

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-092399

Employee: Jamie Scott
Employer: Midamerica Hotels Corporation
Insurer: Self-Insured c/o CMI
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 for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated November 4, 2009.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge John K. Ottenad, issued November 4, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Jamie Scott

Injury No.: 06-092399

Dependents: N/A

Employer: Midamerica Hotels Corporation

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (Open)

Insurer: Self-Insured C/O CMI

Hearing Date: July 9, 2009

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 14, 2006
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? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was employed as a restaurant server for Employer, when she developed bilateral upper extremity (wrist and hand) complaints as a result of her repetitive hand-intensive work in this position.
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: Right and left hands and wrists
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Jamie Scott

Injury No.: 06-092399

- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$209.83
- 19. Weekly compensation rate: \$139.89 for TTD/\$139.89 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

See body of the award and future requirements section below

- 22. Second Injury Fund liability: Open

TOTAL:

23. Future requirements awarded: **Continued and ongoing medical care for Claimant’s bilateral carpal tunnel syndrome, including but not limited to surgery, to cure and relieve her of the effects of the injury, as well as potentially the future payment of TTD benefits until Claimant is placed at maximum medical improvement, as explained in the body of the award.**

Each of said payments to begin immediately and to be payable and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Joseph Monticello.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jamie Scott	Injury No.: 06-092399
Dependents:	N/A	Before the
Employer:	Midamerica Hotels Corporation	Division of Workers'
Additional Party:	Second Injury Fund (Open)	Compensation
Insurer:	Self-Insured C/O CMI	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JKO

On July 9, 2009, the employee, Jamie Scott, appeared in person and by her attorney, Mr. Joseph Monticello, for a hearing for a Temporary or Partial Award on her claim against the employer, Midamerica Hotels Corporation, which is self-insured C/O CMI. The employer, Midamerica Hotels Corporation, which is self-insured C/O CMI, was represented at the hearing by its attorney, Ms. Elizabeth Barringer. The Second Injury Fund is a party to this case but was not represented at the hearing since the issues to be addressed in this Temporary or Partial Award did not involve the Second Injury Fund. The Second Injury Fund case is being left open by agreement of the parties. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about September 14, 2006, Jamie Scott (Claimant), has alleged an occupational disease claim.
- 2) Claimant was an employee of Midamerica Hotels Corporation (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$209.83, resulting in applicable rates of compensation of \$139.89 for total disability benefits and \$139.89 for permanent partial disability benefits.
- 7) Employer has not paid any benefits to date.

ISSUES:

- 1) Did Claimant sustain an occupational disease?
- 2) Did the occupational disease arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints medically causally connected to her alleged occupational disease at work?
- 4) Is Employer liable for future medical care?
- 5) Is Claimant entitled to future TTD benefits?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Dr. Bruce Schlafly, with attachments, dated June 11, 2008

Employer/Insurer Exhibits:

1. Deposition of Dr. R. Evan Crandall, with attachments, dated August 5, 2008

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony and the expert medical opinions and depositions, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 24-year-old restaurant server, who has worked for Midamerica Hotels Corporation (Employer) at the Holiday Inn since September 2004. She worked for Employer full time, an average of 8 hours per day for 5 days per week, prior to September 2006. Claimant testified that she generally worked from 5:30 a.m. to 1:30 p.m. during the breakfast and lunch rush periods. However, now she is only working part-time, a couple of days per week, because she just had a baby. She has not worked anywhere else since she began her employment with Employer. Her hourly rate of pay is \$2.50 per hour plus tips.
- 2) Claimant's job duties for Employer generally involved typical restaurant server activities. She said that she would start the day by making coffee in a large coffee

urn. She would then start the process of stocking up the stations for the breakfast rush. This involved putting juice, milk, bread, butter and syrup on a cart and bringing it to the front from the dry storage and the cooler. She would then unload these various items at the waitress station. She would place creamers in the baskets and put the baskets on each table. She then rolled silverware for approximately 64 settings. When guests arrived, she would serve them their food and then bus the tables after they were finished eating. She testified that the breakfast rush ran from approximately 6:00 a.m. to 8:00 or 9:00 a.m. After the breakfast rush was over, she would start putting everything away to get ready for the lunch rush, including wiping tables and other activities. She did not perform any dishwashing, but she did have to take the dirty dishes back to the kitchen on a tray so that they could be washed. Claimant testified that she carried the trays with her left hand flat and her right hand holding it up on the side to provide support. She testified that lunch usually consisted of serving salads, soups, etc. to the "bridge ladies" who came to the restaurant, ate and played bridge.

