

TEMPORARY OR PARTIAL AWARD

(Affirming Award and Decision of Administrative Law Judge)

Injury No. 13-072248

Employee: Eric Sharp

Employer: 1) Tarlton Corporation
2) C. Rallo Contracting Company, Inc.

Insurer: 1) Old Republic Insurance Company
2) National Fire Insurance Company of Hartford

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 § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated October 17, 2014.

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 § 287.510 RSMo.

The award and decision of Administrative Law Judge John K. Ottenad, issued October 17, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee:	Eric Sharp	Injury No.:	13-072248
Dependents:	N/A		
Employer #1:	Tarlton Corporation		
Employer #2:	C. Rallo Contracting Company, Inc.		
Additional Party:	Second Injury Fund (Open)		
Insurer #1:	Old Republic Insurance Company C/O Gallagher Bassett Services, Inc.		
Insurer #2:	National Fire Insurance Company of Hartford		
Hearing Date:	July 15, 2014	Checked by:	JKO

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? 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 20, 2013
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 laborer for Tarlton, when he developed bilateral hand/wrist/arm complaints as a result of his repetitive hand-intensive activities in this position (jackhammering concrete) for this Employer.
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/Wrists
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00

Employee: Eric Sharp

Injury No.: 13-072248

- 16. Value necessary medical aid paid to date by employer/insurer (Tarlton)? \$4,208.04
- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$1,194.00
- 19. Weekly compensation rate: \$796.00 for TTD/\$446.85 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: N/A

TOTAL:

- 23. Future requirements awarded: **Continued and ongoing future medical care for Claimant's right and left hands/wrists for bilateral carpal tunnel syndrome, including but not limited to surgery, to cure and relieve him of the effects of the injury, 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: Dean L. Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Eric Sharp	Injury No.:	13-072248
Dependents:	N/A		
Employer #1:	Tarlton Corporation		
Employer #2:	C. Rallo Contracting Company, Inc.		
Additional Party:	Second Injury Fund (Open)		
Insurer #1:	Old Republic Insurance Company C/O Gallagher Bassett Services, Inc.		
Insurer #2:	National Fire Insurance Company of Hartford		
Hearing Date:	July 15, 2014	Checked by:	JKO

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

On July 15, 2014, the employee, Eric Sharp, appeared in person and by his attorney, Mr. Dean L. Christianson, for a hearing for a Temporary or Partial Award on his claim against the employer, Tarlton Corporation, its insurer, Old Republic Insurance Company C/O Gallagher Bassett Services, Inc., the employer, C. Rallo Contracting Company, Inc., and its insurer, National Fire Insurance Company of Hartford. The employer, Tarlton Corporation, and its insurer, Old Republic Insurance Company C/O Gallagher Bassett Services, Inc., were represented at the hearing by their attorney, Mr. Patrick A. Patterson. The employer, C. Rallo Contracting Company, Inc., and its insurer, National Fire Insurance Company of Hartford, were represented at the hearing by their attorney, Ms. Randee E. Schmittiel. The Second Injury Fund is a party to this case, but was not represented at the hearing, as this was a temporary hearing.

The parties agreed that this was being tried as a non-Section 203 temporary hearing. 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) Eric Sharp (Claimant) was an employee of the various employers at the following times:
 - a) Claimant was employed by C. Rallo Contracting Company, Inc. (Rallo) from January 24, 2012 to February 21, 2012; March 27, 2012 to April 3, 2012; August 28, 2012 to October 30, 2012; March 26, 2013 to May 7, 2013; and May 29, 2013 to July 31, 2013;
 - b) Claimant was employed by Tarlton Corporation (Tarlton) from May 9, 2013 to May 24, 2013 and August 5, 2013 to October 31, 2013.

- 2) Venue is proper in the City of St. Louis.

- 3) The Claim was filed within the time prescribed by the law.
- 4) At the relevant time, Claimant earned an average weekly wage of \$1,194.00, resulting in applicable rates of compensation of \$796.00 for total disability benefits and \$446.85 for permanent partial disability benefits.
- 5) Tarlton paid medical benefits totaling \$4,208.04.

ISSUES:

- 1) Did Claimant sustain an accident and/or occupational disease?
- 2) Did the accident and/or occupational disease arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints medically causally connected to his alleged accident and/or occupational disease at work?
- 4) What is the appropriate date of injury?
- 5) What is the effect, if any, of the application of the Last Exposure Rule to this Claim?
- 6) Did Claimant provide Employer with proper notice of the injury under the statute?
- 7) Is Employer liable for future medical care?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

1. Deposition of Dr. Bruce Schlafly, with attachments, dated April 23, 2014
2. Certified medical treatment records of Concentra Medical Centers
3. Certified medical treatment records of SSM (Dr. Steven Baak)
4. Certified medical treatment records of Bell Chiropractic Center
5. Certified medical treatment records of Mercy Clinic Internal Medicine
6. Certified medical treatment records of Dr. Jeffery Faron
7. Certified records of the Missouri Division of Workers' Compensation for Claimant in Injury Numbers 89-088889, 94-155554, 94-159130, 95-096262, 96-046098, 96-099992, 97-004223, 98-122508 and 02-087899

Employer/Insurer (Tarlton) Exhibits:

- A. Deposition of Dr. Mitchell Rotman, with attachments, dated May 19, 2014
- B. Laborers' Claim Form dated October 1, 2012 from Claimant
- C. Deposition of Claimant taken on February 7, 2014

Employer/Insurer (Rallo) Exhibits:

Nothing separate offered or admitted, but Rallo adopted the Employee Exhibits offered and admitted above

Notes: 1) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on July 15, 2014.

2) Some of the deposition Exhibits were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

3) The parties asked that I take judicial and/or administrative notice of the file contents, including the pleadings, in the Division of Workers' Compensation file in this matter. Without objection, I will take such judicial and/or administrative notice of those file contents in making my rulings in this case.

FINDINGS OF FACT:

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

- 1) **Claimant** is a 44-year-old, right-handed laborer, who had worked out of the union hall for various employers over the last 26 years. He said that he has moved around quite a bit for work and has not worked for one employer for any extended period of time. Claimant's job as a laborer required extensive and repetitive use of his hands over the years for operating compression hammers, jackhammers and other vibratory tools, as well as demolition, cleanup and lifting and moving objects.
- 2) Claimant testified that he is pursuing a Claim here for bilateral hand, wrist and arm problems. He denied ever being diagnosed with diabetes and also denied any history of rheumatoid arthritis.
- 3) In terms of prior problems, complaints or injuries, Claimant admitted that he fractured his right forearm as a child. He had a fracture to his left fifth finger, which required surgery. He injured his left upper extremity and back, when he fell off a truck in 1994, and he injured his right arm and shoulder in 1995, when he was hit by a scissor lift and knocked into a wire spool. The records of the **Division of Workers'**

Compensation (Exhibit 7) confirm that Claimant had injuries to his right leg in 1989, left knee in 1994, low back in 1994 (15% body as a whole-low back settlement), right shoulder/arm in 1995, left ankle in 1996, low back in 1996, low back in 1997 (8.5% body as a whole-low back settlement), low back in 1998 (10% body as a whole-low back settlement) and low back in 2002.

- 4) The earliest reference to hand complaints or problems in the record of evidence is contained in the medical records of **Dr. Jeffery Faron** (Exhibit 6), Claimant's primary care physician at that time. In a note dated January 3, 2005, Dr. Faron records complaints of right elbow pain and bilateral hand numbness. The note indicates that Claimant works in construction and is unable to rest his arm. Dr. Faron assessed Claimant as having carpal tunnel syndrome and tennis elbow, for which he recommended conservative care with wrist braces and an elbow band. Claimant was instructed to call if he was not improving, but there are no further records from Dr. Faron in evidence in this case.
- 5) Claimant testified that he did not remember numbness in his hands in January 2005 and did not remember that visit to Dr. Faron or his complaints at that time. He denied seeing any other doctors for hand complaints at or around that time and continued working as a laborer, reporting that his hands were "good" from 2005 to 2010.
- 6) Medical treatment records from **Mercy Clinic Internal Medicine** (Exhibit 5), Claimant's current primary care physicians, confirm that when Claimant was examined for groin pain on February 15, 2010, he listed his prior issue with carpal tunnel syndrome as being "RESOLVED." There were no hand/wrist complaints documented during that visit.
- 7) Claimant continued to work as a laborer after 2010, most specifically working for Rallo from January 24, 2012 to February 21, 2012; March 27, 2012 to April 3, 2012; August 28, 2012 to October 30, 2012; and March 26, 2013 to May 7, 2013. He worked for Tarlton from May 9, 2013 to May 24, 2013, and, then, went back to Rallo from May 29, 2013 to July 31, 2013.
- 8) During this time, Claimant began treating with **Dr. Steven Baak**, who Claimant described as an arthritis doctor, because he was having complaints with his hands and, specifically, aching in his right arm. Medical treatment records from **SSM** (Exhibit 3) document Claimant's initial visit with Dr. Baak on September 11, 2012. Claimant was complaining of right arm pain. Dr. Baak ordered an ultrasound, ordered testing that ruled out seronegative arthritis syndrome, diagnosed right carpal tunnel syndrome and injected the right carpal tunnel. On September 13, 2012, Claimant reported improvement with the injection. Claimant was still having issues with his right hand falling asleep, when he saw Dr. Baak on October 23, 2012, despite the injection. Dr. Baak suggested that nerve conduction studies should be performed and surgery might need to be considered for the right carpal tunnel syndrome. He wrote, "This is not an inflammatory syndrome and is clearly related to work with compression hammers and the like thus I anticipate a workman's comp related surgical intervention for CTS likely soon given failure of conservative measures of splinting injection and

- NSAIDs. [sic]” Despite this treatment suggestion from Dr. Baak, Claimant had no further treatment for his hands/wrists with Dr. Baak or anyone else until September 20, 2013. Claimant indicated that he kept working in 2012 and into mid-2013, mostly for Rallo, performing demo work and site cleanup. He said that his hands were good and he had no reason to seek additional treatment because he was working normally without significant complaints.
- 9) Starting on August 5, 2013 and continuing until October 31, 2013, Claimant worked for Tarlton. Claimant testified that his hands started hurting during this period of time, as he was performing jackhammering of 8-18 inches of concrete in a garage in Clayton. He testified that he was mostly using a 90-pound air-compressed jackhammer, but also occasionally used a 60-pound air-compressed jackhammer as well. He said that he had to hang onto the jackhammer with both hands to operate it and his body shook as he performed this task for ten hours a day, four days a week, minus a lunch break and one other break during each day. He estimated that he was actually jackhammering for approximately nine hours per day, for a month and a half straight that he worked for Tarlton at this site. He noted that in his 26 years as a laborer, he had never before jackhammered for nine hours a day, all of those days in a row, so this work for Tarlton was different than he had ever performed for any other employer. He agreed that he had used vibrating tools and hand tools previously, but not to the same extreme as during his work for Tarlton. Claimant testified that about three weeks into this jackhammering job, his hands really started hurting. He described complaints of pain in his hands, his hands were falling asleep, he could not feel his fingers, and he had severe pain in his forearms and up to this elbows. He said that he could not sleep because the pain would wake him up.
- 10) Claimant testified that he sought a course of chiropractic care from **Dr. Gene Bell at Bell Chiropractic Center** (Exhibit 4), which included muscle stimulation in the arms, but that treatment did not really help his complaints. He said that he also used ice and took ibuprofen for his complaints.
- 11) Claimant testified that going into his fourth week performing this job, he told Eric Gilmore, the superintendent at Tarlton, that his hands were hurting and the jackhammering was “killing” him. Mr. Gilmore responded that they were going to have three more years of this kind of work. He did not offer to send Claimant anywhere for medical treatment to address his hand complaints, but, admittedly, Claimant did not ask for medical treatment at that time either.
- 12) On September 20, 2013, Claimant returned to Dr. Baak (Exhibit 3), reporting that he was having a severe flare-up of his carpal tunnel syndrome that was “overwhelming.” Claimant reported that he left work early on September 18 because he was unable to continue this jackhammering work and he was anticipating a change to another activity. Dr. Baak noted, “He is very debilitated and clearly needs to stop running a jackhammer for consecutive shifts and right now should stop it entirely.” Dr. Baak diagnosed a severe flare-up of carpal tunnel symptoms related to jackhammering for the last few months. Now, instead of just positive findings in the right hand/arm, Claimant also had positive findings in the left hand/wrist as well.

- 13) Claimant testified that he returned to work on September 23, 2013 and asked Scooter, another superintendent, for medical care for his hands/wrists. Claimant told him that he could not jackhammer anymore and he needed to see the safety guy, because his hands were killing him and his fingers were numb. At that point, Tarlton sent him to Concentra, where he was also examined by Dr. Rotman.
- 14) Medical treatment records from **Concentra Medical Centers** (Exhibit 2) document Claimant's treatment at that facility. Claimant was first examined there on September 23, 2013, at which time he reported a consistent history of bilateral hand and elbow complaints following 1 ½ months of constant jackhammering of concrete at work. Claimant was diagnosed with lateral epicondylitis, wrist sprain, wrist pain and carpal tunnel syndrome. He was returned to light-duty work and prescribed physical therapy, medications, a cold pack and wrist braces. Claimant attended a total of six physical therapy visits without much of a reduction in his complaints. He, then, saw **Dr. Mitchell Rotman** (Exhibits 2 and A) on September 30, 2013, who again took a consistent history of his work activities and of the jackhammering that triggered his significant hand symptoms. Claimant denied having numbness and tingling problems prior to this work activity. Dr. Rotman ordered EMG/nerve conduction studies, which confirmed that Claimant had severe carpal tunnel syndrome on the right and moderate carpal tunnel syndrome on the left. On October 7, 2013, Dr. Rotman opined that Claimant has bilateral carpal tunnel syndrome, right greater than left, for which he is definitely going to need surgical treatment on each wrist. He noted, "The problem has probably been coming on for years, and the jackhammer use was just the final triggering event."
- 15) Claimant testified that after Dr. Rotman told him he would need surgery, he never saw Dr. Rotman again, and, in fact, has not been seen by any other doctors for treatment of his hands, except Dr. Baak, who provides tramadol, which does not help him very much. Claimant is seeking to have the surgery performed on his hands to try to alleviate his complaints from the carpal tunnel syndrome.
- 16) Claimant testified that after September 23, 2013, he went back to light-duty work for Tarlton, pushing a broom or cleaning the yard. He did not go back to jackhammering. After his job at Tarlton ended on October 31, 2013, he worked for ICS, Volk and Rallo (again), and, now, has been employed by McCarthy for the last 1 ½ months. He said that all of these jobs were less intensive than the work he performed for Tarlton. He also admitted that he applied for and collected unemployment benefits during periods he was not employed after October 2013.
- 17) In terms of his current complaints, Claimant testified that his right hand is numb and is constantly falling asleep. He has numbness in his thumb, index and middle fingers and pain that goes up his arm. He described the pain as severe and said that he has problems sleeping. He said that he basically has the same complaints in his left hand as he described in his right hand.

- 18) On cross-examination by Tarlton, Claimant admitted that he has used jackhammers prior to his work for Tarlton, just not to the extent he was using them at Tarlton on this job. He also admitted that he has used compression hammers to chip floors or remove tiles, both before and after his job at Tarlton. He admitted that he denied having numbness and tingling in his hands prior to August 2013, when asked in his deposition, and he admitted that he did not tell Concentra, Dr. Rotman or Dr. Schlafly about the prior complaints and problems with his hands when he was examined by them. Claimant admitted basically having problems with his hands on a monthly basis since 2012, which he attributed to some arthritis, and for which he sought the treatment with Dr. Baak and takes the tramadol. Despite what is contained in Dr. Baak's records, Claimant testified that he did not remember Dr. Baak telling him that he had carpal tunnel syndrome in 2012, or that it was related to work or that he needed surgery. All he remembered Dr. Baak telling him is that he had a pinched nerve and arthritis, for which he gave Claimant the injection and the tramadol.
- 19) Despite the difference between the actual contents of Dr. Baak's records and Claimant's recollection of his visits and discussions with Dr. Baak, Claimant's testimony was bolstered by the **Laborers' Claim Form** (Exhibit B), wherein he reported a diagnosis of tendonitis/pinched nerve on September 7, 2012. There was no mention of a carpal tunnel syndrome diagnosis. Therefore, even though Dr. Baak's records contain the diagnosis, as well as a discussion of Claimant's work and potential need for surgery, Claimant's testimony that he was unaware of that and was only aware of a pinched nerve or arthritis diagnosis, seems supported by the contemporaneous filing of the claim form with the Laborers' Union on October 1, 2012.
- 20) On cross-examination by Rallo, Claimant testified that he never reported any arm or hand problems to anyone at Rallo and never requested medical care from them either. He admitted that he never missed any work there and never modified his work at all. He confirmed that the first time he had to work light duty because of his hands was after September 2013, when he was working for Tarlton. Prior to 2013, he was working full duty, doing all the aspects of his job. He also confirmed that he had no problems with his hands and did not use a jackhammer during his employment at Rallo, nor even during his initial period of employment at Tarlton in May 2013. Claimant testified that the jackhammering at Tarlton caused a change in the condition of his hands, including worsened symptoms and more parts of his hands/fingers being involved. He confirmed that the symptoms were new and different compared to the prior problems he had had with his hands.
- 21) Claimant took the deposition of **Dr. Bruce Schlafly** (Exhibit 1) on April 23, 2014 to make his opinions in this case admissible at trial. Dr. Schlafly is board certified in orthopedic surgery with added qualifications in surgery of the hand. He examined Claimant on one occasion, December 18, 2013, at the request of Claimant's attorney and provided no medical treatment. After taking a history from Claimant, reviewing some medical records and performing a physical examination of Claimant, he issued his report in this case on that same date. Claimant provided Dr. Schlafly an accurate and consistent account of the work activities he was performing for Tarlton and Rallo

leading up to this significant onset of bilateral hand complaints. Of note, Claimant reported that his hands were "fine" until he performed the extensive jackhammering for Tarlton, and he did not give Dr. Schlafly the prior history of any hand problems or treatment for carpal tunnel syndrome. Dr. Schlafly diagnosed bilateral carpal tunnel syndrome and recommended surgery for the treatment of this condition. He opined that Claimant's work as a laborer, and, specifically, his work for Tarlton, operating the jackhammer, is the prevailing factor in the cause of Claimant's bilateral carpal tunnel syndrome and his need for bilateral carpal tunnel releases.

- 22) Subsequent to his initial report, Claimant sent Dr. Schlafly the medical treatment records from Dr. Baak, Dr. Faron and Bell Chiropractic Center, as well as Claimant's deposition testimony, and after review of that additional information, Dr. Schlafly issued a supplemental report in this case dated April 9, 2014. This additional information basically dealt with the problems, complaints and diagnoses that Claimant had in his hands prior to his work for Tarlton. Dr. Schlafly's opinions on the diagnosis and need for surgical treatment in this case did not change from his first report, nor did his opinion on what was the prevailing factor for this condition, but his explanation of his opinion did slightly change based on this new information. He explained that if nerve conduction studies had been performed on Claimant's hands prior to August 2013, they probably would have shown abnormalities involving the median nerves, but Claimant's symptoms prior to August 2013 were intermittent and at a mild level compared to his current complaints. He further explained that the constant jackhammering at Tarlton is the prevailing factor in the aggravation of Claimant's probable pre-existing carpal tunnel syndrome, such that he now required surgical treatment instead of conservative care to alleviate his complaints.
- 23) On cross-examination, Dr. Schlafly agreed that Claimant's employment activities prior to August 2013 actually caused the development of the carpal tunnel syndrome, but the employment activities with Tarlton in August and September 2013 resulted in an aggravation of the pre-existing bilateral carpal tunnel syndrome. He also agreed that Claimant missed no time from work nor was he unable to perform any of his regular job duties prior to August 2013. Dr. Schlafly confirmed that he thought there was a change in Claimant's condition after using the jackhammer in August 2013, as evidenced by the marked increased intensity in the pain, numbness and tingling in the hands. He opined that he thought there would be some disability associated with the probable pre-existing carpal tunnel syndrome, which was markedly worsened by the Tarlton employment activities.
- 24) Employer took the deposition of **Dr. Mitchell Rotman** (Exhibit A) on May 19, 2014 to make his opinions in this case admissible at trial. Dr. Rotman is board certified in orthopedic surgery with added qualifications in surgery of the hand. He examined and treated Claimant for a time, as described above, and then issued some additional reports on October 14, 2013 (further revised on October 24, 2013) and April 28, 2014, after he had the chance to review and consider additional information and medical records. Dr. Rotman opined that Claimant had idiopathic carpal tunnel syndrome, which generally comes on slowly over a period of years, and given the advanced nature of his nerve studies, he believed if studies had been done prior to February

2013, they also would have shown carpal tunnel syndrome findings. He originally opined that the jackhammering at Tarlton would have been the prevailing factor that brought out his symptoms, but would not have been the prevailing factor for the cause of the idiopathic condition. However, after further consideration of the prior symptoms and complaints, he opined that the prevailing factor “is clearly not related to his work at Tarlton but related to the date of diagnosis when he first treated and diagnosed with carpal tunnel back in 2012 [sic].” He opined that, “That is clearly the date of injury here.” He commented further that, “It appeared based on the records that Mr. Sharp was also using his hands fairly heavily at his place of employment at that time and that workers’ compensation issues were addressed back in 2012 at the time of previous employment prior to his working for Tarlton in 2013.” He wasn’t surprised that jackhammering would trigger his symptoms again. While he agreed that Claimant was in need of bilateral carpal tunnel releases, he did not believe the need for those releases was Claimant’s work at Tarlton, and, instead, he believed the prevailing factor was “his activities on September 11, 2012 as well as his BMI of greater than 30 which is also the risk factor for carpal tunnel syndrome.” He focused on the date of September 11, 2012, because that was the date he believed the diagnosis of bilateral carpal tunnel syndrome was made based on ultrasound criteria.

25) On cross-examination, Dr. Rotman explained why he generated the revised addendum report on October 24, 2013, following the original report on October 14, 2013. He said that originally he was working with an understanding that the date of injury was September 23, 2013, since that is what he got from Concentra when Claimant was referred to him, but when he received correspondence from the insurer with a date of injury of September 2, 2013, he decided to issue the revised addendum with the revised date. Other than the letter from the insurer, he had not seen that date anywhere else. He also further explained his opinion that he believed the prevailing factor was as of September 11, 2012, by noting that the date of the test that diagnosed the injury or condition becomes the date of injury for a legal case. He also explained his opinion that carpal tunnel syndrome is an idiopathic condition, by noting that they know the risk factors for it, but “work has never been proven as a cause of carpal tunnel.” He noted that it is considered work related when the work is heavy, repetitive, with vibrating tools and lots of heavy grasping, but it has never been proven to actually cause the ligament to become thick. It is just an aggravating factor that brings on the symptoms to the point where surgery is needed. In that respect, he did believe that jackhammering could cause carpal tunnel symptoms. However, he did not believe that any repetitive use of the upper extremities in a workplace setting could cause carpal tunnel syndrome.

26) Despite his earlier opinions on carpal tunnel syndrome never being related to work, on further cross-examination, Dr. Rotman tried to explain that date of a test for diagnosis sets the legal date for the alleged injury, but, then he added, only “if he is doing repetitive, heavy activities at the time.” It is completely confusing and unclear why it matters what activities a claimant was doing at the time of a diagnostic test, as far as a date of injury is concerned, if work can never cause the condition anyway. He admitted that he believed Claimant had asymptomatic left carpal tunnel back in 2012.

27) While Claimant was in the courtroom testifying in this matter, sitting in the witness chair, I observed that he would often let his hands hang down at his sides below the level of the witness chair he was sitting in and would shake them out, his right hand more often than his left hand, in an apparent attempt to gain some relief of the symptoms he was having in his hands. He explained that he shakes his hands because they fall asleep on him.

RULINGS OF LAW:

Based on a comprehensive review of the evidence described above, including Claimant's testimony, the expert medical opinions and depositions, the medical treatment records, and the other records, 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 the first five issues are seemingly interconnected in this case, I will address them together in this section of the award.

- Issue 1: Did Claimant sustain an accident and/or occupational disease?*
- Issue 2: Did the accident and/or occupational disease arise out of and in the course of employment?*
- Issue 3: Are Claimant's injuries and continuing complaints medically causally connected to his alleged accident and/or occupational disease at work?*
- Issue 4: What is the appropriate date of injury?*
- Issue 5: What is the effect, if any, of the application of the Last Exposure Rule to this Claim?*

Considering the alleged date of the injury, it is important to note the statutory provisions that 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."

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*,

121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

I find that there is really no dispute in this case, and the evidence clearly shows, that Claimant has bilateral carpal tunnel syndrome, based on the physical examinations and the diagnostic evidence in the record. I further find that there is really no dispute that Claimant is in need of surgical treatment to address his severe bilateral carpal tunnel syndrome. Both of the medical experts in the record, Drs. Schlafly and Rotman, agree on these two points. The real disputes have to do with causation, the connection of this condition to his work for the employers, and which of the two competing employers, if either, should be responsible for providing benefits to Claimant for this condition.

As a preliminary matter, I should also note that while the parties put at issue whether Claimant suffered an accident and/or occupational disease that arose out of and in the course of his employment for Employer, in reality, I found no evidence in the record to substantiate an accident theory in this case. Neither Claimant's testimony, nor the opinions or testimony of the medical experts, nor any other evidence for that matter, supports a finding that Claimant's bilateral carpal tunnel syndrome came from an accident, suffered by Claimant in the course and scope of his employment. Therefore, any issues suggesting an accident theory in this case are denied and I will focus on the occupational disease theory of the case that is really at issue in this matter.

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."

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), provided guidance on the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that he contracted an occupationally-induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) Whether there was an exposure to the disease 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. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Id.* at 48. Finally, the Court noted, "where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible." *Id.*

In a case such as this one, where Claimant worked for multiple employers over the course of many years, and where competing employers are disputing their responsibility for the alleged condition, I find that it is necessary to first determine whether Claimant suffered from a compensable occupational disease that arose out of and in the course of his employment, and which was medically causally related to it (irrespective of which employer may be responsible for it), and only after making that determination, to then decide which of the competing employers, if either, is responsible for the payment of benefits for the condition.

Based on Claimant's credible testimony and the competent, credible and persuasive testimony of Dr. Bruce Schlafly, I find that Claimant has met his burden of proving the presence of an occupational disease that arose out of and in the course of his employment. I further find that he has met his burden of proof to show that his bilateral carpal tunnel syndrome is medically causally related to his employment as a laborer.

I find that the undisputed evidence in the record shows that Claimant has worked as a laborer out of the union hall for over 26 years. I find that his work as a laborer routinely required repetitive, extensive use of his hands for operating vibratory hand tools, such as compression hammers for chipping floors or tile, and even larger and heavier jackhammers, which required extensive gripping and which shook his whole body as he operated them. His job duties as a laborer also required the extensive use of his hands for grasping, lifting and moving objects, while performing demolition and cleanup duties. I find that his job duties as a laborer were hand intensive and regularly required the extensive, repetitive use of his hands to perform his work for the various employers for whom he was employed.

I further find, based on the undisputed description of his job duties at Tarlton beginning on August 5, 2013, that his work there for that employer was particularly hand intensive and repetitive. Claimant credibly and consistently described the work he performed for Tarlton during this time, which included jackhammering of 8-18 inches of concrete in a garage in Clayton, mostly using a 90-pound air-compressed jackhammer, but also occasionally using a 60-pound air-compressed jackhammer as well. He credibly described how he had to hang onto the jackhammer with both hands to operate it and his body shook as he performed this task for ten hours a day, four days a week, minus a lunch break and one other break during each day. He estimated that he was actually jackhammering for approximately nine hours per day, for a month and a half straight that he worked for Tarlton at this site. Finally, he noted that in his 26 years as a laborer, he had never before jackhammered for nine hours a day, all of those days in a row, so this work for Tarlton was different than he had ever performed for any other employer. This description of his work activities for Tarlton was consistently repeated by Claimant in the medical treatment records and examination reports. I find that Tarlton provided no evidence to dispute this description of the work activities or the extent of the vibratory, repetitive, hand-intensive nature of the work Claimant performed for them beginning on August 5, 2013.

In order to meet his burden of proof in this matter, in addition to credible testimony on his own behalf, Claimant also needed to submit competent, credible and reliable medical evidence to show that he suffered from an occupational disease and also to show that that occupational disease was medically causally related to his work as a laborer. To meet this burden of proof, Claimant offered the opinions and testimony of Dr. Bruce Schlafly, who opined that Claimant's work as a laborer, and, specifically, his work for Tarlton, operating the jackhammer, is the

prevailing factor in the cause of Claimant's bilateral carpal tunnel syndrome and his need for bilateral carpal tunnel releases. To counter this opinion, Employer offered the opinions and testimony of Dr. Mitchell Rotman, who opined that Claimant had idiopathic bilateral carpal tunnel syndrome, which generally comes on slowly over a period of years. He testified that, "work has never been proven as a cause of carpal tunnel." He noted that it is considered work-related when the work is heavy, repetitive, with vibrating tools and lots of heavy grasping, but it has never been proven to actually cause the ligament to become thick. It is just an aggravating factor that brings on the symptoms to the point where surgery is needed. In that respect, he did believe that jackhammering could cause carpal tunnel symptoms. However, he did not believe that any repetitive use of the upper extremities in a workplace setting could cause carpal tunnel syndrome. Having reviewed both opinions in light of the rest of the extensive medical treatment records and evidence in this case, I find that the opinions and testimony of Dr. Schlafly are more competent, credible and persuasive than the contrary opinions of Dr. Rotman in this case.

While I find that both experts are equally qualified to render opinions in this area of medicine, as both are board certified orthopedic surgeons with added qualifications in surgery of the hand, I find that Dr. Rotman's opinion, that repetitive use of the upper extremities cannot cause carpal tunnel syndrome, runs afoul of years of accepted case law and learned medical literature. Despite his contention that work cannot cause carpal tunnel syndrome, even in his own reports and testimony, in an attempt to shift liability away from Tarlton, he seemingly points to the repetitive, hand-intensive work Claimant was doing prior to September 11, 2012 as the prevailing factor for Claimant's bilateral hand condition. If he truly believes work does not cause carpal tunnel syndrome, then it makes no sense why he would point to activities in 2012 as the prevailing factor, instead of activities in 2013 when he was employed by Tarlton. If work does not cause the condition, then it should not matter what Claimant was doing in 2012 or 2013. Additionally, on further cross-examination, Dr. Rotman tried to explain that date of a test for diagnosis sets the legal date for the alleged injury, but, then he added, only "if he is doing repetitive, heavy activities at the time." It is completely confusing and unclear why it matters what activities a Claimant was doing at the time of a diagnostic test, as far as a date of injury is concerned, if work can never cause the condition anyway.

Dr. Schlafly's opinion on the relationship between Claimant's work as a laborer (specifically his work for Tarlton operating the jackhammer), and the development of the bilateral hand condition (carpal tunnel syndrome) is supported by the other evidence in this case. I find that there was an exposure to the disease, greater than or different from that which affects the public generally, because of the work Claimant was doing with the extensive, repetitive use of his hands and his work with heavy grasping and vibratory tools as a part of his job. I also find that there is a recognizable link between the disease (bilateral carpal tunnel syndrome) and some distinctive feature of the employee's job (hand intensive, repetitive use of vibratory tools involving heavy grasping) which is common to all jobs of that sort. Dr. Schlafly credibly described a recognizable link between a distinctive feature of Claimant's job (the hand intensive, repetitive use of vibratory tools involving heavy grasping) and the bilateral carpal tunnel syndrome. Considering all these things, I find Dr. Schlafly credibly established that Claimant's work was the prevailing factor in causing the bilateral hand condition (carpal tunnel syndrome).

Tarlton suggests that Claimant is not credible and his testimony cannot serve as a basis for an award of compensation in this matter because he did not disclose his prior hand problems

to the treating and examining physicians in this case. For that same reason, Tarlton suggests that the opinions and testimony of Dr. Schlafly should not be relied on in this matter. I disagree. While the prior medical records discuss carpal tunnel syndrome, I believe Claimant when he testified that his understanding was that he had a pinched nerve, not carpal tunnel syndrome. This testimony is further bolstered by the Laborers' Claim Form (Exhibit B), wherein he reported a diagnosis of tendonitis/pinched nerve on September 7, 2012. There was no mention of a carpal tunnel syndrome diagnosis. Therefore, even though Dr. Baak's records contain the diagnosis, as well as a discussion of Claimant's work and potential need for surgery, Claimant's testimony that he was unaware of that and was only aware of a pinched nerve or arthritis diagnosis, seems supported by the contemporaneous filing of the claim form with the Laborers' Union on October 1, 2012. Additionally, while Claimant did not provide a detailed history of his prior hand problems and treatment to Dr. Schlafly when he examined him, I find that Dr. Schlafly did have a complete history, via the additional medical records and reports he reviewed, before issuing his final report and providing his testimony 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 his burden of proving the presence of an occupational disease of bilateral carpal tunnel syndrome that arose out of and in the course of employment as a laborer, and which was medically causally connected to it. I find that Claimant's hand intensive, repetitive use of vibratory tools involving heavy grasping, during the course of his employment as a laborer, was the prevailing factor in causing this medical condition and any disability Claimant currently has in his hands/wrists as a result of it. I find that his work as a laborer was the primary factor, in relation to any other factor, in causing both the medical condition and disability in his hands/wrists.

Having now determined that Claimant met his burden of proving a compensable occupational disease that arose out of and in the course of his employment, and which was medically casually related to it, it is now appropriate to determine an appropriate date of injury and which, if either, of the two competing employers is responsible for the payment of benefits for this bilateral hand condition.

The determination of these issues begins with **Mo. Rev. Stat. § 287.063.2 (2005)**, which states:

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 prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.

It is, therefore, necessary to determine when there was "evidence of disability" in order to determine whose employment Claimant was in prior to that evidence of disability and if Claimant was exposed to the hazard of the occupational disease in that employment, such that that employer would be liable for compensation in this case. It is also important to note, that this statutory provision, commonly referred to as the *last exposure rule*, is a rule of convenience and not a rule of causation. *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612 (Mo. 2002),

citing *Johnson v. Denton*, 911 S.W.2d 286, 288 (Mo. 1995) and *Maxon v. Leggett & Platt*, 9 S.W.3d 725, 730 (Mo. App. S.D. 2000).

In trying to persuade this Court on when there was first “evidence of disability” in this case, Claimant and Rallo argue that the first evidence of disability was in September 2013, when Claimant was employed by Tarlton, because that is when Claimant first missed time from work on account of his occupational disease bilateral hand injury. They cite *King v. St. Louis Steel Casting Co.*, 182 S.W.2d 560, 562 (Mo. 1944) for the proposition that, “The disability from occupational disease, for which compensation is payable, must necessarily occur when the employee is incapacitated for work.” Similarly, they point to *Simmerly v. Bailey Corporation*, 890 S.W.2d 12, 14 (Mo. App. S.D. 1994), which held that disability occurred when the employee suffered a loss of earning power and was unable to do the work that exposed her to the carpal tunnel syndrome, regardless of the fact that it was initially diagnosed at an earlier time.

On the other hand, Tarlton argues that the first evidence of disability in this case actually occurred prior to their employing Claimant in 2013, because that is when Claimant was first diagnosed with the condition and, when, according to the medical records, a physician indicated a potential need for surgery. They cite cases such as *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo. App. W.D. 1997), *Rupard v. Kiesendahl*, S.W.3d 389 (Mo. App. W.D. 2003) and *Feltrop v. Eskens Drywall and Insulation*, 957 S.W.2d 408 (Mo. App. W.D. 1997) which all stand for the proposition that an employee does not need to actually miss time from work to show evidence of disability, but rather, it is harm to the employee’s earning capacity on account of the injury that triggers the date of disability. They point to such factors as an employee’s inability to perform certain work tasks or limitations on his ability to work that affects his earning ability.

In the case at bar, while the medical records show that Claimant was diagnosed with carpal tunnel syndrome prior to his work at Tarlton (prior to 2013), I find that the date of diagnosis is not controlling for the purposes of establishing “evidence of disability.” Likewise, I do not believe that a potential surgical recommendation is controlling either. The controlling factor is when Claimant’s bilateral hand condition caused harm to Claimant’s earning capacity and/or caused Claimant to miss time from work. Claimant credibly testified that he kept working in 2012 and into mid-2013, mostly for Rallo, performing demo work and site cleanup. He said that his hands were good and he had no reason to seek additional treatment because he was working normally without significant complaints. I find that it was not until September 20, 2013, when Claimant was examined by Dr. Baak, that there is any reference to Claimant needing to change or alter his working abilities because of his hand complaints and problems. On that date, Dr. Baak noted, “He is very debilitated and clearly needs to stop running a jackhammer for consecutive shifts and right now should stop it entirely.” That statement from Dr. Baak is followed three days later by a visit to Concentra Medical Centers, when Claimant is placed on light-duty work restrictions on account of his bilateral hand problems.

Applying the facts of this case to the statute, as dictated by the relevant case law described above, I find that Claimant showed evidence of disability on account of his bilateral carpal tunnel syndrome occupational disease as of September 20, 2013. That is the first date when a physician issued a work restriction, no use of a jackhammer, which harmed his earning capacity and negatively affected his ability to perform his job as a laborer. I find that as of September 20, 2013, Claimant was incapacitated from any work with a jackhammer, which previously had been

a component of his job as a laborer. Therefore, I find that the appropriate date of injury for this Claim is September 20, 2013. Since Claimant was in the employment of Tarlton when he was last exposed to the hazard of the occupational disease prior to evidence of disability on September 20, 2013, I find that Tarlton is liable for the compensation to be provided under this section on account of the compensable occupational disease of bilateral carpal tunnel syndrome.

I should also note that Tarlton alleges that Dr. Schlafly's testimony, that there would be some disability associated with the probable pre-existing carpal tunnel syndrome, also supports their contention that there was "evidence of disability" prior to Claimant's employment by Tarlton. I am not persuaded by this argument. It is clear to me in reading Dr. Schlafly's testimony in context, that the disability he was referring to is perhaps some amount of permanent partial disability that is normally assessed for milder versus severe cases of carpal tunnel syndrome. I find that all of the cases enumerated above, all focus on "disability" as defined by having a negative impact on an employee's earning capacity. As noted above, the first evidence of that was on September 20, 2013. So, while Dr. Schlafly agreed that Claimant may have had some disability prior to Tarlton as a result of having prior carpal tunnel syndrome, he also clearly stated that Claimant missed no time from work nor was he unable to perform any of his regular job duties prior to August 2013. Therefore, based on the definition of "disability" contemplated by the relevant case law for this statutory provision, I continue to believe that September 20, 2013, is the date on which evidence of disability manifested itself in this case.

The statute does allow for the last employer that exposed Claimant to the hazards of an occupational disease due to repetitive motion to attempt to shift liability for that disease to the prior employer, if the exposure at the last employer was for less than three months. Under **Mo. Rev. Stat. § 287.067.8 (2005)**:

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 the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

Therefore, according to this provision, in order to shift liability for the repetitive motion occupational disease away from the last employer, it must be shown that Claimant was exposed to the repetitive motion at the last employer for less than three months *and* that there is evidence demonstrating that the exposure at the immediate prior employer was the prevailing factor in causing the injury.

In the case at bar, it is clear that Claimant was exposed to the repetitive motion that caused the bilateral carpal tunnel syndrome for a period of less than three months at Tarlton prior to the evidence of disability. He began working for Tarlton on August 5, 2013 and demonstrated evidence of disability on account of the bilateral carpal tunnel syndrome on September 20, 2013. However, being exposed for less than three months is not enough to shift liability to the immediate prior employer. It must also be shown that the exposure to the repetitive motion at the immediate prior employer is the prevailing factor in causing the injury. I find that that has not been shown in this case. Claimant's testimony and the credible and persuasive medical opinions of Dr. Schlafly, as well as the medical treatment records of Dr. Baak from September 20, 2013,

all point to the jackhammering activity at Tarlton as the prevailing factor for the occupational disease (bilateral carpal tunnel syndrome) in this case. Quite frankly, there is no credible or persuasive evidence in the record that points to Claimant's exposure at Rallo as the prevailing factor for the bilateral carpal tunnel syndrome occupational disease in this case. Therefore, I find that the liability for this occupational disease cannot be shifted from Tarlton to Rallo on account of this statutory provision.

Accordingly, on the basis of Claimant's credible testimony and the credible and persuasive testimony of Dr. Bruce Schlafly, I find that Claimant met his burden of proving the presence of an occupational disease of bilateral carpal tunnel syndrome that arose out of and in the course of his employment as a laborer, and which was medically causally connected to it. I find that as of September 20, 2013, Claimant was incapacitated from any work with a jackhammer, which previously had been a component of his job as a laborer. Therefore, I find that the appropriate date of injury for this Claim is September 20, 2013. Since Claimant was in the employment of Tarlton when he was last exposed to the hazard of the occupational disease prior to evidence of disability on September 20, 2013, I find that Tarlton is liable for the compensation to be provided under this section on account of the compensable occupational disease of bilateral carpal tunnel syndrome.

Issue 6: Did Claimant provide Employer with proper notice of the injury under the statute?

Under **Mo. Rev. Stat. § 287.420 (2005)**, "No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice."

When considering this notice provision for occupational diseases, and specifically interpreting the phrase "after the diagnosis of the condition," Courts have held that "a person cannot be diagnosed with an 'occupational disease or repetitive trauma' until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure." **Allcorn v. Tap Enterprises, Inc.**, 277 S.W.3d 823 (Mo. App. S.D. 2009). In other words, a mere diagnosis of a condition is not enough. It is only after a diagnosis is made and a medical causal connection between that diagnosis and the work exposure is given, that the 30-day notice time frame begins to run.

Case law has held that the purpose of this section is to give an employer the timely opportunity to investigate the facts surrounding an injury, and if the injury occurred, the chance to provide the employee with medical treatment in order to minimize the disability. **Willis v. Jewish Hospital**, 854 S.W.2d 82 (Mo. App. E.D. 1993) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). However, if the employee failed to give timely written notice of the injury, that failure may be circumvented if the failure to give timely written notice did not prejudice the employer.

In the case at bar, Claimant testified that going into his fourth week working for Tarlton in August/September 2013, he told Eric Gilmore, the superintendent at Tarlton, that his hands were hurting and the jackhammering was “killing” him. Mr. Gilmore responded that they were going to have three more years of this kind of work. He did not offer to send Claimant anywhere for medical treatment to address his hand complaints, but, admittedly, Claimant did not ask for medical treatment at that time either. Then, on September 23, 2013, he asked Scooter, another superintendent, for medical care for his hands/wrists. Claimant told him that he could not jackhammer anymore and he needed to see the safety guy, because his hands were killing him and his fingers were numb. At that point, Tarlton sent him to Concentra for medical care for his wrists. Given the information contained in the Court file for this case, I find that Tarlton filed a Report of Injury on September 30, 2013, admitting that they were notified of the injury on September 23, 2013. I further find that the Claim for Compensation was filed by Claimant on November 1, 2013.

Much like in *Allcorn*, the resolution of this issue in the case at bar turns on when “the diagnosis of the condition” occurred. As discussed in detail above, an important benchmark in this determination is when the condition reached the point of showing evidence of disability, which in this case was on September 20, 2013, because up to that point, though he may have had the condition, it was not a compensable condition until reaching the point of showing evidence of disability. Having reviewed the medical treatment records and expert reports in detail, I find that the first “diagnosis of the condition” occurred on September 20, 2013, when Dr. Steven Baak wrote his note, in which he both, offered a diagnosis and related it to the jackhammering Claimant had been performing for Tarlton. Claimant verbally notified Tarlton on September 23, 2013 and was sent by Tarlton for medical treatment. Even if there would be a dispute about Dr. Baak offering a clear medical causation opinion at that time, then certainly by the time Dr. Schlafly offered such an opinion on December 18, 2013, Claimant had already verbally notified Tarlton and filed his written Claim for Compensation to provide notice to Tarlton in this matter.

To the extent that Claimant verbally notified Tarlton three days after his visit to Dr. Baak on September 20, 2013, to the extent that Tarlton admitted receiving notice of the injury on September 23, 2013, and, further, to the extent that Tarlton had the opportunity to provide medical care at Concentra, which they later terminated on their own, I find that Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute and/or showed that Tarlton was not prejudiced by the lack of written notice in this case.

Issue 7: Is Employer liable for future medical care?

According to **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 his claim, the burden is also on him 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 he 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 and Dr. Mitchell Rotman for the bilateral carpal tunnel syndrome related to this injury at work for Tarlton leading up to September 20, 2013.

After thoroughly reviewing the medical opinions and testimony from Drs. Schlafly and Rotman, I find that there is no dispute that Claimant is in need of bilateral carpal tunnel release surgeries to cure and relieve him of the effects of his bilateral carpal tunnel syndrome, which I have now determined to be related to his work as a laborer for Tarlton. It is important to note that there is no opinion from a physician in the record suggesting that surgery is not needed or unnecessary given Claimant's failure to respond to the previously provided conservative care.

Therefore, based on Dr. Schlafly's opinion, and based on Claimant's desire to receive the recommended medical care, I find Claimant has met his burden of proof to show an entitlement to future medical treatment for his bilateral hands/wrists. Tarlton is directed to return Claimant to a treating physician and/or 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. Tarlton 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 his work for Tarlton.

CONCLUSION:

Claimant has met his burden of proving that his bilateral carpal tunnel syndrome is the result of a compensable occupational disease, which arose out of and in the course of his employment, and which was medically causally related to it. He met that burden through his own credible testimony, and the credible and persuasive testimony of Dr. Schlafly that his work was the prevailing factor in causing the resulting medical condition and his bilateral hand/wrist disability. The appropriate date of injury for this Claim is September 20, 2013, because that is the date Claimant was incapacitated from any work with a jackhammer, which previously had been a component of his job as a laborer. Since Claimant was in the employment of Tarlton when he was last exposed to the hazard of the occupational disease prior to evidence of disability on September 20, 2013, Tarlton is liable for the compensation to be provided under this section on account of the compensable occupational disease of bilateral carpal tunnel syndrome. Rallo bears no responsibility under the statute for the provision of any benefits on account of this bilateral carpal tunnel syndrome Claim.

To the extent that Claimant verbally notified Tarlton three days after his visit to Dr. Baak on September 20, 2013, to the extent that Tarlton admitted receiving notice of the injury on September 23, 2013, and, further, to the extent that Tarlton had the opportunity to provide medical care at Concentra, which they later terminated on their own, I find that Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute and/or showed that Tarlton was not prejudiced by the lack of written notice in this case

Tarlton is responsible for providing continued and ongoing medical treatment for Claimant's bilateral carpal tunnel syndrome to cure and relieve him of the effects of the injury, including, but not limited to, referral to a physician and/or surgeon for evaluation and surgery. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Dean L. Christianson for necessary legal services.

Made by: _____
 JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation