

TEMPORARY AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury Nos.: 08-123983 & 09-073962

Employee: Chad Uhrhan
Employer: Drury Company
Insurers: Missouri Employers Mutual
Midwest Builders Casualty Mutual
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation cases are submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, heard oral argument and considered the whole record. Pursuant to § 286.090 RSMo, we issue this temporary award modifying the December 2, 2010, temporary or partial award of the administrative law judge (ALJ). We adopt the findings, conclusions, decision and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

The ALJ found that Midwest Builders Casualty Mutual is responsible for employee's past medical expenses totaling \$3,557.41, in addition to \$477.95 in mileage reimbursement. The ALJ went on to find that "[t]hese proceeds are to be paid to [e]mployee who in turn will need to reimburse MEM relative to the amounts paid."

We find that the ALJ ordering employee to reimburse MEM was improper under Missouri Workers' Compensation Law. Therefore, we affirm the ALJ's finding that Midwest Builders Casualty Mutual is responsible for employee's past medical expenses and mileage reimbursement, but we specifically do not affirm or adopt the ALJ's ordering of employee to reimburse MEM. There is no statutory authority permitting the Commission/Division to issue an order directing an employee to reimburse an alleged insurer in such manner.

The award and decision of Administrative Law Judge Matthew W. Murphy issued December 2, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this temporary award.

This award is only temporary or partial. It 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.

¹ Statutory references are to the Revised Statutes of Missouri 2008 unless otherwise indicated.

Employee: Chad Uhrhan

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The Commission further approves and affirms the administrative law judge's allowance of attorney's fees as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 29th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: Chad Uhrhan Injury No. 09-073962, 08-123983
Dependents: N/A
Employer: Drury Company
Additional Party: Second Injury Fund
Insurer: Missouri Employees Mutual
Builders Casualty Company
Hearing Date: 8/30/10

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: 12/15/08 and 6/25/09
5. State location where accident occurred or occupational disease contracted: Cape Girardeau, 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 the 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: Employee was injured while performing repetitive work activities at or above shoulder level.

Employee: Chad Uhrhan

Injury No. 09-073962, 08-123983

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Bilateral shoulders
14. Compensation paid to date for temporary disability: \$0.00
15. Value necessary medical aid paid to date by employer/insurer? \$4,035.36 paid by MEM; \$0 by Builders Casualty Co.
16. Value necessary medical aid not furnished by employer/insurer? Unknown.
17. Employee's average weekly wage: \$1,119.64.
18. Weekly compensation rate: TTD/PTD: \$746.43, PPD: \$422.97
19. Method wages computation: Stipulation.
20. Amount of compensation payable:

Unpaid medical expenses: \$3,557.41

Additional Medical Aid: Such medical, surgical, chiropractic, and hospital treatment including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury.

This award is only temporary and 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.

FINDINGS OF FACT AND RULINGS OF LAW

On August 30, 2010, the employee, Chad Uhrhan, appeared in person and by his attorney, David J. Jerome, for a hearing for a temporary award. Attorney George Floros represented employer Drury Construction and Missouri Employers Mutual (MEM). Attorney Steven McManus represented the employer Drury Construction and insurer Builders Mutual Casualty (Builders Mutual). The Second Injury Fund is to remain open and did not participate in the proceedings. Venue is proper and jurisdiction lies with DWC. The record was closed after presentation of evidence. 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. Covered Employer** - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law and liability was funded by: Missouri Employers Mutual until 3/31/09; Builders Mutual Casualty Company from 4/1/09 to present.
- 2. Covered Employee** - On or about the date of the alleged occupational disease, the employee was an employee of Drury Construction and was working under the Missouri Workers' Compensation.
- 3. Notice** - Employer had notice of employee's occupational disease.
- 4. Statute of Limitations** - Employee's claim was filed within the time allowed by law.
- 5. Average Weekly Wage and Rate** - Employee's average weekly wage for both injury dates was \$1,119.64. The rate of compensation for temporary total disability and permanent total disability is \$746.43. The rate for permanent partial disability is \$422.97.
- 6. Medical Causation** - Employee's injury was medically causally related to the incident which is the subject of this hearing.
- 7. Medical Aid Furnished** - Employer/Insurer through MEM has paid medical expenses totaling \$3,557.41. MEM seeks credit against Builders Mutual Casualty to the extent of these medical expenses.
- 8. Temporary Total Disability Paid** - Employer/Insurer has paid \$0 as temporary total disability benefits for 0 weeks of disability.
- 9. Mileage** - Employer/Insurer through MEM has paid mileage expenses totaling \$477.95. MEM seeks credit against Builders Mutual Casualty to the extent of these mileage expenses.
- 10. Permanent Total Disability** - There is no claim for permanent total disability for purpose of this hearing.

11. Permanent Partial Disability - There is no claim for permanent partial disability for purposes of this hearing.

ISSUES

1. Accident/Occupational Disease - There is a dispute as to whether the employee sustained an occupational disease arising out of and in the course of his employment.

2. Notice - There is a dispute as to whether the employee provided appropriate notice to the employer exclusively relative to the injury of December 15, 2008.