- 3) On cross-examination, Claimant admitted that the volume of customers she has varies from day to day. She described a typical day as waiting on approximately 80-90 customers. She testified that a slow day was approximately 60 customers. She estimated that 40-50% of each workday involved carrying the trays to and from the tables, and about 20% of each workday was rolling silverware. She estimated that over the course of the day, she might roll anywhere from 250-300 silverware sets.
- 4) Claimant testified that she first noticed problems with her hands in September 2006. She said that she was waking up with a tingling feeling from her palm up into her first two fingers and then she would also notice some pain that traveled up the arm into the neck.
- 5) Claimant testified that she reported her hand symptoms to Employer and she was eventually sent to the doctor. The only time she missed work for her hand symptoms was when she was sent to the doctor. She described her symptoms as constant since September 2006, and she testified that she had more trouble with the left hand than the right hand.
- 6) In terms of other injuries or accidents she has had, Claimant testified that she fractured her left wrist when she was nine or ten years old. She said the wrist was casted, but she had no other treatment for it since the cast was removed. Claimant admitted that she was involved in a motor vehicle accident in March 2009, but she denied that she had ever been involved in such an accident before that time. She testified that she received treatment for her neck for whiplash at the hospital the night of the accident, but that was all the treatment she received for the accident. Claimant admitted that she is on Medicare for disability related to ulcerated colitis. She has treated for this condition since she was 13 years old. She testified that she takes regular medication, sulfasalazine, an anti-inflammatory, to treat her ulcerated colitis.
- 7) Claimant was examined by **Dr. R. Evan Crandall** (Exhibit 1) at Employer's request on October 17, 2006. Claimant provided a history of the onset of her bilateral hand and wrist complaints a couple of months prior to the examination, with a worsening

of those complaints on September 15, 2006. Claimant reported her complaints as night numbness, numbness during the day, a burning feeling in the hands, and pain into the neck and upper back. She reported that it bothered her to drive and hold the phone. She provided a consistent history of her work activities for Employer and of her past medical history. On physical examination, Dr. Crandall found a positive Phalen's test bilaterally, an equivocal provocative test bilaterally, and negative Tinel's and Finkelstein tests bilaterally. Dr. Crandall recommended a nerve conduction study to determine whether or not she has a peripheral nerve compression syndrome, but noted that even if she is shown to have carpal tunnel syndrome, "The information she provided about her job does not support her case as being work related." Dr. Crandall wrote, "A server position in a restaurant does not have enough physical activity to be an ergonomic risk factor to cause carpal tunnel syndrome. This type of position has been analyzed many times. NIOSH guidelines require lifting of 10,000 pounds per day. Typically, waitresses lift between 1,000 and 1,500 pounds per day. This is the equivalent of the first 5 to 10 minutes of a workout at a gym for exercise." He noted that carpal tunnel syndrome is a "common disease" and she is capable of working without restrictions.

- 8) In Dr. Crandall's next report dated December 5, 2006 (Exhibit 1), he noted that Claimant had undergone the nerve conduction study that same date performed by Dr. Daniel Phillips and it showed that Claimant had "severe carpal tunnel syndrome on both sides." It also showed evidence of mild ulnar neuropathy across the left elbow. He wrote that the level of carpal tunnel syndrome suggested that it had been present for a long time. He characterized it as "unusual" for this to exist in a person Claimant's age, and noted that it is "extremely uncommon" for a person in a waitress position to claim a repetitive motion injury, because they do not perform enough lifting. He recommended bilateral carpal tunnel releases to treat her condition, but did not recommend surgery for the elbow. He again noted that he did not think this was a work-related condition.
- 9) Claimant was examined by **Dr. Bruce Schlafly** (Exhibit A) at her attorney's request for an Independent Medical Examination on March 12, 2007. According to the doctor's report, Claimant's hands were fine until September 2006 when she gradually began to notice pain and numbness, left worse than right, which she reported to her manager. Claimant provided a consistent history of her work activities as a server for Employer, as well as of her prior medical conditions and injuries. Claimant reported pain and numbness in both hands, especially with lifting, carrying trays or serving meals, and also reported that her hands wake her up at night. The physical examination revealed good range of motion in the wrists, with a negative Phalen's test bilaterally, a positive Tinel's sign over the left wrist, but a negative Tinel's sign in the right wrist. Claimant demonstrated decreased sensation to the pinwheel in the index fingers, particularly the left index finger, but two-point discrimination at the fingertips was normal.
- 10) Dr. Schlafly provided a primary diagnosis of left carpal tunnel syndrome. He also found that Claimant had right carpal tunnel syndrome, but it was not as severe as the left side. He recommended a left carpal tunnel release, and further recommended re-evaluation of the right wrist for possible right carpal tunnel release after the surgery

on the left had been completed. Dr. Schlafly opined that Claimant's repetitive work for Employer as a server and waitress was "the substantial and prevailing factor in the cause of her bilateral carpal tunnel syndrome, and in the need for treatment."

- 11) In his final report dated March 16, 2007, Dr. Crandall (Exhibit 1) wrote that he had reviewed the ergonomic job analysis performed by St. John's Mercy Sports & Therapy on January 18, 2007. Dr. Crandall felt that Claimant's job, as portrayed in the report, does not support Claimant's case being a work-related hand-intensive position that would be able to cause or contribute to carpal tunnel syndrome. Therefore, he opined that Claimant's job was neither the prevailing factor nor a substantial factor in the cause of her carpal tunnel syndrome.
- 12) Claimant took the deposition of **Dr. Bruce Schlafly** (Exhibit A) on June 11, 2008 to make his opinions in this case admissible at trial. Dr. Schlafly is a board certified orthopedic surgeon with added qualifications in surgery of the hand. He examined Claimant one time at the request of Claimant's attorney and provided no treatment. Dr. Schlafly testified consistent with his medical report and the opinions contained therein that have already been summarized above. He characterized her work activities for Employer as hand-intensive. He testified that he believed Claimant's hand-intensive, repetitive work activities for Employer were the prevailing factor in the development of her bilateral carpal tunnel syndrome, worse in the left than the right, and in the need for the treatment he had recommended for her wrists.
- 13) On cross-examination, Dr. Schlafly agreed that carpal tunnel syndrome is more common in women in the 40 to 60 year old age distribution, and that sometimes prior traumas could result in carpal tunnel syndrome.
- 14) Employer took the deposition of **Dr. R. Evan Crandall** (Exhibit 1) on August 5, 2008 to make his opinions in this case admissible at trial. Dr. Crandall is board certified in plastic surgery with a hand certification. Dr. Crandall testified consistent with his medical reports and the opinions contained therein that have already been summarized above. He noted that prior to his examination of her on October 17, 2006, her only treatment for her hand complaints had been wearing a brace at night. He agreed that the significant findings on his physical examination of her included a positive Phalen's test, an equivocal provocative test and a negative Tinel's sign bilaterally. He found normal range of motion and strength. He further confirmed that based on the OSHA/NIOSH guidelines for what they consider risk factors for carpal tunnel syndrome, her server position would not be able to cause carpal tunnel syndrome. Dr. Crandall testified that the results of the nerve conduction study confirmed severe carpal tunnel syndrome, which he opined you could not get in a year or two. He believed her problem was present for a longer period of time. He testified that the studies suggested her carpal tunnel syndrome was not only not work related, but it pre-existed her employment for Employer. Dr. Crandall testified that based on the results of his examination of Claimant, the diagnostic study, the job analysis, and his previous experience, Claimant's job was not the prevailing or substantial factor in causing her carpal tunnel syndrome. There was no cross-examination of Dr. Crandall on the causation issue from Claimant's counsel.

- 15) Claimant testified that she became pregnant in March 2008 and she delivered her baby on December 18, 2008. She denied any diagnosis of, or treatment for, diabetes or thyroid disease. She testified that she was 5 feet 5 inches tall and weighed approximately 180 pounds. In terms of hobbies prior to September 2006, Claimant testified that she went shopping, but really not much else.
- 16) Claimant described current complaints of tingling in the hands, waking up at night with the hand complaints, and feeling pain going up her arm. She described the shooting pain up the arm as constant, but noted that it has only reached the neck a couple of times. She admitted that her symptoms were mainly at night, but she did have some trouble gripping items as well. She testified that she has not seen any physician for her hand or wrist complaints since her examinations with Drs. Schlafly and Crandall. She was asking for medical treatment for her wrists to alleviate these complaints.

RULINGS OF LAW:

Based on a comprehensive review of the evidence described above, including Claimant's testimony, and the expert medical opinions and depositions, as well as my personal observations of Claimant at hearing, and based on the applicable laws of the State of Missouri, I find the following:

Since these three issues are seemingly interconnected in this case, I will address them together in the award.

Issue 1: Did Claimant sustain an occupational disease?

Issue 2: Did the occupational disease arise out of and in the course of employment?

Issue 3: Are Claimant's injuries and continuing complaints medically causally connected to her alleged occupational disease at work?

Considering the date of the injury, it is important to note that the new statutory provisions are in effect including, **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court "shall construe the provisions of this chapter strictly" and that "the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts." Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

I find that there is no dispute in this case, and the evidence clearly shows, that Claimant has bilateral carpal tunnel syndrome, based on the physical examinations and the

electrodiagnostic evidence in the record. The real dispute has to do with causation and the connection of this condition to her work for Employer.

Under **Mo. Rev. Stat. § 287.067.1 (2005)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, under **Mo. Rev. Stat. § 287.067.3 (2005)**, “An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” That section then defines “prevailing factor” as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” It continues, “Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”

In a case such as this one where there are conflicting opinions from the medical experts, it is a well-settled principle of law that, “where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999)

Considering the competent and substantial evidence listed above, I find that Claimant has met her burden of proving the presence of an occupational disease of bilateral carpal tunnel syndrome that arose out of and in the course of her employment for Employer and that is medically causally connected to that employment.

In arriving at this conclusion, I first considered the testimony provided by Claimant. I find that Claimant credibly described her job duties as a restaurant server. Her description of the job duties was consistently found in the medical treatment records and reports. She consistently and credibly explained at hearing the various duties that were required of her that involved the use of her hands, sometimes in a bent position, during the course of her working day for Employer. She explained how she would carry the trays on her raised left hand, with the palm up, and serve with the right hand off of the tray. That bolstered the credibility of her testimony that the complaints in the left hand were worse than the right hand. I further found her testimony credible that she would notice pain and complaints after working during the day. Both Dr. Schlafly and Dr. Crandall had similar descriptions of her work activities involving her hands. Additionally, Employer offered no evidence to dispute Claimant’s description of her work activities.

In addition to Claimant’s credible testimony, in order to meet her burden of proof, Claimant also needed to present credible medical evidence to support her claim that there was an occupational disease that arose out of and in the course of her employment and which was medically causally connected to it. In this case, there were opinions from two medical experts submitted at trial, who agreed on the presence of carpal tunnel syndrome, but who disagreed on its relationship to work, and whether or not it was medically causally connected to it. Dr. Bruce Schlafly opined that Claimant’s work activities were the prevailing factor in causing the bilateral hand and wrist condition to be symptomatic and need surgical treatment, while Dr. R. Evan Crandall opined that Claimant’s work was not the prevailing factor in causing the hand and wrist diagnosis.

After consideration of all of the evidence regarding Claimant's job duties, as well as after a thorough review of the basis of each doctor's opinion, I find that Dr. Schlafly's opinions on medical causation and the relationship of the bilateral carpal tunnel syndrome to her work doing repetitive, hand-intensive work for Employer, are more credible and persuasive than the opinions of Dr. Crandall in that regard.

In determining whose medical opinion was more competent, credible and reliable, I was struck by Dr. Crandall's bold assertion that, "A server position in a restaurant does not have enough physical activity to be an ergonomic risk factor to cause carpal tunnel syndrome." It was even more stunning that he made such an assertion in his very first report before even knowing for sure if she had carpal tunnel syndrome since no nerve conduction studies had yet been done. He states in his report that he will not know if she has carpal tunnel syndrome until nerve conduction studies are done, but rules out the possibility that it could be work related apparently solely because of her job classification as a restaurant server. Admittedly, he does cite some NIOSH guidelines on physical activity as support for this assertion, but those guidelines were not placed into evidence, and even if they were, those guidelines deal with what constitutes an "ergonomic risk factor" for carpal tunnel syndrome, not whether or not Claimant's job activities were "the prevailing factor" in causing the condition.

Then in subsequent reports, after establishing that she does, in fact, have carpal tunnel syndrome, Dr. Crandall comments how "unusual" it is for someone Claimant's age to have carpal tunnel syndrome, and how the test results show that it was a long-standing condition because of how "extremely uncommon" it is for a waitress to claim a repetitive motion injury. In reading Dr. Crandall's reports and testimony, I find that he is intent, from the very beginning, to find that this condition is not work-related, based solely on some belief he has that restaurant servers cannot get work-related carpal tunnel syndrome. Dr. Crandall points to no other systemic disease, condition, injury, activities or hobbies that could account for the onset of this condition. Despite the fact that he acknowledges it is unusual for someone Claimant's age to get carpal tunnel syndrome, and despite his inability to find any other cause for the condition outside of her work, he seemingly is able to rule out her work based solely on this overbroad, incredible assertion in his very first report that servers cannot get work-related carpal tunnel syndrome.

For all these reasons, I find that Dr. Crandall's opinions are less credible, persuasive or reliable than the well-founded opinions of Dr. Schlafly in that regard.

Dr. Schlafly's opinions on the presence of an occupational disease, its relationship to work and whether or not it was medically causally connected to it, are more credible and persuasive than those discussed above from Dr. Crandall. Dr. Schlafly's opinion on the relationship between the repetitive hand use, and the development of the bilateral carpal tunnel syndrome is supported by the other evidence in this case. He described the greater exposure to the disease in the hands and wrists because of the work Claimant was doing. He described a recognizable link between a distinctive feature of Claimant's job (the repetitive hand use while carrying trays, serving food, rolling silverware and performing other server activities) and the bilateral carpal tunnel syndrome. Considering all these things, I find he credibly established that Claimant's work was the prevailing factor in causing the bilateral carpal tunnel syndrome. All in all, I found his opinion to have a more solid basis and also found his opinions to be more consistent with the rest of the evidence in this case.

Accordingly, on the basis of Claimant's credible testimony and the credible and persuasive testimony of Dr. Bruce Schlafly, I find that Claimant met her burden of proving the presence of an occupational disease of bilateral carpal tunnel syndrome that arose out of and in the course of employment for Employer, and which was medically causally connected to it. I find that Claimant's hand-intensive and repetitive work for Employer was the prevailing factor in causing this medical condition and any disability Claimant currently has in her hands and wrists as a result of it. I find that her work for Employer was the primary factor, in relation to any other factor, in causing both the medical condition and disability.

Issue 4: Is Employer liable for future medical care?

Issue 5: Is Claimant entitled to future TTD benefits?

Regarding the issue of medical care, under **Mo. Rev. Stat. § 287.140.1 (2005)**, "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Claimant bears the burden of proving this element of the claim.

Just as Claimant must prove all of the other material elements of her claim, the burden is also on her to prove entitlement to future medical treatment. *Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo.App. 1997) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 223 (Mo. banc 2003). Claimant is entitled to an award of future medical treatment if she shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. *Concepcion v. Lear Corporation*, 173 S.W.3d 368, 372 (Mo.App. 2005).

Based on the competent and substantial evidence described above, I find that Claimant is entitled to the future medical care suggested and recommended by Dr. Bruce Schlafly for the bilateral carpal tunnel syndrome related to this injury at work for Employer on September 14, 2006.

After thoroughly reviewing the medical report and opinions from Dr. Schlafly, I find a clear, credible, and persuasive opinion from him that Claimant will need additional treatment including surgery to treat her left, and perhaps her right, hands and wrists, which is medically causally related to her work as a restaurant server for Employer. It is important to note that even Dr. Crandall, despite his contrary opinion on causation, agrees with Dr. Schlafly on the need for future medical treatment for this condition. Quite frankly, there is no opinion in the record indicating that Claimant is at maximum medical improvement for the bilateral carpal tunnel syndrome.

Therefore, based on Dr. Schlafly's opinion, and based on Claimant's desire to receive the recommended medical care, I find Claimant has met her burden of proof to show an entitlement to future medical treatment for her left and right hands and wrists. Employer is directed to return Claimant to a treating orthopedic and/or hand surgeon for further evaluation and a determination on whether the previously recommended surgery is still needed to cure and relieve Claimant of

the effects of this injury at work. Employer is then directed to provide any and all treatment (conservative or surgical) recommended by that physician (or any other referral physicians) to cure and relieve Claimant's bilateral carpal tunnel syndrome, which is medically causally related to her work for Employer.

Regarding the issue of future TTD, Employer is responsible under the statute for the payment of temporary total disability benefits pursuant to **Mo. Rev. Stat. § 287.170 (2005)** during the continuance of such disability at the appropriate weekly rate of compensation. The statute also defines "total disability" under **Mo. Rev. Stat. § 287.020.6 (2005)** as the "inability to return to any employment and not merely...(the) inability to return to the employment in which the employee was engaged at the time of the accident." Claimant bears the burden of proof on this element of her claim just as on any other element.

Case law has held that the test for entitlement to temporary total disability is not whether Claimant is able to do some work, but whether Claimant is able to compete for work in the open labor market under her current physical condition. *Thorsen v. Sachs Electric Co.*, 52 S.W.3d 611 (Mo.App. W.D. 2001).

Claimant alleges potential entitlement to future TTD during the anticipated ongoing course of treatment until she is placed at maximum medical improvement. None of the medical opinions submitted at trial indicate Claimant is incapable of working full, unrestricted duty at this point. Obviously, if Claimant is taken out of work by the treating physician in the future while she is receiving treatment for the bilateral carpal tunnel syndrome, then perhaps at that point Claimant would have further entitlement to TTD benefits. It would be speculative now, however, for me to even consider a period of future TTD with no concrete opinion that it will actually be needed by Claimant in the future.

Given the totality of the evidence in this case, and given my prior reliance on Dr. Schlafly's opinion that additional treatment is needed to cure and relieve Claimant of the effects of this work-related occupational disease, I leave open the possibility that Claimant may be entitled to future TTD benefits depending on the treatment ultimately provided by the authorized treating physician, and that physician's opinion on Claimant's ability to work while receiving the necessary treatment.

Therefore, Employer is not directed to pay additional TTD benefits at this time, but is directed to review the need for future TTD during the ongoing course of treatment, dependent on the opinion of their authorized treating physician, until Claimant is placed at maximum medical improvement for the bilateral carpal tunnel syndrome.

CONCLUSION:

Claimant has met her burden of proving that her bilateral carpal tunnel syndrome is the result of a compensable occupational disease, which arose out of and in the course of her employment, and which was medically causally related to it. She met that burden through her own credible testimony, and the credible and persuasive testimony of Dr. Schlafly that her work was the prevailing factor in causing the resulting medical condition and any hand disability. Employer is responsible for providing continued and ongoing medical treatment for Claimant's left and right hands and wrists to cure and relieve her of the effects of the injury, including, but not limited to, referral to an orthopedic/hand surgeon for evaluation and surgery. Additionally, if the authorized treating physician should opine that Claimant is unable to work as a result of the work injury, Employer is responsible for the payment of future TTD benefits until the doctor releases Claimant at maximum medical improvement for her bilateral carpal tunnel syndrome. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Joseph Monticello for necessary legal services.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation