

TEMPORARY OR PARTIAL AWARD  
(Affirming the Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 06-113799

Employee: Thomas Smalley

Employer: Landmark Erectors

Insurer: American Family Mutual Insurance Company

Date of Accident: September 6, 2006

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, read the briefs, heard oral arguments and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 22, 2008, as supplemented herein.

The administrative law judge concluded that employee's occupational disease became disabling on September 6, 2006, that Landmark Erectors (Landmark) was the employer ninety days prior to that date, and as such could not avail itself of the exception to the Last Exposure Rule contained in §287.067.8 RSMo, and therefore, Landmark was liable to employee for benefits. We agree with this conclusion. However, we offer this supplemental opinion to clarify that decision.

The Last Exposure Rule is applicable to this case. "Th[e] last exposure rule is not a rule of causation." *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo. banc 2002). "Rather, as the starting point, the last employer before the date of the claim is liable if that employer exposed the employee to the hazard of the occupational disease." *Id.*

The Last Exposure Rule is set forth in §287.063 RSMo, as amended, as follows:

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of [section 287.067](#).
2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease **prior to evidence of disability**, regardless of the length of time of such last exposure, subject to the notice provision of [section 287.420](#). (emphasis added).

The phrase "evidence of disability" means when there is evidence that employee is actually disabled to some

degree by his occupational disease. Here, employee did not suffer any disability until September 6, 2006, when Dr. Ollinger informed employee that he needed bilateral carpal tunnel surgery. It was also at this time that employee was experiencing constant numbness, tingling and pain in his fingers and hands, and that he was told his medical issues were work related. As such, employee was last exposed to the hazard of his occupational disease on September 6, 2006.

We also agree with the administrative law judge that the exception to the Last Exposure Rule contained in §287.067.8 is not applicable here. That section sets forth that:

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.

Employee began working for Landmark at the beginning of April 2006. His disability began on September 6, 2006. At that time, employee had been working for Landmark for just over five months. Clearly this is outside of the three-month time period under the exception. As such, since Landmark was the last employer to expose employee to the hazard of his occupational disease, and because the exception is not applicable in this instance, Landmark is liable to employee for benefits.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued January 22, 2008, is affirmed, and is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of August 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**TEMPORARY OR PARTIAL AWARD**

Employee:	Thomas Smalley	Injury No.: 06-113799
Dependents:	N/A	Before the
Employer:	Landmark Erectors	<b>Division of Workers'</b>
Additional Party:	N/A	<b>Compensation</b>
Insurer:	American Family Mutual Insurance Company	Department of Labor and Industrial
Hearing Date:	November 20, 2007	Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDV: ms

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
  - 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
  - Date of accident or onset of occupational disease: September 6, 2006
  - 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
  - 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:  
Developed carpal tunnel syndrome while performing iron work.
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: Both upper extremities.
  - Nature and extent of any permanent disability: Not yet determined
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-  
Employee: Thomas Smalley Injury No.: 06-113799
17. Value necessary medical aid not furnished by employer/insurer? Unknown
  - Employee's average weekly wages: \$1,142.40
19. Weekly compensation rate: \$718.87/376.55

20. Method wages computation: Agreed

### COMPENSATION PAYABLE

21. Amount of compensation payable:

Medical expenses:	*
Temporary total disability (or temporary partial disability)	**

22. Second Injury Fund liability: Open

(use of an asterisk (\*) denotes a contingent benefit)      Total:      \*      \*\*

23. Future requirements awarded: See Award

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

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: John J. Larsen, Jr.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Thomas Smalley

Injury No.: 06-113799

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Landmark Erectors

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

Additional Party: N/A

Insurer: American Family Mutual Insurance Company

Checked by: MDV: ms

## ISSUES

The Issues presented for resolution by way of this hearing are notice and whether Landmark Erectors is the proper employer liable for Workers' Compensation benefits for this admittedly work related carpal tunnel syndrome. The parties agree Claimant has a work related injury. They differ over the responsible Employer. Employers' brief indicates "medical causation" is an issue, but it was not indicated at trial and will not be addressed.

## FINDINGS OF FACT

- Claimant was born October 2, 1952, and has worked as an iron worker since 1975 out of The Local 396 Union Hall. Claimant has worked for thirty-five continuous years in this employment.
  
- From November of 1999 to September of 2003 Claimant worked for Alberici. From September 3, 2003 to March 2004 Claimant worked for Acme Erectors. From April 4, 2004 to October 2005 Claimant again worked for Alberici. From October 2005 to March 2006 Claimant worked for ClayCo. From April 1, 2006 to mid January 2007 Claimant worked for Landmark Erectors, the employer herein. From January 7, 2007 to the present Claimant has worked for McCarthy Brothers.
  
- Claimant began experiencing numbness and tingling in his fingers in 2005. It was not specific, but it was pain in his wrist going into his forearms and would occur when he was sleeping. Sometimes it would wake him up as many as three times a night. Claimant neither requested nor received treatment from Alberici for whom he was working at the time. He did not discuss these complaints with Alberici, and he did not lose any time from work with Alberici as a result of these symptoms.
  
- On October 25, 2005, work was slowing with Alberici and a new project was beginning with ClayCo, so Claimant went to work for ClayCo Construction on October 26, 2005. Claimant was the foreman in charge of setting steel on that project. In that capacity he was responsible for unloading steel, hooking and hoisting it to the proper building levels. He would "up right" beams by hand, weld with an "auto wire", feed the welding machine using a trigger gun, and generally perform all the tasks of the trade of an iron worker.
  
- Claimant's duties were no different at ClayCo than they were at Alberici in terms of hand intensity. The symptoms have been steadily progressing.
  
- Claimant first mentioned his hand problems to Dr. Goldstein, his family physician on February 14, 2006, when he complained of numbness in his fingers at night, particularly the fourth and fifth digit, or the ring and little finger. There is no diagnosis in Dr. Goldstein's records and none was provided to Claimant verbally. Claimant was working for ClayCo at that time.
  
- In March 2006, one month later, Claimant left the ClayCo job because it was winding down and he was

laid off.

- Three weeks later he went to work for Landmark. His hand complaints did not get any better during the time he was not working. Claimant went to work for Landmark in the first week of April 2006, and again performed all facets of the iron working business, setting steel, laying welds, laying roof deck, welding joints, moving structural steel, core drilling concrete, hammer drilling anchors, cutting, torch welding, setting siding and sheet metal.
- The hand intensity was the same as all the prior jobs. Work at Landmark was the same as it was at Alberici and ClayCo, performing all facets of the iron working trade in the usual hand intensive matter.
- On May 2, 2006 Claimant went to see Dr. Enad with a variety of complaints, including numbness and tingling in his hands which the doctor thought might be carpal tunnel syndrome. Therefore, on May 12, 2006, Dr. Enad performed a nerve conduction test in order to “rule out” carpal tunnel syndrome. Claimant was diagnosed with carpal tunnel syndrome on that date.
- Claimant purchased splints for his hands which he used at work for a while but then discontinued using. No prescriptions were provided and he was eventually referred to Dr. DeFillipo who contacted the employer to verify payment before performing surgery.
- Claimant told Landmark on June 5, 2006, that they needed to contact Dr. DeFillipo so that carpal tunnel surgery could be performed. This was three weeks after the nerve conduction study. Landmark contacted their Workers’ Compensation insurance company, American Family, which said it was not obligated to pay.
- Claimant then informed ClayCo who referred him to its Workers’ Compensation insurer, Zurich. Zurich scheduled an appointment with Dr. Ollinger, and on September 6, 2006 Dr. Ollinger, after taking a history and reviewing Claimant’s medical records, diagnosed a “work related” carpal tunnel syndrome in which he found Claimant’s job duties were the prevailing factor in causing the condition.
- Dr. Ollinger felt that the longer Claimant waited to have this surgery performed the worse the condition would get.
- Zurich then also denied liability for the Claim.
- Claimant then obtained an attorney to help him sort out the claim.

- Claimant saw Dr. Schlafly in May 2007. He diagnosed work related carpal tunnel syndrome.
- Claimant now has difficulty driving and carrying buckets that weigh fifty pounds. The condition has been gradually getting worse, and Claimant is doing exactly the same work as when his symptoms began.

## RULINGS OF LAW

- NOTICE

The Act requires Claimant to give Employer notice of the diagnosis of his injuries within 30 days. Section 287.420 RSMo., (Cum.Supp.2005) specifically provides that:

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 the failure to receive the Notice.

Employer contends Claimant pleaded May 2, 2006 as the date of injury and therefore must provide notice by June 1, 2006. However, Employer confuses “date of injury” with the phrase “diagnosis of the condition”. The statute plainly states that the required notice is restricted to claims for occupational diseases. The only way to rationally construe the statute is to require the diagnosis to pertain to the diagnosis of a work related condition or “occupational disease”, not any and all conditions which might arise. Thus, the diagnosis must pertain to the diagnosis of an “occupational disease”. The first diagnosis of an occupational disease was made by Dr. Ollinger on September 6, 2006. Other physicians may have suspected CTS or even diagnosed it, but the first diagnosis of an occupational disease was made September 6, 2006. There is no evidence of record of any earlier work related diagnosis.

Claimant suspected an occupational disease earlier than September 6, 2006. His suspicions, however, do not control. Claimant is not a physician and cannot make such a “diagnosis”. The other physicians may have suspected or diagnosed carpal tunnel syndrome, but there is no evidence they believed it was work related, nor did they diagnose it as work related.

Support for requiring work-relatedness exists in the Poster Provisions of The Act, wherein Employers provide Employees statutorily required information regarding their rights and duties under the law, including their duty to notify employer of a work related condition. Section 287.127 provides:

- Beginning January 1, 1996, all employers shall post a notice at their place of employment, in a sufficient number of places on the premises to assure that such notice will reasonably be seen by all employees. An employer for whom services are performed by individuals who may not reasonably be expected to see a posted notice shall notify each such employee in writing of the contents of such notice. The notice shall include:

- (1) That the employer is operating under and subject to the provisions of the Missouri Workers’ Compensation Law;
- (2) That employees must report all injuries immediately to the employer by **advising the employer personally, the employer’s designated individual or the employee’s immediate boss, supervisor or foreman** and that the employee may

lose the right to receive compensation if the injury or illness is not reported within thirty days **or in the case of occupational illness or disease, within thirty days of the time he or she is reasonably aware of work relatedness of the injury or illness**; employees who fail to notify their employer within thirty days may jeopardize their ability to receive compensation, and any other benefits under this chapter;

- (3) The name, address and telephone number of the insurer, if insured. If self-insured, the name, address and telephone number of the employer's designated individual responsible for reporting injuries or the name, address and telephone number of the adjusting company or service company designated by the employer to handle Workers' Compensation matters;
- (4) The name, address and the toll-free telephone number of the division of Workers' compensation;
- (5) That the employer will supply, upon request, additional information provided by the Division of Workers' Compensation;
- (6) That a fraudulent action by the employer, employee or any other person is unlawful.

2. The Division of Workers' Compensation shall develop the notice to be posted and shall distribute such notice free of charge to employers and insurers upon request. Failure to request such notice does not relieve the employer of its obligation to post the notice. If the employer carries Workers' Compensation insurance, the carrier shall provide the notice to the insured within thirty days of the insurance policy's inception date.

3. Any employer who willfully violates the provisions of this section shall be guilty of a class A misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than six months or by both such fine and imprisonment, and each such violation or each day such violation continues shall be deemed a separate offense.

In the case of an occupational illness or disease, the Poster Provisions limit the requirement to provide 30 days notice only to those situations when Claimant becomes reasonably aware of the "work relatedness" of the disease. Thus, the two statutes must be read together and harmonized, and neither can be read in a vacuum. **I find a Claimant must provide notice of a "work related condition" when a physician determines the condition is related to the work and Claimant becomes aware of the diagnosis.**

Next employer complains Claimant failed to provide 30 days **written** notice of his injury. Again by reference to the highlighted language above in The Poster Provisions, it is clear that statute doesn't require written notice. In Fact, Section 287.127 requires an employee to give his boss, supervisor or foreman **verbal** notice, to "advise" them "personally". That is not written notice.

The two statutes are in conflict. One requires written notice after diagnosis and excuses it upon a showing of no prejudice. The other requires verbal notice after becoming reasonably aware of the conditions work relatedness. Claimant clearly complied with the notice requirement in the Poster Provisions. Dr. Enad diagnosed Carpal Tunnel Syndrome on May 12, 2006 and Claimant reported it verbally within thirty days on June 5. I think it would be quite absurd to require the employer to tell Claimant in a statutorily mandated poster that he/she must give verbal notice and then create a written notice requirement that employee would only find by looking up the statute and resolving the discord between the two conflicting statutes. I find the Act excuses written notice due to the conflict in the statutes. It is the only way to harmonize the conflicting requirements.

Claimant was diagnosed with a simple Carpal Tunnel disease on May 12, 2006, and a more specific "work related" Carpal Tunnel Syndrome on September 6, 2006 by Dr. Henry Ollinger. Claimant gave Employer, Landmark Erectors verbal notice of his potential injuries on June 5, 2006, and requested surgery. Thus I find Claimant gave Employer verbal notice of the condition prior to the date that he was actually diagnosed with the work related condition. Landmark filed a report of Injury on June 5, 2006. Employee's claim was filed November 20, 2006. Employer had adequate verbal notice of the potentiality of a work related occupational disease on June 5, 2006, and thereafter. That is sufficient given the conflict in the statutes.

Further, Section 287.420 RSMo., the **written** notice provision relied upon by Employer, excuses written notice if Employee can prove Employer was not prejudiced by lack of notice. In this case, Landmark Erectors denied liability based on changes to the Workers' Compensation Law in 2005 and certain definitions it believed favored them, such as interpretation of "date of disability" as will be described below. Thus, written notice is excused here because it simply would have resulted in the same denial of liability based on law not facts. Landmark's denial rested on interpretation

of law as to which Employer was legally responsible for benefits, not a dispute over facts. There is no prejudice inhering to Landmark's ability to investigate or litigate this claim. It could not be prejudiced in any way by not receiving written notice. The failure to provide written notice is excused.

Employer had adequate notice of Claimant's injuries.

- LIABILITY

Landmark denies it is the Employer responsible for Claimant's carpal tunnel syndrome. Selection of the correct Employer is governed by Sections 287.063 and 287.067 RSMo., (Cum. Supp.2005). Section 287.063.2 casts liability on "the Employer in whose employment the employee was last exposed to the hazard of occupational disease **prior to evidence of disability**".

The day Claimant was diagnosed with a "work related" carpal tunnel syndrome and treatment was prescribed is the key date in my interpretation of the law. The physician diagnosed a "work related" disease on September 6, 2006 that needed surgery. Dr. Ollinger believed damage would be worse if surgery was delayed. That is the first evidence of work related disability. Claimant was working for Landmark on September 6, 2006, therefore Landmark is the Employer required to pay benefits for this admittedly work related disease.

Landmark can next only avoid liability by application of Section 287.067.8 RSMo., (Cum. Supp.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.

Ninety days prior to September 6, 2006, is June 7, 2006. Claimant was working for the Employer, Landmark Erectors on June 7, 2006. In fact, he gave Landmark notice of his injuries two days earlier. Therefore, Landmark may not avail itself of the provisions of Section 287.067.8.

### DISCUSSION

Claimant gave adequate notice to Landmark Erectors and Landmark Erectors was the Employer on the date of disability. The date of disability is the date of the first diagnosis of a "work related" injury on September 6, 2006, by Dr. Ollinger. Landmark was the Employer ninety days prior to that, so the kickback provisions of Section 287.067.8 do not apply. Landmark is the Employer responsible for providing Claimant with Workers' Compensation benefits for his work related occupational disease, which was first diagnosed on September 6, 2006, and of which Employer had adequate notice on June 5, 2006 and thereafter. The only date that will consistently and adequately work for implementing the changes to the notice and liability provisions under SB1 in 2005 is the date of diagnosis of a work related injury.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

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

A true copy: Attest:

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*Jeffrey W. Buker*  
*Director*  
*Division of Workers' Compensation*