ 2006 W.L. 2940746 (Mo.App. S.D.). Such is not the case here. While Claimant had not been working for Smurfit for three months when he filed the first claim, he had been working for Smurfit for seven months when he filed the second claim. This second claim operates to negate the first claim. The “three month exception” is not applicable in the second claim because it was filed more than three months after Claimant began working for Smurfit.

The Southern District noted another turning point shifting liability away from the last employer in Maynard v. Lester E. Cox Medical Center/Oxford Health Care, 111 S.W.3d 487 (Mo.App. 2003). For the liability for claimant’s occupational disease to [accrue to] subsequent employers, claimant would have to have been employed in an occupation or process in which the hazard of the disease exists. Id. at 491 citing §287.063.1. This concept can be thought of as a “no exposure rule”. Thus if claimant is not exposed to the hazard of an occupational disease in the subsequent employment, that employer is not liable.

Reviewing the substantial, competent and credible evidence in this case, it is clear that Claimant was exposed to the hazard of the occupational diseases complained of in his subsequent employment with Jefferson Smurfit. Since the controlling or second claim was filed while Claimant was employed with Jefferson Smurfit, and after he had been there for three months, the last exposure rule operates to absolve Willert from liability for Claimant’s occupational disease. The rule operates to place that liability on the subsequent employer. Thus, whether I specifically denominate the issue “last exposure rule” or as a sub-issue inherent in the issue “occupational disease,” this claim is not viable against the named employer.

The Supreme Court recently reaffirmed the application of the last exposure rule:

"The exception to the last exposure rule is usually invoked by downstream employers seeking to deny benefits to a new employee with a pre-existing condition and shift liability back upstream to a prior employer. Here, [employee] interpreted the statute as an instruction to bypass the ordinary procedure of filing the claim against his then-current employer and instead file his claim against [previous employer]. [Employee] contends that [the subsequent employer] did not expose him to the hazard of the occupational disease that caused his injury because his repetitive activities at [subsequent employer] were different and less strenuous than those he performed at [former employer]. [Employee] identifies swinging a sledgehammer as the specific "hazard of the occupational disease" referenced in section 287.063 and as the "substantial contributing factor" referenced in section 287.067.7.

It is undisputed that [employee] had been performing repetitive work using his upper extremities throughout his tenure at [subsequent employer]. ... The ALJ weighed the evidence and concluded that [employee] was exposed to the hazard of his occupational disease for more than three months at [subsequent employer].

The ALJ properly noted that grading the level of activity is not a factor once the employee has been exposed to repetitive activity for three months. The relevant statutes along with this Court's holding in Endicott create a bright line rule of convenience intended to eliminate the need to distinguish between sledgehammers and screws. [Employee's] medical records document his shoulder pain during several months of employment at [subsequent employer] before he filed the present claim. The last exposure rule of section 287.063 requires only that the employee be exposed to the "hazard of the occupational disease." It does not require that the hazard to which he was exposed be the "substantial contributing factor" to the injury. In other words, as to ... the most recent employer, [employee] need only show that he was exposed to the same type of hazard.

Pierce v. BSC, Inc., SC87689, ____ S.W.3d ____ (Mo.banc. December 5, 2006).

Likewise, I need not distinguish between the levels of activity at the different employers. I merely determine that Claimant was exposed to the same hazard of the occupational disease complained of while at subsequent Employer. The last exposure rule operates here as a bright line test to absolve Willert of any liability and deprive me of jurisdiction.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation