

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 06-016288

Employee: Emily Thomas
Employer: Lutheran Home for the Aged
Insurer: Self-insured
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 (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence 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 March 4, 2009, as supplemented in this opinion.

In the award, the administrative law judge concluded as follows:

Although the employee did not give notice thirty days or less after she was diagnosed with bilateral carpal tunnel syndrome, the employee did repeatedly tell her supervisor of her complaints in her bilateral upper extremities after she was diagnosed with her condition. . . . The employee proved that the employer was not prejudiced by failure to receive the written notice within thirty days [as required by section 287.420 RSMo] because the supervisor knew that the employee was having complaints with her bilateral upper extremities. I find that proper notice was given to employer because the employer was not prejudiced by not receiving written notice within thirty days of the diagnosis of the condition.

Section 287.420 RSMo provides, in pertinent part, as follows:

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.

We agree with the administrative law judge's analysis regarding prejudice; however, such analysis was not necessary because employee provided proper notice under

Employee: Emily Thomas

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section 287.420. In *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823 (Mo. App. S.D. 2009), the court examined a case in which this Commission had read section 287.420 to mean that the employee had to provide notice within 30 days after the initial diagnosis of the underlying condition. The court found error in this analysis and 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.” *Id.* at 829.

In the case at hand, the best evidence shows that the first time a diagnostician indicated that claimant’s bilateral carpal tunnel syndrome was work-related was February 14, 2006, when she met with Dr. Tobin. Employee filed her claim for compensation with the Division of Workers’ Compensation (Division) on February 24, 2006. The Division’s records, of which we take administrative notice, further reveal that the Division sent a notice to employer on March 9, 2006, confirming its receipt of claimant’s claim for compensation.

Accordingly, we conclude that claimant gave notice to employer compliant with section 287.420 not later than March 9, 2006.

The Commission further approves and affirms the administrative law judge’s allowance of attorney’s fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Maureen T. Tilley, issued March 4, 2009, is attached and incorporated by this reference to the extent it is not inconsistent with this opinion.

Given at Jefferson City, State of Missouri, this 14th day of October 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Emily Thomas

Injury No. 06-016288

Dependents: N/A

Employer: Lutheran Home for the Aged

Additional Party: Second Injury Fund (left open)

Insurer: Self-insured, TPA, Cambridge Integrated Services

Hearing Date: December 1, 2008

Checked by: MT/sm

SUMMARY OF FINDINGS

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? February 14, 2006
5. State location where accident occurred or occupational disease contracted:
Cape Girardeau County, Missouri
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 happened or occupational disease contracted: The employee was doing repetitive work with her left and right upper extremities which resulted in an occupational disease for both extremities.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Left and right upper extremities
14. Nature and extent of any permanent disability: 20% permanent partial disability at the 175 week level for both upper extremities, a 15% load, and 3 weeks scarring for both upper extremities. This amounts to \$24,104.96.
15. Compensation paid to date for temporary total disability: None
16. Value necessary medical aid paid to date by employer-insurer: None
17. Value necessary medical aid not furnished by employer-insurer: \$18,058.50
18. Employee's average weekly wage: \$418.80
19. Weekly compensation rate: \$278.67
20. Method wages computation: See findings
21. Amount of compensation payable: See findings
22. Second Injury Fund liability: Left open
23. Future requirements awarded: None

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Stephen Taylor

FINDINGS OF FACT AND RULINGS OF LAW

On December 1, 2008, the employee, Emily Thomas, appeared in person and by her attorney, Stephen Taylor, for a hearing for a final award. The employer was represented at the hearing by its attorney, John Lichtenegger. The Second Injury Fund was left open and therefore no attorney was present on its behalf. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provision of the Missouri Workers' Compensation Act.
2. On or about February 14, 2006, the employee was an employee of the Lutheran Home for the Aged who was self insured which was administered by Cambridge Integrated Services.
3. The employer has paid no temporary total disability benefits.

ISSUES

1. Occupational disease
2. Notice
3. Statue of limitations
4. Average weekly wage and rate
5. Medical causation
6. Medical aid furnished by employer-insurer
7. Previously incurred medical aid in the amount of \$18,220.50. There is a dispute as to authorization, reasonableness, necessity, and casual relationship.
8. Nature and extent of disability
 - a. Additional TTD for the time periods of April 21, 2006 through July 13, 2006 in the amount of \$3,065.33
 - b. Permanent partial disability
9. The employee is requesting costs for litigation
10. The employer is requesting costs for Dr. Tobin's expenses including his deposition expense and the cost of his medical report.
11. The employer's Motion to Dismiss
12. The date of the occupational disease

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

A. Medical Records

- B. Medical Bills
- C. Report of Dr. Bruce Schlafly
- D. Fax of Donna Lehde, Cambridge Insurance Company to Dr. Gregory Tobin dated September 7, 2007
- E. Authorization for Release of Information dated April 14, 2006 executed by Employee
- F. Letter from Steve Taylor to John Lichtenegger regarding ex parte contact
- G. Dr. Tobin Letter of June, 2007
- H. Dr. Tobin letter of June, 2007
- I. Health insurance program booklet
- J. Deposition of Dr. Annamaria Guidos
- K. Medical Bill of Pyramid
- L. Medical Bill of Dr. Tobin (June-September 2007)

Employer-Insurer's Exhibits

- 1. Curriculum Vitae of Dr. Greg Tobin
- 2. Dr. Tobin's medical record
- 3. Auburn Surgery Center
- 4. Letter of June 28, 2007
- 5. Letter of September 13, 2007
- 6. Job description
- 7. Deposition of Dr. Greg Tobin
- 8. Employee's request for family medical leave
- 9. Midwest physicians and surgeons information sheet on employee
- 11. Disability benefits payments to employee showing short term payments
- 12. Employee's short term disability application claim form
- 13. Record of payments on medical bills paid to providers or employee by Blue Cross

At the hearing the employer objected to employee's exhibits B, K and L. This matter was taken under advisement and the exhibits were then admitted into evidence. The employee objected to employer's exhibits 10 and 14. This matter was taken under advisement and these exhibits were not admitted into evidence.

FINDINGS OF FACT

Employee's testimony

- The employee, Emily Thomas, testified that she became pregnant soon after graduating high school and was out of work for a while. Upon gaining employment she went to work at a mini mall as a cashier in the jewelry department where she worked for approximately six months. The employee next went to work at Papa D's as a waitress. She had no injuries and no complaints related to her upper extremity while employed with Papa D's. The employee eventually worked at Hardee's and Shoney's as a cook.
- The employee testified that she had several jobs including working as a waitress, working in a laundry as well as working at ELR Laundry. She worked at ELR Laundry for

approximately four years. The employee had no injuries while employed at ELR Laundry and no complaints related to her upper extremities.

- The employee testified that after she worked at ELR Laundry, she worked as a cook at the Sikeston Convalescent Center from 1994 through 1997. The employee did not sustain at Sikeston Convalescent Center and she did not have any complaints related to her upper extremities while she worked there.
- The employee testified that she worked at Miner Nursing center in Sikeston for three years as a cook from 1997 through 2000. This job entailed cooking for the residents within the kitchen facility and she only had to cook for 60 residents per day. The employee did not sustain any injuries at this job and had no complaints with her bilateral upper extremities while working there.
- The employee testified that in 1998 she began receiving treatment for an arthritis condition called Sjogren 's syndrome. She sought treatment for this condition from doctors in Saint Louis and Cape Girardeau.
- The employee testified that in June of 2000 she began working at the Lutheran Home in Cape Girardeau as a cook. In addition to working as a cook, she began working as a pots helper, overseer, dish washer, and she prepared salads and desserts in the kitchen.
- The employee testified that while working at the Lutheran Home she also worked part time at Chateau Girardeau on three separate occasions. She worked there as a tray line aid. The employee worked at Chateau Girardeau two days a week for 3.5 hours per day. The last time she was employed at Chateau Girardeau was May of 2005.
- The employee testified that around 2002-2003 she worked at Arby's part time while employed at the Lutheran Home. She worked there for about 12 hours per week.
- The employee testified that when she began working at the Lutheran Home in 2000 her job involved cooking large portions of food using large pots and pans, chopping meat, and stocking groceries. The job involved stirring the food throughout the cooking process then serving and later cleaning and scrubbing the pots and pans. She cooked for about 120 residents per day and 60 employees per day. For the first five years that the employee worked at the Lutheran Home these tasks were all performed within the kitchen at the Lutheran Home. The employee stated that when she began working at the Lutheran Home she had no complaints with her upper extremities.
- The employee stated that in the summer of 2005 the Lutheran Home management modified the way the cooks prepared and served food so that instead of having all of the food prepared and served inside the kitchen, the buffet was moved to the center of the dining area. The employee was required to carry large buffet dishes of hot foods repeatedly to and from the kitchen throughout the day. The number of dishes that the employee carried depended on how many other workers were there on a given day.
- The employee testified that in the summer of 2005 her job duties changed because of the speed of the food service. The employee testified that when the food was served in the kitchen the nurses would come into the kitchen, pick up the plates of food and then serve the residents. The employee stated that when the food was served in the kitchen, the pace of the process of dishing food onto the plates was relatively slow and she would have a chance to rest between serving the plates while the nurses walked to and from the kitchen for the plates. The employee stated that once the food was moved to the buffet, the process was much quicker and did not allow her to take breaks in between serving the

plates because the nurses did not have as far to walk. The employee stated that after the new serving method was changed, the employee started to have onset of symptoms in her hands of numbness, tingling, pain and swelling.

- The employee stated that she and an overseer were the only ones working in the kitchen.
- The employee stated that while at the Lutheran Home she would cook breakfast and lunch each day and then would cook supper two days a week. She was required to move all of these foods in large pans each morning to and from the buffet and then wash and scrub them clean. The employee stated that she was required to move enough large serving dishes of food to serve approximately 120 residents per day and 60 employees per day.
- The employee testified that after she cleaned the breakfast dishes she would repeat the food preparation for lunch and move the large serving dishes from the kitchen to the buffet. On the days she served supper, the entire process had to be repeated as well.
- The employee testified that her job at the Lutheran Home required her to scrub the ovens, the steamer and the steam table. The employee was also required to prepare food for the following day at the end of the day.
- The employee testified that in 2004 she sustained a burn injury to her arm while working at the Lutheran Home. At that time her supervisor filled out a report of injury and treatment was provided. The employee did not file a claim for that injury.
- The employee testified that after a few months of working the new buffet arrangement at the Lutheran Home, she began to experience pain, tingling and numbness in her wrists. The employee stated that these complaints were not similar to any complaints she had experienced before. The employee continued to work only at the Lutheran Home during this time.
- The employee stated that she reported the injury to Pat Brown, her supervisor. The employee stated that her supervisor did not do anything regarding the employee's complaints.
- The employee stated that she sought treatment for her hand complaints with Dr. Roumany in August of 2005 because her symptoms continued to get worse. The employee had a nerve conduction study at St. Francis in September, 2005 that diagnosed carpal tunnel syndrome by she continued to work her normal hours and handle her normal work responsibilities throughout the summer and fall of 2005. She testified that she again reported these complaints to her supervisor, Pat Baldwin and her supervisor did nothing.
- The employee testified that after five months of working on the buffet arrangement, her complaints became worse. She testified that she once again told her supervisor, Pat Baldwin, and her supervisor did nothing.
- The employee stated that after months of conservative treatment with Dr. Roumany, her complaints had not improved and she was referred to Dr. Tobin. She testified that she saw Dr. Tobin on February 14, 2006 and he told her that she had carpal tunnel and she needed surgery. She testified that Dr. Tobin told her that her carpal tunnel syndrome was related to her work as a cook. The employee stated that this was the first time any doctor told her that the carpal tunnel syndrome was work related. The employee stated that she hired an attorney the next day.

- The employee stated that her attorney filed a claim on her behalf the week that she hired him. She then had surgery pursuant to Dr. Tobin's direction. She used her health insurance for the treatment. She first had surgery on her left hand and then she had surgery on her right hand. Dr. Tobin had her off work for six weeks after her first surgery and six weeks after her second surgery. She also underwent physical therapy after each surgery. The employee had a 2 ½ to 3 inch scar on both hands.
- The employee stated that she tried to return to work on July 14, 2006 and worked until August 20, 2006 at the Lutheran Home. The employee requested a reduction to part time work because of her hand and health problems but it was denied. The employee stated that she then quit because her hands were still in pain and she could not work the hours given to her.
- The employee stated that in June 2007 she was contacted by Premier Physical Therapy of Cape Girardeau and was told that she needed to come for an evaluation. She did not notify her attorney about the phone call from Premier Physical Therapy because she assumed it was normal in a workers' compensation claim. The employee stated that she completed a questionnaire at Premier Physical Therapy and she stated that she was there for a work related injury.
- The employee testified that Dr. Tobin's office called her and asked her to come back in. She stated that she thought this was normal in a workers' compensation case and she thought her attorney had arranged for her to go back and see Dr. Tobin. She later learned that from her attorney that Dr. Tobin had asked her to come back because the employer's insurance company had hired him to write an opinion.
- The employee stated that as a result of a lung condition, she has been receiving Social Security Disability benefits since August 2006. Under the Social Security Disability law she is able to work part time a few hours a week. She works 16-24 hours a week at a kitchen in the County Garden Retirement Facility. At this facility there are only 30 residents and she does not serve the employees. All of the cooking at this facility is done in the kitchen and the work is at a much slower pace.
- The employee testified that she continues to suffer from limited strength in her bilateral upper extremities. She can no longer clean her own house or go to the laundromat. She can't grocery shop alone. She relies upon others at home and at the Country Garden to lift items that weigh much more than a gallon of milk. She also has tingling and swelling in her hands, which she did not have before she has the carpal tunnel syndrome. She still has right and left hand pain when the weather turns cold. The employee's pain remains a 3 on a pain scale. Furthermore, the employee has not injured her hands or upper extremities since the injuries by Dr. Tobin.
- The employee testified that she never sent a letter requesting medical treatment.
- The employee testified that the last amount she made at the Lutheran Home was \$10.53 per hour. The employee testified that she might have made \$10.45 an hour on the date of her occupational disease.
- The employee testified that when she first saw Dr. Tobin there was an information sheet that stated "if injury occurred at work please give name and phone number." The employee stated that she left that portion of the information sheet blank.

Testimony of Eric Thomas

- The employee's husband, Eric Thomas, testified that he attended all of the employee's doctor's appointments and that Dr. Tobin advised the employee that her complaints were related to her work as a cook at the Lutheran Home and that she needed to pursue light duty work.

Testimony of Pam Cagle

- Pam Cagle, the director of human resources at the Lutheran Home, testified that the employee is a good worker and the manner in which food was served changed during the summer of 2005 so that the food was served straight to the residents. She testified that the employee worked 40 hours a week.
- Ms. Cagle stated that the Lutheran Home's health plan is self-insured. The employee's pay was \$40.00 per pay period for health insurance and dental insurance.
- Ms. Cagle testified that the administrator of the health insurance plan has the right to recover the money spent on the employee's medical expenses if the employee's injury is because of a workers' compensation case.
- Ms. Cagle testified that the workers' compensation third party administrator had not paid any of the bills incurred by the employee for treatment of her injury. She stated that Donna Lehde was an employee for the third party administrator hired to handle workers' compensation claims for the Lutheran Home.
- Ms. Cagle testified that she would schedule 6-8 people in the kitchen per day.

Cape Girardeau Physician Associates

- Medical records from Cape Girardeau Physician Associates on September 19, 2005 state that the employee was complaining of numbness and tingling in both upper extremities and intermittent pain in her hands. Dr. Roumany noted that the employee had no synovitis in any of her joints. He scheduled the employee for nerve conduction studies and an EMG.
- The EMG/nerve conduction study report dated September 27, 2005 found that the employee suffered from "moderately severe bilateral carpal tunnel syndrome, this being slightly worse on the left side."
- On October 4, 2005 the employee saw Dr. Roumany with symptoms of continued numbness and pain and tingling along with pain in her wrists and hands. Dr. Roumany gave the employee an injection of Kenalog and lidocaine in both wrists and gave her wrist splints which he suggested that she wear at bedtime.
- Medical records from October 20, 2005 from Cape Girardeau Physician Associates for a follow-up regarding her bilateral wrist injections note that the employee's pain and swelling in her right hand was better but she was continuing to have pain in her left hand.

The employee was given another injection of Kenalog and lidocaine in her left carpal tunnel and was given a wrist splint to wear on both hands at bedtime.

Dr. Gregory Tobin and Physical Therapy Records

- On February 14, 2006, the employee was seen at Midwest Physicians and Surgeons by Dr. Gregory A. Tobin. Dr. Tobin initially diagnosed the employee with bilateral carpal tunnel syndrome.
- On March 7, 2006 he suggested that the employee undergo a release of her carpal tunnel.
- On March 22, 2006, Dr. Tobin diagnosed the employee with mixed connective tissue disorder.
- On April 21, 2006 Dr. Tobin performed a decompression of the employee's ulnar nerve at the wrist and median nerve carpal tunnel release on her left hand. The employee saw Dr. Tobin on April 25, 2006 and May 11, 2006 during the healing process.
- On May 12, 2006 the employee was seen initially at St. Francis Medical Center for physical therapy. When the employee was seen on May 6, 2006 at St. Francis Medical Center, Center for Health and Rehabilitation she completed a patient information form. On the form the employee indicated that she was being treated for a work related injury. On May 23, 2006 the employee had completed four sessions of physical therapy and was discharged from physical therapy.
- On May 25, 2006 the employee saw Dr. Tobin for a follow-up visit regarding her left carpal tunnel complaints. At that time the employee decided that she would proceed to have a carpal tunnel release and an ulnar nerve decompression on her right side.
- On January 7, 2006, the employee underwent an ulnar nerve decompression at her wrist and a right carpal tunnel release.
- As prescribed by Dr. Tobin, the employee underwent a course of physical therapy from June 29, 2006 through July 20, 2006.
- Dr. Tobin's records reflect that he last saw the employee for treatment on August 3, 2006. He stated that no further visits were required and he would see if she had any continuing problems.
- Dr. Tobin also stated that the employee had electrodiagnostics which demonstrated significant slowing of the nerve, median nerve at the carpal tunnel and also had a significant history of something called mixed connective tissue disorder. He also stated that after he evaluated the employee he thought that she had carpal tunnel syndrome because of her mixed connective tissue disorder.
- Dr. Tobin stated that the employee's permanent partial disability rating for the left hand is 12% and the permanent partial disability rating for her left hand is 15%.
- A fax dated September 7, 2007 from Donna Lehde, senior claims adjustor at Cambridge Insurance Company, states, "Dr. Tobin, I have attached a copy of her job description. Based on the description and your treatment of Ms. Thomas, do you feel her short employment with our client was the prevailing factor for the need of the bilateral carpal tunnel releases?"
- Dr. Tobin stated that on June 28, 2007, he wrote a rating report. Dr. Tobin stated that he talked to the employee about her job when he made his determination that the employee's

job was not highly repetitive. He opined that the employee's work did not play a factor in the cause of her carpal tunnel.

Dr. Anna Maria Guidos

- Dr. Guidos evaluated the employee on December 7, 2007. The employee discussed her duties at the Lutheran Home with Dr. Guidos. Dr. Guidos also reviewed the employee's job description given by the Lutheran home.
- Dr. Guidos stated that the scooping and spooning of 110-160 plates per day qualified as hand or arm intensive.
- Dr. Guidos testified that because the employee did not have synovitis in the wrists at the time that she saw a rheumatologist, Dr. Roumany, in the dorsum, the top or the ulnar aspects of the wrists that the mixed connective tissue disorder was not a contributing factor to the employee's bilateral carpal tunnel syndrome.
- Dr. Guidos stated that the repetitive work and constant stirring and spooning of food that was performed by the employee at the Lutheran Home was the prevailing factoring the employee's bilateral carpal tunnel syndrome and ulnar nerve problems.
- Dr. Guidos stated that the employee's part time work at Chateau Girardeau did not affect her opinion.
- Dr. Guidos rated the employee's disability at 25% of each hand at the wrist with an additional amount for the combination of the injuries.

Dr. Bruce Schlafly

- Dr. Bruce Schlafly, a hand surgeon, examined the employee on December 20, 2006.
- Dr. Schlafly took a history of the employee's duties at the Lutheran Home and reviewed her medical records.
- Dr. Schlafly opined that the employee's work at the Lutheran Home was the prevailing factor of her bilateral carpal tunnel syndrome and her need for carpal tunnel releases.
- Dr. Schlafly rated the employee at 25% of each hand at the wrist due to carpal tunnel syndrome and surgical releases plus an additional amount for the synergistic effect of the injuries.

Employee's claim for compensation and employer-insurer's denial of that claim

- Employee's claim for compensation was received by the Division of Workers' Compensation on February 24, 2006.
- The employer's answer for the employee's claim for compensation was received by the Division of Workers' Compensation on March 23, 2006. The employer denied the employee's claim and stated that it has insufficient information to admit or deny as no notice was given to employer.

Employee's job description from Donna Lehde, senior claims adjustor, to Dr. Tobin

- The employee's job summary given by Donna Lehde to Dr. Tobin included: Ensures proper preparation, portioning, and serving of both regular and modified diets according to standardized recipes and menu runners; follows sanitary guidelines and routinely performs cleaning, both assigned and unassigned; assists on receiving and storage; performs necessary tasks to meet needs of residents, specifically with respect to diet and food preferences, supervise/direct kitchen employees in absence of kitchen manager and overseer.
- The employee's duties included: Prepare quality food products for regular and modified diets according to standardized recipes and menu runners; serve foods in an interactive manner; serve foods in proper portions according to menu runner; prepare, serve, and store foods at proper temperatures and according to sanitation guidelines; act responsibly to avoid food waste; take appropriate care of food service equipment and operate safely; observe infection control, safety, chemical, and disaster policies (fire, tornado, etc.) as needed; assist with receiving and storage; perform daily and assigned cleaning duties; interact with residents/residents families in a caring, friendly manner and work to meet residents dietary wants/needs; interact with other departments in a friendly, helpful manner; assist co-workers as needed to assure tasks are completed in timely manner; serve as overseer in absence of kitchen manager or overseer; follow rules and regulations of dietary department and The Lutheran Home; attend in-service and meeting; and other duties as assigned.
- The employee's physical, mental and environmental conditions included: Standing and walking on the tile floors for five hours; frequent bending, twisting, grasping, and reaching; frequent pushing, pulling and lifting of 35-50 pounds, exposure to loud noise and slippery surface; exposure to potentially dangerous equipment (meat slicer, steam table, etc.), exposure to hazardous materials, chemicals, vibration, repetitive movement, wetness, extreme cold, potential electrical hazard, potential burns; ability to coordinate eye, hand, and foot movement; exposure to time constraint.

Employee's short term disability policy

- The employee filled out a claim for short term disability on May 16, 2006. The disability was through Healthy Alliance Life Insurance Company.
- The employee wrote on the claim that the accident happened from "doing something for so long" and "cooking, touching cold stuff, and picking up heavy stuff."
- The form for short term disability had a front and a back. The employee filled out some information and signed her name on the front on May 16, 2006. The employer filled out some information on the front as well and Pam Cagle from human resources signed the form on May 12, 2006. The physician, Dr. Tobin, filled out the back on May 11, 2006. One question on the back of form asked if this condition was "arising out of the patient's employment." Dr. Tobin marked, "No". The employee testified that she did not look at the back of this document.
- The employee wrote that her weekly or hourly rate on the date of the disability was \$418.00.

Medical Bills

- A balance statement which shows \$120.00 paid to Cape Girardeau Physician Associate from Anthem Blue Shield for services rendered on 2-28-06.
- Bills to the employee for Dr. Tobin's services include: The first bill from 2-14-06 and was for \$215.00. The amount paid was \$132.00 and the balance due was \$83.00, the next bill was from 3-7-06 for \$90.00. The amount paid was \$51.00 and the balance was for \$39.00, the next bill was from 4-21-06 and was for \$2,445.00. The amount paid was \$1,068.00 and the balance due was \$1,377.00, the next bill was from 4-25-06 and the total charges were \$55.00. The amount paid was \$44.37 and the balance due was \$10.63, the next bill was from 5-11-06 for \$20.00 and the amount paid was \$20.00. The next bill was from 6-7-06 for \$2445.00. The amount paid was for \$1068.00 and the balance due was for \$1,377.00. The employee also presented an insurance claim form from the employee. The form was for services rendered on 6-28-07 in the amount of \$263.00.
- A bill to the employee from Auburn Surgery Center for \$8,700.00 for services rendered on 4-21-06.
- A bill to the employee from JK Essmeyer for \$1,200 for services rendered on 4-21-06 and 6-07-06.
- A bill from St. Francis Medical Center for \$2,580.50 for services rendered from 5-12-06 through 6-29-06.
- A bill from Premier Rehab for \$350.00 for services rendered on 6-21-07 for an occupational therapy evaluation.

APPLICABLE LAW

- The burden is on the employee to prove all material elements of the employee's claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only the employee sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and the injuries and the medical treatment for which the employee is seeking compensation. *Griggs v A.B. Chance Company*, 503 S.W.2d 697(Mo.App.1973).
- §287.020.6 defines "total disability" as an inability to return to any employment and not merely mean inability to return to the pre-accident employment. For periods of temporary total disability, the employer shall pay during the continuance of such disability. Mo. Rev. Stat. §287.170.
- §287.067.1 defines "occupational disease" an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational diseases defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

- §287.067.2 states that an injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The “prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. 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.
- §287.067.3 states that an injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. 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. The “prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. 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.
- §287.063.1 states that 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 set forth in subsection 8 of section 287.067.
- §287.063.2 states that the employer is 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.
- §287.063.3 states that the statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.
- §287.170 (4) for all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee’s average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage.
- §287.420 states 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 failure to receive the notice.
- §287.430 states that except for a claim for recovery filed against the Second Injury Fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefore is filed with the Division within two years after the date of the injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.

- §287.560 states that if the Division or the Commission determines that any proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

RULINGS OF LAW:

Issue 1. Occupational disease and Issue 5. Medical causation

The employee's job at the Lutheran Home was hand intensive. It included serving food, carrying heavy dishes, cleaning the kitchen and preparing food. The employee testified that after a few months of working the new buffet arrangement at the Lutheran Home, she began to experience pain, tingling and numbness in her wrists. The employee stated that these complaints were not similar to any complaints she had experienced before. The employee testified that the complaints continued to get worse and she eventually sought treatment with Dr. Tobin. Dr. Tobin eventually performed surgery on the employee's right and left upper extremities. The employee last saw Dr. Tobin for treatment on August 3, 2006. On June 28, 2007, he wrote a rating report. Dr. Tobin stated that he talked to the employee about her job when he made his determination that the employee's job was not highly repetitive. He opined that the employee's work did not play a factor in the cause of her carpal tunnel. Dr. Tobin believed that the employee had carpal tunnel syndrome because of her mixed connective tissue disorder.

Dr. Guidos evaluated the employee on December 7, 2007. The employee discussed her duties at the Lutheran Home with Dr. Guidos. Dr. Guidos also reviewed the employee's job description given by the Lutheran home. Dr. Guidos stated that the scooping and spooning of 110-160 plates per day qualified as hand or arm intensive. Dr. Guidos testified that because the employee did not have synovitis in the wrists at the time that she saw a rheumatologist, Dr. Roumany, in the dorsum, the top or the ulnar aspects of the wrists that the mixed connective tissue disorder was not a contributing factor to the employee's bilateral carpal tunnel syndrome. Dr. Guidos stated that the repetitive work and constant stirring and spooning of food that was performed by the employee at the Lutheran Home was the prevailing factor of the employee's bilateral carpal tunnel syndrome and ulnar nerve problems. Dr. Guidos stated that the employee's part time work at Chateau Girardeau did not affect her opinion. Dr. Guidos rated the employee's disability at 25% of each hand at the wrist with an additional amount for the combination of the injuries.

Dr. Bruce Schlafly examined the employee on December 20, 2006. Dr. Schlafly took a history of the employee's duties at the Lutheran Home and reviewed her medical records. Dr. Schlafly opined that the employee's work at the Lutheran Home was the prevailing factor of her bilateral carpal tunnel syndrome and her need for carpal tunnel releases.

Dr. Schlafly rated the employee at 25% of each hand at the wrist due to carpal tunnel syndrome and surgical releases plus an additional amount for the synergistic effect of the injuries.

I find that the employee was a credible witness. I further find that the opinion of Dr. Guidos and Dr. Schlafly were more credible than the opinion of Dr. Tobin. Furthermore, I find that the employee sustained an occupational disease while working at the Lutheran Home for the Aged. I find that the employee's occupational disease of carpal tunnel syndrome in her right and left upper extremities arose out of and in the course of her employment at the Lutheran Home for the Aged. I find that the employee's work at the Lutheran Home for the Aged was the prevailing factor in causing the employee's carpal tunnel syndrome in her right and left upper extremities. I find that the employee's injuries to her right and left upper extremities were medically causally related to her occupational disease of carpal tunnel syndrome.

Issue 12. Date of the Occupational Disease

On September 27, 2005, Dr. Roumany diagnosed the employee with moderately severe bilateral carpal tunnel syndrome that is slightly worse on the right. Dr. Roumany did not state whether the employee's work was the cause of her bilateral carpal tunnel syndrome. The employee's symptoms got progressively worse and she eventually sought treatment with Dr. Tobin. On February 14, 2005, Dr. Tobin diagnosed the employee with bilateral carpal tunnel syndrome and the employee then filed a claim for compensation with the division of Workers' Compensation. The employee and her husband both testified that Dr. Tobin told them that the bilateral carpal tunnel syndrome was work related. I find that the employee's date of occupational disease is February 14, 2006.

Issue 2. Notice and

Issue 3. Statute of Limitations

Section 287.063.3 of the Missouri Revised Statutes states that the statute of limitation shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent than an injury has been sustained related to such exposure. Section 287.430 states that except for a claim for recovery filed against the Second Injury Fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefore is filed with the Division within two years after the date of the injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.

Section 287.420 of the Missouri Revised Statutes states 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 failure to receive the notice.

The employee discovered that she had bilateral carpal tunnel syndrome on September 27, 2005. The employee repeatedly told her supervisor about the complaints she was having in her upper

extremities after her symptoms began. The employee's supervisor ignored the employee's complaints. The employee saw Dr. Tobin on February 14, 2006, which is when he diagnosed the employee with bilateral carpal tunnel syndrome. The employee filed a claim for compensation on February 24, 2006 with the Division of Workers' Compensation.

Although the employee did not give notice thirty days or less after she was diagnosed with bilateral carpal tunnel syndrome, the employee did repeatedly tell her supervisor of her complaints in her bilateral upper extremities after she was diagnosed with her condition. The supervisor chose to ignore the employee's complaints. The employee proved that the employer was not prejudiced by failure to receive the written notice within thirty days because the supervisor knew that the employee was having complaints with her bilateral upper extremities. I find that proper notice was given to the employer because the employer was not prejudiced by not receiving written notice within thirty days of the diagnosis of the condition.

The employee's date of occupational disease is February 14, 2006. The employee filed a claim with the Division of Workers' Compensation on February 24, 2006, ten days after the date of occupational disease. Therefore the employee filed a claim for compensation within the two years allowed by law. I find that the employee filed her claim before the statute of limitations came into effect.

Issue 4. Average weekly wage and rate

Section 287.170 (4) of the Missouri Revised Statute states that for all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage.

The employee testified that she was not sure what her average weekly wage was at the time of her disability. However, on the employee's short term disability claim, the employee wrote that her weekly rate on the date of the disability was \$418.00. The employee therefore made \$10.45 an hour.

I find that the employee's average weekly rate at the time of her disability was \$418.00. Furthermore, I find that the employee's rate for temporary total disability and permanent partial disability is \$278.67.

Issue 6. Medical aid furnished by employer and Issue 7. Past medical aid

The employee filed a claim for compensation on February 24, 2006. The employer denied the employee's claim on March 26, 2006. The employee testified that she used her health insurance to pay for her medical treatment. Furthermore, Pam Cagle testified that the employee paid \$40.00 a pay period for her health and dental insurance. Ms. Cagle also testified that the health insurance is self-insured.

Ms. Cagle testified that the administrator of the health insurance plan has the right to recover the money spent on the employee's medical expenses if the employee's injury is because of a workers' compensation case. Although the health insurance is self-insured, it is completely unrelated to workers' compensation benefits.

The employee's medical bills include: \$120.00 to Cape Girardeau Physician Associate for services rendered on 2/28/06, \$215.00 for Dr. Tobin's services from 2-14-06, \$90.00 for Dr. Tobin's services rendered on 3-7-06, \$2,445.00 for Dr. Tobin's services rendered on 4-21-06, \$55.00 for Dr. Tobin's services rendered on 4-25-06, \$20.00 for Dr. Tobin's services rendered on 5-11-06, \$2445.00 for Dr. Tobin's services rendered on 6-7-06, \$263.00 for Dr. Tobin's services rendered on 6-28-07, \$8,700.00 for Auburn Surgery Center for services rendered on 4-21-06, \$1,200 for JK Essmeyer for services rendered on 4-21-06, \$2,580.50 for St. Francis Medical Center for services rendered from 5-12-06 through 6-29-06, and \$350.00 from Premier Rehab for services rendered on 6-21-07.

I find that the employer has not furnished any medical aid. The employee used her medical insurance which she paid for every pay period. The employer is self-insured for medical, however the medical insurance is completely unrelated to the workers' compensation system.

I also find that the employer is responsible to pay the employee for all of the medical bills related to her bilateral carpal tunnel system after the date that the claim was denied. The claim was denied on March 26, 2006. Therefore the employer is directed to pay the employee \$18,058.50 for past medical bills.

Issue 8. Nature and Extent of Disability

A. Temporary total disability

The employee received short term disability payments for when she was off work due to her bilateral carpal tunnel syndrome. Her short term disability policy is unrelated to the workers' compensation system.

The employee is requesting temporary total disability for the time period of April 21, 2006 through July 13, 2006 for the amount of \$3,065.33. The employee testified that Dr. Tobin took her off work for six weeks after her first and second surgeries. The employee returned to work on July 14, 2006. The employee's temporary total disability rate was \$278.67. The employee was off work for 11 weeks. 11 weeks times \$278.67 is \$3,065.33. Therefore the employer is ordered to pay the employee \$3,065.33 for temporary total disability for the time period of April 21, 2006 through July 13, 2006.

B. Permanent Partial Disability

I find that the employee sustained twenty percent (20%) permanent partial disability on the right upper extremity at the 175 week level, which is equal to 35 weeks. I find that the employee sustained twenty percent (20%) permanent partial disability of the left upper extremity at the 175 week level, which is equal to 35 weeks. Furthermore, I find that the employee is entitled to a 15% load because of the synergistic effects of her injuries, which is equal to 10.5 weeks. I also find that the employee sustained scars on each hand which are worth three weeks of compensation for each hand. Accordingly, the employer is directed to pay the employee the sum of \$278.67 for 86.5 weeks for a total of \$24,104.96.

Issue 9. Employee's Request for Costs for Litigation

Section 287.560 states that if the Division or the Commission determines that any proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

Although the award was not in the employer's favor, the employer defended the award based upon reasonable grounds. Therefore, I find that the employee's request for costs for litigation has been denied.

Issue 10. Employer's request for costs of Dr. Tobin's expenses

The employee has been awarded permanent partial disability, temporary total disability, and past medical aid, therefore employer's request for the costs of Dr. Tobin's expenses is unfounded. The employer's request for the costs of Dr. Tobin's expenses is denied.

Issue 11. The employer's Motion to Dismiss

Issues in a workers' compensation case are determined by the administrative law judge at a hearing. The Motion to Dismiss is not the proper way for this case to be disposed. Furthermore, the employer's Motion to Dismiss was based on the issue of notice. I found that there was proper notice and therefore the issue is moot and the Motion to Dismiss is denied.

ATTORNEY'S FEE

Stephen Taylor, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____

Made by:

Maureen T. Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Peter Lyskowski
Acting Division Director
Division of Workers' Compensation