3. Medical Causation - There is a dispute as to whether the employee's current condition is causally related to his work activities.

4. Previously Incurred Medical - Employee is claiming previously incurred medical expenses in the amount of \$3,557.41 as well as \$477.95 in mileage that has been paid by Missouri Employers Mutual. There is a dispute as to whether Missouri Employers Mutual can obtain reimbursement directly from Builders Mutual Casualty Company.

5. Future Medical - Employee is claiming additional or future medical aid.

EXHIBITS

The following exhibits were offered and entered into evidence:

Employee's Exhibits:

- A. Deposition of Dr. Jacques Van Ryn
- B. Medical records of Dr. David Brown
- C. Medical records of Timberlake Surgery Center
- D. Medical records of Mid-America Rehab
- E. Medical records of Dr. S. Ken Griffith
- F. File materials from DWC

Employer/Insurer's Exhibits (MEM)

- 1. Payment history
- 2. Claim for Compensation, date of accident 10/7/09
- 3. Claim for Compensation, date of accident 6/25/09
- 4. Claim for Compensation, date of accident 12/15/08

Employer/Insurer's Exhibits (Builders Mutual)

- I. Photographs of work area
- II. Deposition of Dr. Lyndon Gross

SUMMARY OF EVIDENCE

Employee's Testimony

Mr. Chad Uhrhan (hereinafter referred to as "Employee") testified that he was born on June 15, 1973. He began working at Drury Company when he was 15 years old as an intern. He worked part-time until he was 19 years old and has been working full-time ever since. Employee's job is a commercial sheet metal worker wherein he installs guttering and downspouts in both commercial and high end residential homes.

Employee testified that prior to the present injuries and during the course of his employment, he developed carpal tunnel syndrome in April of 2007. This condition was deemed to be related to his work activities and he was sent to Dr. David Brown who performed surgery to both of his hands. All treatment and lost time benefits were paid for by the workers' compensation carrier. This case was settled on a pro-se basis.

By October of 2008, Employee developed problems with his elbows. He returned to Dr. Brown who diagnosed him with having bilateral lateral epicondylitis related to his work activities. On January 23, 2009, Employee underwent left cubital tunnel syndrome. On February 13, 2009, Employee underwent right cubital tunnel syndrome. All medical care was paid for by the workers' compensation carrier. While Employee was off work, all lost time benefits were paid by the workers' compensation carrier. Employee testified that following these surgeries, he was eventually released to full duty on April 6, 2009. He returned to work for his same employer.

Employee testified that for the 12 months leading up to his elbow surgeries, he was a working foreman. He noted that he would work eight hours per day at least five days per week. Leading up to the elbow surgeries, he spent 60% of his work week in the fabrication shop with the remaining 40% out in the field.

Employee testified that while he was in the fabrication shop, his job involved the manipulation and bending of 4'x10' sheets of sheet metal that had to be bent using a brake in order to make the various elements of the guttering. Employee testified that in order to perform this activity, he would initially have to remove from storage shelves a 4'x10' sheet of sheet metal that weighed 80 to 100 pounds. He noted that these sheets are stored at or near his shoulder height and that he would have to remove them from the shelf in order to take them to the work bench. Once he had transferred the sheeting to his work bench, he would cut the sheet into the sizes that he needed. He would then manipulate the pieces of metal into the brake to make the appropriate bends.

Employee testified that in order to bend the metal, he would have to push a handle forward and then backwards in order to complete the brake. Employee noted that in order to complete the bend, it required that he place his hands at or above shoulder level while leaning forward to push the handle forward all the way to his knees. Employee testified that he would have to complete 5 to 10 sheets per hour and that he would make 6 to 10 bends per sheet. Employee noted that it would take approximately 45 to 50 minutes to complete all of this bending on each sheet. In between the bends, Employee would have to manipulate the metal by turning it over. Employee

demonstrated that in order to turn over the metal, he would have to flip the metal with one hand while keeping the other stationary on the table. This often required that he lift his arm above shoulder level in order to complete this task. Employee testified that while working in the shop, he spent at least 40% at or above shoulder level in performing his work activities.

Employee testified that 40% of his work week, was spent out on the work site. This involved the installation of guttering elements on commercial buildings. His job included installing copings; installing gravel stops; installing fascias; installing guttering and downspouts; installing metal soffitt panels; installing metal roof panels; and laying metal decks. Employee testified that he felt that 35% of his day was spent at or above shoulder level.

Employee testified that when he arrived at a job site, his initial job was to remove ladders off of the top of the truck to move them to the work site. This activity required that he reach overhead to remove them. In addition, the Employee would spend 1 to 1-1/2 hours of his day handing materials up to individuals on the roof above him. This activity required that he lift his arms overhead to hand the materials up.

In addition, Employee testified that while installing guttering or downspouts, he would stand on a ladder and reach up to install the materials either at or above shoulder level. Alternatively, he would work on the roof and reach down. Employee testified that he predominantly worked on the ladder reaching up. Employee testified that he would spend approximately 60% to 70% of his installations on a ladder versus on a lift. He noted that when he was installing off of a ladder, he would install at eye level which would require that he drill out in front or up with arms extended upward. Employee testified that while performing these activities of drilling and installing the gutters, it placed force on his upper extremities.

Employee testified that while working in the field, he would be required to use drills, snips, hammer drills, rivet guns, and hammers. While drilling, he would often have to drill overhead into wood and concrete fascia boards.

Employee testified that prior to his elbow surgeries, he did not have any specific problems associated with his shoulders. He testified on direct examination and cross-examination that when he had problems with his elbows, he noted symptoms in his arms going up into his shoulders but was more focused on the problems with his elbows. Employee testified that he had no specific treatment to his shoulder nor did any doctor diagnose any problems relative to his shoulders until after the elbow surgeries. Since he had no specific diagnosis by Dr. Brown relative to his shoulders, Employee did not advise his employer of shoulder injuries since Dr. Brown had limited treatment exclusively to his elbows.

After his elbow surgeries, the Employee was released to return to work full duty as of April 6, 2009. At that time, he returned to work with the same employer but had lost his status as foreman. As a result, his job duties had changed and he spent 40% of his week in the shop and 60% working in the field. As a result, when he returned to work, his overhead work activities increased since he was now having to drill and manipulate guttering at or above shoulder levels.

Employee testified that after he returned to work in April of 2009, his shoulder symptoms began to increase and became more specific. As a result, when he followed up with Dr. Brown for his last visit on May 13, 2009, he advised the doctor of the problems associated with his shoulders. Dr. Brown referred the Employee to Dr. Lyndon Gross for further evaluation of his shoulders.

Employee was first seen by Dr. Gross on June 25, 2009. Employee testified that he did not know Dr. Gross before this evaluation and he was sent there by his employer through their workers' compensation carrier. Employee testified that when he met with Dr. Gross, he discussed with him the nature of his work activities which included the amount of overhead work that he performed in both the shop as well as in the field. Following an evaluation, Dr. Gross diagnosed the Employee with having bilateral shoulder rotator cuff tendinopathy. Employee testified that Dr. Gross was the first doctor that had examined him or provided him with a diagnosis relative to his shoulders. Following this evaluation, Dr. Gross recommended injections into his shoulders and provided work restrictions limiting the Employee to no overhead work.

Dr. Gross' medical treatment was authorized by Drury Company through its workers' compensation carrier, MEM. Employee obtained injections from Dr. Gross as well as physical therapy at Mid-America Rehab. All medical treatment was paid for by the workers' compensation carrier, MEM.

By July 16, 2009, Employee's shoulder was not doing any better. Dr. Gross discussed possible surgery on both shoulders. When he followed up with Dr. Gross on August 6, 2009 and August 18, 2009, Dr. Gross had the same recommendations for surgeries. The employee stated that the surgery had been postponed because the doctor was seeking authorization from the workers' compensation carrier before moving forward with the treatment. Employee noted although the recommendation had been made by the employer's choice of doctor, the authority was never provided for this surgical intervention.

Employee testified that between his initial medical treatment with Dr. Gross on 5/13/09 up until he last saw him on 8/18/09, he did not sustain any new accidents or injuries to either of his shoulders. He noted that his only stressors on the shoulder were his continued work activities. Employee noted that the complaints that he voiced to Dr. Gross in May of 2009 were the same as those that he voiced in August of 2009.

Employee testified that as a result of Dr. Gross not being authorized to perform the surgeries, he has been unable to move forward with any treatment. He noted that he continued to work for the same employer but is having increasing difficulty in completing his work activities. Employee testified that at the end of the day, his shoulders have a great deal of pain and he has difficulty in raising or holding them over his head for any duration. Employee testified that his problems are currently getting worse as time goes on.

Employee continues to have pain at the top of both of his shoulders. He noted that these problems have been present since he returned to work in May of 2009. Employee testified that he has weakness in his arms and has problems when tries to lift anything over 25 pounds from shoulder level to overhead. He has not missed any time due to the shoulder problem but continues to have problems with keeping up the pace of his work activities.

Employee testified that in addition to seeing Dr. Gross, he was also seen by Dr. Jacques Van Ryn. Employee testified that whenever he met with Dr. Van Ryn, he spent approximately one hour with the doctor and discussed in detail the nature of his work activities. He noted that Dr. Van Ryn is recommending the exact same procedure that was discussed by Dr. Gross.

Employee was shown photographs marked as Builders Mutual Exhibit I. Employee confirmed that these were photographs of his work environment and included photographs of the sheet metal brake. Employee noted that he was approximately 5'8" whereas the individuals that were photographed at the brake were over 6' tall. As a result, the Employee noted that whenever he would grab the handle it was at the level of his ears whereas the photographs show the individuals grabbing the handle a little below shoulder level.

Moreover, Employee testified that whenever he would bend the metal at the brake, he would lean forward extending his arms out to push the handle all the way forward to the point that it was near his knees. In addition, the handle would have to be pulled towards him much like a slot machine handle to brake the metal in the opposite direction. Employee testified that many times he would have to do this activity by himself which would require that he would complete the on side of the brake, go to the other end and complete the brake on the opposite side. This motion required not only pushing the handle forward but also backward to complete the activity. Employee testified that when he would push or pull the handle of the brake, he would feel it in his shoulder as it required force to move the heavier gauged metals.

On cross-examination from MEM, Employee testified that he had been seen by his family doctor, Dr. Griffith in October of 2008. During this treatment, the Employee made no mention of problems with his shoulders but did discuss problems with his arms. The Employee testified that in October of 2008, he was concerned that his carpal tunnel syndrome was coming back but noted that he had symptoms in his entire arm going up to the shoulders. Additionally, Employee noted that Dr. Brown performed no treatment to his shoulders and that Dr. Gross was the first doctor who had examined, diagnosed and treated his shoulders.

In addition, Employee testified that he had no restrictions on his shoulders until seeing Dr. Gross in June of 2009. He also had no lost time due to his shoulder problem and continues to perform his normal work activities.

On cross-examination from Builders Mutual, Employee testified that in 2008, he had pain in his hands, up his elbows and into his shoulders. He noted that while his pace slowed down at work, he was still able to complete his work activities. By December of 2008, his arms were still hurting and he still had symptoms in his shoulders. Employee testified that when he was off work following the surgeries to his elbows, his shoulder problems reduced. However, when he returned to work, his symptoms increased and gradually worsened to the point that he needed medical care.

Employee testified that he went crossbow hunting three times in 2008 but did not shoot any deer. He went rifle hunting one time in 2009 and shot one deer but his father was able to field dress it for him.

Employee testified that the first time he felt the burning in his shoulders was in April of 2009. He noted that these problems began about one week after he had returned to work following his elbow surgeries.

Testimony of Charlie Menz

Charlie Menz testified on behalf of the Employer. Menz testified that he has worked for Drury Company for 36 years. His title is department manager/estimating. His job is to perform all of the estimating as well as to oversee the people in the shop. Menz testified that he had known the Employee for 20 years. He believed that Chad worked 50% in the shop with the majority of that time being with co-workers. It was his belief that the majority of the work was not performed overhead and that lifts were used extensively for installing the guttering.

However, on cross-examination, Menz testified that his normal position was that of an estimator. He did not do fabrication and did not use the sheet metal brake. Although Menz was photographed in front of a brake at the request of Builders Mutual, Menz admitted that the pictures were staged by the insurance company as it was not part of his normal work activities.

In addition, Menz testified that when an individual was in the shop, they would spend four to six hours performing activities on the brake. By his estimation, an individual would have to process 400 feet of sheet metal during the course of a shift. He noted that the majority of the time, an individual would be working alongside a co-worker to complete these brakes but admitted that there were times when an individual would have to do both sides of the brakes. Menz noted in completing the brakes, each 10 foot section would require six to nine brakes. As for coping, it would require six brakes. As a result, Menz confirmed the Employee's testimony that if he was by himself, he would have to complete 200 feet of metal sheeting that were broken into 10 foot sections. This would create 20 sheets that would require six to nine brakes per piece of metal. In addition, there would be an additional 20 pieces of coping that would require six brakes per section.

Menz testified that he was 6' and was required to grab the handle straight out in front of him. He admitted that if an individual was shorter, they would have to reach up higher to push the handle forward or pull it back.

Menz testified that as it relates to the job site, he only visited the job sites one day per week and is there for approximately 30 minutes. He admitted that his job was not to perform the work activities but simply to make certain that all is going well.

Additional Testimony

Photographs of Work Site

Photographs of the work site were entered into evidence on behalf of the Employer. The photographs showed two individuals which Employee identified as being over 6' tall operating the brake. Both are bent in a forward position with their arms straight out in front of them. The

individuals' feet are spread as they pull the handle towards them to bend the metal. Missing from the photograph are the metal pieces within the brake itself. In addition, further photographs show a white handle that requires that the individual lean forward and extend their arm parallel to their shoulder level in order to bend the handle all the way to knee level. The position of the body indicates that the arms are at or above shoulder level from for most of the brake activities.

Medical Evidence

Dr. David Brown's Records

Dr. Brown's medical records reveal that Employee had treated with Dr. Brown for bilateral carpal tunnel syndrome in 2007. Employee underwent a right carpal tunnel release on 4/12/07 and a left carpal tunnel release on 4/26/07. Dr. Brown released him from his care on October 1, 2007.

On November 3, 2008, Employee returned with further problems in his hands and forearms. At that time, he was diagnosed with bilateral cubital tunnel syndrome. Employee underwent left cubital tunnel release on January 23, 2009. This was followed up by a right cubital tunnel release on February 13, 2009. On April 6, 2009, Dr. Brown released the Employee to return to work full duty. All treatment up to this point had been to the hands and elbows and there were no discussions involving treatment or examination to the shoulders.

On May 13, 2009, Employee returned to Dr. Brown. At that time, Dr. Brown noted that Employee's numbness and tingling were much better although he still had soreness around the elbow. The doctor noted that the Employee's main complaint was pain over both shoulders that he had had ever since prior to the surgeries. At that time, Dr. Brown referred Employee to Dr. Lyndon Gross for further treatment.

Medical records from Dr. Gross reveal that he first examined Employee on June 25, 2009. Dr. Gross' history of present illness discussed Employee's work activities at Drury Company as a sheet metal worker since 1989. Dr. Gross described the job entailing drilling, using snips to cut sheet metal, hammering, and welding. Dr. Gross' records reveal no alternate cause or inciting episode for the shoulder problems. Following physical examination, Dr. Gross diagnosed bilateral shoulder rotator cuff tendinopathy. Dr. Gross recommended injections into both shoulders as well as work restrictions that limit the amount of overhead lifting. Following approval by the workers' compensation carrier, Dr. Gross provided the injections and referred Employee to Mid-America Rehabilitation.

By July 16, 2009, Dr. Gross provided the same working diagnosis and discussed with him Employee continuing conservative treatment but noted the possibility of surgery. By August 6, 2009, Dr. Gross confirmed the need for surgery. The medical notes stated that, "we will have to await approval from his workers' compensation agent prior to proceeding." Similarly, on August 18, 2009, Dr. Gross provided the same recommendations. The doctor noted in his medical records that, "we will await approval from his workers' compensation agent prior to proceeding forward with further intervention." At that time, Dr. Gross was recommending right shoulder arthroscopy with subacromial decompression.

On August 31, 2009, Dr. Gross provided a supplemental opinion at MEM's request. Within his conclusions, Dr. Gross stated that he did not believe that work was the prevailing factor for Employee's problems. He noted that doing repetitive activities at shoulder or above shoulder level, could contribute to this condition but would not be the prevailing factor for any necessary treatment. Dr. Gross noted that Employee did not present any specific injury to his shoulder which he could attribute the cause for the need for treatment in his shoulders. This statement was made in spite of Dr. Gross having provided treatment and received payment by the workers' compensation carrier.

On April 2, 2010, Dr. Gross' deposition was taken. The doctor testified consistent with his medical records. However, on cross-examination, Dr. Gross changed his opinion. Dr. Gross stated that he believed that the conservative treatment he had provided was related either to the work activities or to Employee being deconditioned from the surgery that Dr. Brown had performed on him previously to his elbows. The doctor testified that when he requested payment for the treatment that he had provided, he considered the condition to be related to the work activities. The doctor noted that he believed that Employee's work activities had aggravated the condition.

However, Dr. Gross went on to testify that he felt that the need for the shoulder surgeries were due to the underlying degeneration and not due to the work injuries. However, Dr. Gross admitted that these work activities served to aggravate the shoulder problems. The doctor testified that the work activities would have made symptomatic a previously asymptomatic condition. Dr. Gross went on to indicate that patients do not seek medical treatment or have recommendations for surgery unless they are symptomatic. In Employee's case, his condition has become symptomatic because of the aggravation caused by his overhead work activities. Dr. Gross noted that the purpose behind the surgical intervention was to decrease the subjective symptoms that were aggravated and initiated by his repetitive overhead work activities. As a result, Dr. Gross concluded that he believed that the Employee had an underlying rotator cuff tendinopathy which he believed was related to Employee's aging process which was aggravated by his work or may have been due to his deconditioned state from the previous surgeries to both his elbows and wrists. Dr. Gross concluded that the need for surgery is not related to the fact that he had the rotator cuff condition but is due to the fact that the rotator cuff tendinopathy has become symptomatic. The doctor noted that it is a condition going from asymptomatic to symptomatic that led to his recommendation for surgery.

Medical Records and Deposition of Dr. Jacques Van Ryn

Dr. Jacques Van Ryn testified on behalf of Employee. Dr. Van Ryn examined the Employee on November 12, 2009 and agreed with Dr. Gross regarding the diagnosis of bilateral shoulder impingement syndrome with possible partial rotator cuff tears. Dr. Van Ryn concluded that because Employee had failed injections and physical therapy, he now needed an arthroscopic evaluation as well as acromioplasty in both shoulders with possible debridement of partial rotator cuff tears.

Dr. Van Ryn testified that he was very familiar with Employee's job duties as a metal fabricator. He testified that it was his understanding that the Employee would make and install guttering, copings, and downspouts. Dr. Van Ryn testified that he believed that the Employee's work activities required that he pull and push the brake handles in order to bend the metal to manipulate it into the guttering. The doctor testified that this required that he would pull from a straightening of the elbow to bending over a hundred degrees. He noted that since these activities were done at shoulder level, force was being applied to the shoulder joints. In addition, the doctor testified the Employee would have to perform pulling activities with the shoulder while pushing downward from an elevated position. The doctor noted that it was this downward pressure from a shoulder elevation that was required to bend the parts.

Dr. Van Ryn testified that it was his understanding the Employee would do 10 to 16 parts per hour with four to five turns of lifting, rotating, and bending the metal per part. As a result, Dr. Van Ryn concluded that Employee was doing 60 to 70 forceful manipulations with these parts. Dr. Van Ryn testified that this activity was significant to him in that the activities that were positioned at shoulder height or higher caused a pinching of the rotator cuff within the shoulder blade. The doctor noted that biomechanically, it placed the Employee in a disadvantageous position where he was up at shoulder height applying force to the shoulders.

In addition, Dr. Van Ryn testified that it was his understanding that the Employee's job on the work site would include the delivery and installation of fabricated guttering. He noted that this included loading and unloading long pieces of metal from above shoulder height. In addition, when the Employee was actually applying and installing guttering and downspouts, a lot of the work was done with a ladder with the arms in a position above shoulder height.

Interestingly, Dr. Van Ryn testified that he was very familiar with these work activities. He testified that he was previously the company doctor at the McDonnell Douglas plant and had observed sheet metal workers working on brakes similar to those used by Employee.

Dr. Van Ryn testified that as part of his review of the medical records, he had also reviewed the medical opinions from Dr. Gross. However, Dr. Van Ryn testified that when he examined the Employee for arthritis, he found that his studies were negative for arthritis of the glenohumeral joint. The doctor based this upon his physical examination as well as a review of the MRI scans.

As part of his diagnosis, Dr. Van Ryn diagnosed the Employee as having tendinopathy in the shoulders as a result of the repetitive stressors that pinched the tendon, rubbed the tendon, and led to an element of loss of blood supply. Dr. Van Ryn testified that this was early for an individual at 36 to have visible tendinosis on MRI. As a result, he felt that it was the Employee's repetitive overhead activities with force that caused the changes in the tendon. In addition, Dr. Van Ryn diagnosed impingement syndrome with possible partial rotator cuff tears. The doctor described this condition as the Employee having swollen rotator cuff tendons that had been repetitively pinched. As a result, the tendons had become swollen and have started chafing and tearing on the tendon itself.

Dr. Van Ryn testified that based upon his physical examination, review of the medical records, and review of the radiographic films, the prevailing factor that led to the diagnosis of the

conditions in his shoulder is the repetitive forceful use at or above shoulder level work that Employee had done at Drury Company. Dr. Van Ryn noted that the Employee had no alternate factors in her personal life and had no findings of arthritis within the shoulder. The only additional factor discussed by Dr. Van Ryn was a potential deconditioning of his arms while he was off of work for an extended period due to treatment on his elbows.

Dr. Van Ryn testified that the Employee had advised him that the onset of symptoms began in October of 2008 but that he first sought medical treatment with Dr. Gross in June of 2009. Dr. Van Ryn noted that Dr. Brown had referred the Employee for a shoulder problem but that Dr. Gross' evaluation in June of 2009 was the first diagnosis.

Dr. Van Ryn testified that due to the Employee having exhausted a course of conservative nonsurgical treatment, he recommended surgical treatment for both shoulders. The treatment would be an arthroscopy as well as an acromialplasty and debridement of any partial tears. Dr. Van Ryn testified that he attributed the need for this surgery to the work that the Employee performed at Drury Company.

Medical records from Dr. S. Ken Griffith

Medical records from Dr. S. Ken Griffith indicate the Employee saw Dr. Griffith for personal health problems in 2008 and 2009. There is no mention of any problems involving either shoulder during this course treatment.

Findings of Fact and Rulings of Law

Issue 1. and 3. Occupational Disease and Causation

There is a dispute as to whether the Employee sustained an accident/occupational disease arising out of and in the course of his employment. The majority of facts in this case appear to be undisputed although there exists questions as to when the "determination of disability" attached in this case. The Employee continued to work for the same employer throughout both claims but coverage from MEM ended on March 31, 2009 with Builders Mutual beginning coverage effective April 1, 2009.

An Employee's claim for compensation due to an occupational disease is to be determined under §287.067 Missouri Revised Statutes (2000). It defines occupational disease as:

"an identifiable disease arising with or without fault out of and in the course of employment. Ordinary diseases of life to which the general public is exposed outside of the employment should not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section." Missouri Revised Statute 287.067 (2000).

In addition, as it relates to repetitive activities:

"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 disease 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.” Missouri Revised Statute 287.067.3

The courts have noted that in proving a causal connection between the conditions of employment and an occupational disease, the claimant bears the burden of proof. *Vickers v. Missouri Department of Public Safety*, 33 S.W.3d 287 (MO Appellate Western District 2009). In order for the claimant to prove causation, he/she must show a recognizable link between the disease and some distinctive feature of the job. Additionally, there must be evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Id.*, at 292. The court noted that “a claimant must submit medical evidence establishing a probability that the working conditions caused the disease, although they need not be the sole case.” *Id.*, at 292. “Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee.” *Id.*, at 292.

After the 2005 amendments to the statutes, the definition of a compensable injury by occupational disease was changed from “a substantial factor” to use of the language “the prevailing factor” in relation to causation. The prevailing factor was defined by the statutes 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. Missouri Revised Statute 287.067.2.

In addition, §287.063 Missouri Revised Statute states as follows:

“An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length time, however short, he is employed in an occupation or process in which the hazard of the disease exists.”

However, as it relates to subsequent employers, an exception exists to the last exposure rule. Under §287.067.7, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period 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. §287.060.7 Missouri Revised Statute (2005). However, the exception to the last exposure rule does not apply to successive insurers. *Smith v. Tiger Coaches, Inc.*, 730 S.W.3d 756 (E.D. 2002).

Considering these elements listed above, the initial question is whether Employee sustained an occupational disease causally related to his work activities. Additionally, if the Employee sustained a repetitive motion injury, the next question would be which insurance carrier would be responsible for the appropriate benefits.

At trial, Employee testified that he has continued to work for the same employer for the past 20 years. His job duties include the bending and manipulation of sheets of steel to prepare and mold guttering. When not manipulating the metal into guttering, Employee's job duties included the installation of the various guttering elements including downspouts, gutters, coping, and fascia board.

Employee testified that prior to his elbow surgeries in January and February of 2009, he spent 60% of the work day in the shop with 40% of his work activities being performed above shoulder level. The Employee testified to completing and manipulating five to 10 sheets that were 4' x 10' long. Employee noted that he would make six to eight bends per sheet and would perform these same activities over an eight hour work shift. This leads to calculations of bends on the break machine of 30 to 80 per hour or 240 to 640 breaks per work shift. In addition, the Employee noted that in between brakes, he would have to flip the 4' x 10' sheets which often required that one end be lifted over his head to work on the opposite side of the sheet of metal. Employee noted that he had to complete these activities continuously.

At trial, the employer introduced pictures surrounding the brake machine. The workers seen operating the brake machine were operating it directly at shoulder level. However, as was noted by Employee, those individuals were 6' tall whereas he was only 5'8". As a result, Employee noted that when he would hold the handle, it would be at or above shoulder level and most often at ear level for each of the brakes. The photographs note that the Employee had to pull the handle for a forward brake. In addition, Employee had a second large handle with a counterweight that began at eye level and was pushed forward all the way until it bent to his knees. As was noted in the photographs, the individuals were seen leaning forward to complete this task with arms straight out in front of them.

In addition, Employee testified when he returned to work following the elbow surgeries, he lost his foreman status and therefore only spent 40% of the time in the shop with the remaining 60% in the field. Employee noted that when in the field, his job was to install guttering, fascia, coping, gravel stops, and downspouts on commercial buildings. Employee testified that as part of his work activities, he had to reach overhead to retrieve ladders off of the back of the truck as well as reach overhead to hand up materials to the roof at the beginning of each shift. Employee noted that this would take one to one and a half hours of reaching overhead to complete these activities. Employee testified that he felt that he spent approximately 35% of his day working at or above shoulder level in installing these various guttering elements. Employee noted that as part of his work activities, he would work off of a ladder and therefore would keep all of the drilling activities at eye level or above. Employee also noted that there were times when he would have to drill straight up into concrete in order to install fascia boards and guttering.

Employee testified that while performing these work activities, he began to develop problems in his arms leading up to his shoulders. The problems began in October of 2008 when he returned to Dr. Brown for problems with his arms. Employee described the problems as occurring throughout his arms and leading up to his shoulders. Employee was not as concerned about his shoulder at that time as he thought he was developing recurrent carpal tunnel syndrome. Employee noted that although he had these problems, he did not stop work nor did he seek

medical attention for his shoulders as he felt that the main problems were coming from his hands and elbows.

Following the surgeries to his elbows, Employee returned to work for the same employer in April of 2009. While continuing his work activities, he noted increased symptoms in his shoulders that eventually led him to return to Dr. Brown in May of 2009. Dr. Brown referred Employee to Dr. Lyndon Gross for further evaluation and care. Dr. Brown's medical records note the shoulder problems but do not provide an examination or diagnosis. On June 25, 2009, Dr. Gross examined Employee's shoulders and provided the first diagnosis relative to this condition. Dr. Gross testified that he felt that these problems were initially due to the work injury. Dr. Gross provided injections and physical therapy that was paid by MEM.

For the reasons stated herein, Employee sustained a compensable repetitive motion injury as a result of his work activities for employer. Review of the Employee's testimony as well as the photographs presented indicated that the Employee had to work extensive portions of his workday at or above shoulder level in initiating the brakes on the metal pieces. Photographs show not only did the Employee begin at or above his shoulder level but that he had to lean forward placing his arms in a more elevated position relative to his body. It was noted by Employee as well as Employee's supervisor, Charlie Menz that Employee was required to perform these brakes 240 to 640 per work shift. In addition, when Employee was not working in the shop, his job activities required the installation of guttering, coping, fascia, and downspouts. Employee testified that while performing these activities, he spent 35% of his day either at or above shoulder level. Most significantly, in addition to working at or above shoulder level, he was required to forcefully drill into wood and concrete as part of the installation process for the guttering, fascia, coping, and downspouts.

Dr. Van Ryn testified that he believed that the prevailing factor for his diagnosis and recommendation for medical care were the work activities that were described above. Dr. Van Ryn noted that there was no degenerative arthritis nor was there any outside factors to which he could attribute this diagnosis.

Interestingly, Dr. Gross agreed with Dr. Van Ryn that the work activities were the prevailing factor in the need for the conservative treatment in the form of injections and physical therapy. Dr. Gross not only prescribed this form of treatment but had it authorized by the workers' compensation carrier. However, the doctor later changed his opinion to indicate that he believed that the surgery was not causally related to these work activities. Interestingly, the doctor admitted that the need for surgery was due to the symptoms voiced by Employee and that the symptoms were brought about by the work activities. In spite of this admission, Dr. Gross continued to testify that the work activities did not cause the need for surgery.

Therefore, it is this Court's conclusion that the Employee's work activities for Drury Company were the prevailing factor in leading to the diagnosed condition of bilateral impingement syndrome and tendinopathy. The activities described by the Employee are sufficiently repetitive and overhead to bring about this diagnosis.

Having concluded that the work activities brought about the diagnosed condition, the second question is determining the responsible insurance carrier. As noted above, in determining the responsible employer, the court has recently changed the standard. Previously, the employer liable for the compensation is the employer in whose employment the employee was last exposed to hazard of occupational disease “for which claim is made.” §287.063.2 (2000). This statutory provision was changed in 2005 to indicate that the employer liable for compensation shall be the employer in whose employment the employee was last exposed to the hazard of occupational disease “prior to evidence of disability.” §287.063.2 (2005). Unfortunately, there has been no true discussion by the courts regarding the term “evidence of disability.” However, the court has recently held the following:

In the present case, the Employee testified that although he had symptoms in his shoulders as early as October of 2008, he received no physical examination or treatment from the employer until June 25, 2009. During that time period, the Employee was seen by the employer’s chosen doctor, Dr. David Brown for problems associated with his elbows. Dr. Brown neither examined nor discussed any problems associated with the shoulders. However, by May 13, 2009, Dr. Brown first mentioned problems associated with Employee’s shoulders and recommends that he be referred to Dr. Lyndon Gross for further evaluation and treatment. Similarly, in reviewing Employee’s family doctor’s records, there exists no treatment, examination, or recommendations for care relative to the shoulders. As a result, the first time that a doctor describes problems specifically associated with the shoulders was on May 13, 2009, well into coverage by Builders Mutual.

Similarly, Employee testified that from October of 2008 when he first began having problems with his shoulders up until being seen by Dr. Gross in June of 2009, he did not miss any time from work due to problems with his shoulders. Employee testified that he was able to complete his work activities, although his pace may have slowed. The first work restrictions placed on Employee occurred on June 25, 2009 when Dr. Gross advised Employee to limit his amount of overhead work. As a result, the first evidence of any medical disability occurred on June 25, 2009, well into the coverage period of Builders Mutual.

Based upon the foregoing, the first medical evidence of any disability associated with Employee’s shoulders occurred on May 13, 2009 when he was first evaluated by Dr. David Brown with the problems associated with his shoulders. This is consistent with Employee’s testimony that after he returned to work following his release in April in 2009 relative to his elbows, his shoulder problems progressively worsened to the point that he returned to Dr. Brown for further medical care. This worsening of the condition occurred on May 13, 2009 with the definitive diagnosis occurring on June 25, 2009. Both of these dates fell well within the Builders Mutual policy which began on April 1, 2009. As a result, the first evidence of disability occurred during coverage by Builders Mutual and they are held to be the liable carrier in this case.

Issue 2. Notice to MEM

MEM has raised the issue of notice relative to the injury date of December 15, 2008. However, since it has been determined that Employee’s first knowledge of a compensable and different

problem with his shoulders occurred on May 13, 2009, this issue is moot. However, it should be pointed out that all treatment and diagnosis in this case have been performed by employer's chosen physician. MEM had not only accepted the compensability of this matter but also had paid \$4,035.36 in benefits without claiming any issue or prejudice associated with a lack of notice.

Issue 4. Past Medical Expenses

Employee is claiming past medical expenses totaling \$3,557.41 as well as \$477.95 in mileage reimbursement. These proceeds were paid by MEM based upon Dr. Gross' opinion that the work activities were the prevailing factor in the need for the conservative treatment. MEM now seeks to have these proceeds reimbursed based upon its belief that these benefits should have been paid by the subsequent carrier, Builders Mutual.

Based upon the foregoing arguments, Builders Mutual is held to be responsible for these medical expenses and mileage reimbursements. These proceeds are to be paid to Employee who in turn will need to reimburse MEM relative to the amounts paid.

Issue 5. Additional/Future Medical Care

Employee is claiming additional and future medical care. Employee provided the testimony from Dr. Jacques Van Ryn who has concluded that Employee is in need of bilateral arthroscopic evaluation and acromioplasty of both shoulders with possible debridement of partial rotator cuff tears. Dr. Gross is in agreement with this course of action although there is a disagreement as to whether the work activities were the prevailing factor in bringing about the need for this surgical intervention. Based upon the conclusions set forth above, and pursuant to §287.140.1, employer is ordered to provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines as may be required to cure and relieve the effects of this work injury.

Attorney's Fees

Mr. David Jerome 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 these attorney's fees shall constitute a lien on the compensation awarded herein.

Interest

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

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Employee: Chad Uhrhan

Injury No. 09-073962, 08-123983

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Date: _____