

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 02-144321

Employee: Amy Walters

Employers: 1) Children's Mercy Hospital
2) Truman Medical Center

Insurers: 1) Self-Insured c/o Thomas McGee
2) Self-Insured c/o Corporate Claims Management

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, heard the arguments of the parties, and considered the whole record. The Commission finds that the award of the administrative law judge was not made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission reverses the Temporary Award and decision of Administrative Law Judge Emily Fowler, dated April 21, 2009. The award and decision are attached and incorporated to the extent they are not inconsistent with our findings, conclusions, award, and decision herein.

Preliminaries

The Findings section of the administrative law judge's award is thorough and accurate. We adopt the administrative law judge's findings as they appear therein as our own.

For context, we recount some basic facts. Employee is a nurse who contracted carpal tunnel syndrome. She worked for two hospitals; Children's Mercy Hospital (CMH) and Truman Medical Center (TMC).

On April 7, 2005, employee filed her original claim against CMH. This claim is the subject of this award. The Division of Workers' Compensation (Division) assigned Injury No. 02-030979 to this claim. On March 12, 2007, employee (newly represented by counsel) re-submitted the claim against CMH. On April 12, 2007, employee filed an amended claim against CMH. Finally on September 26, 2009, employee filed another amended claim – this time against CMH and TMC. The administrative law judge awarded benefits for this claim.

On April 12, 2007, employee also filed an original claim against TMC. The Division assigned Injury No. 07-030979 to that claim. On September 25, 2008, employee filed an amended claim in Injury No. 07-030979 naming both TMC and CMH as employers. The administrative law judge consolidated Injury No. 07-030979 with the instant claim (Injury No. 02-144321) for purposes of discovery, proceedings, and hearings. On April 21, 2009, the administrative law judge issued a Temporary Award denying benefits in Injury No. 07-030979 on the basis that compensation was awarded in Injury No. 02-144321.

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The administrative law judge found CMH liable for benefits in this case. CMH filed an Application for Review alleging, among other things, that the administrative law judge erred in concluding that CMH is liable to employee for workers' compensation benefits because CMH was not the last employer to expose employee to the hazards of the occupational disease.

Discussion

Liability of Children's Mercy Hospital

The administrative law judge ruled that because CMH did not file a timely answer to the April 7, 2005, Claim for Compensation, CMH is deemed to have admitted that the "date of accident" for employee's claimed occupational disease was July 28, 2002, as it appears on the Claim. "Date of accident" has no significance in determining liability in an occupational disease claim. "[T]he date of exposure to an occupational disease forms the basis for a determination of the employer's and insurer's liability." *Garrone v. Treasurer of State*, 157 S.W.3d 237, 244 (Mo. App. 2004). No doubt, employee was exposed to the hazard of carpal tunnel syndrome on July 28, 2002. But the date of accident is of no consequence in a repetitive motion case, as to the instant case, because it does not figure into the calculation of the period of exposure.

In Missouri, where an employee has been exposed to the hazards of the occupational disease in more than one employment, the last exposure rule determines which of multiple employers is liable for compensation.

Until August 28, 2005, the liable employer was "the last employer in whose employment the employee was last exposed to the hazard of the occupational disease for which the claim is made, regardless of the length of time of such last exposure." Section 287.063 RSMo (2004). "This last exposure rule is not a rule of causation.' Rather, as the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease.' Section 287.067.7 (less than three months' exposure) has been recognized as a turning point to shift liability away from the last employer." *Copeland v. Associated Wholesale Grocers*, 207 S.W.3d 189, 192 (Mo. App. 2006), quoting *Endicott v. Display Techs.*, 77 S.W.3d 612, 615 (Mo. 2002).

Undoubtedly, CMH exposed employee to the hazards of carpal tunnel syndrome. However, TMC was the last employer to expose employee to the hazards of carpal tunnel syndrome before the date of the claim. Employee worked exclusively for TMC for more than 3 months at the time the claim was filed, so § 287.067.7 RSMo (2004) does not operate to shift liability back to CMH. As succinctly stated by the appellate court in *Copeland, supra*, the starting point, the last employer before the date of claim is liable if that employer exposed the employee to the hazard of the occupational disease, becomes the ending point. Accordingly, TMC is the liable employer, pursuant to the last exposure rule.

As of August 28, 2005, the liable employer is the last 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. Section 287.063 RSMo (2007).

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This Commission has not yet been faced with the question of what constitutes "evidence of disability." We note that cases interpreting "disability" were not abrogated by the 2005 amendments to the Law. "Disability" for workers' compensation purposes means, "the inability to do something; the deprivation or lack of physical, intellectual, or emotional capacity or fitness; the inability to pursue an occupation or perform services for wages because of physical or mental impairment." *Loven v. Greene County*, 63 S.W.3d 278 (Mo. App. 2001), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Employee was not rendered unable to perform services for wages or otherwise incapacitated from pursuing her occupation at any time before she left her employment with CMH or within the 3 months thereafter.

Applying either the pre-amendment Law or the Law as amended, TMC was the last employer to expose employee to the hazards of the occupational disease for purposes of the last exposure rule. The administrative law judge erred in concluding that CMH is liable for benefits for employee's carpal tunnel syndrome.

Liability of Truman Medical Center

Pursuant to § 287.430 RSMo, a claim for occupational disease must be filed within two years after the date of injury or death or within two years of payment of some element of compensation: "[N]o proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death,..."

Until August 28, 2005, the two year period did not begin to run until it became "reasonably discoverable and apparent that a compensable injury has been sustained." § 287.063.3 RSMo (2004). The question as to when a compensable injury becomes reasonably discoverable and apparent is a question of fact to be determined by the Commission. *Mann v. Supreme Express*, 851 S.W.2d 690, 692 (Mo. App. 1993). Under the law in effect before August 28, 2005, the statute of limitations in an occupational disease case starts to run when: (1) an employee is no longer able to work due to the occupational disease; (2) an employee must seek medical advice and is advised that he can no longer work in the suspected employment; or (3) the employee experiences some type of disability that is compensable. *Rupard v. Kiesendahl*, 114 S.W.3d 389 (Mo. App. 2003), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Within this context, a disability is the inability to do something; the deprivation or lack of physical, intellectual, or emotional capacity or fitness; the inability to pursue an occupation or perform services for wages because of physical or mental impairment. *Loven*, 63 S.W.2d at 284. It is not necessary for an employee to miss work before that employee can recover on an occupational disease claim. *Coloney v. Accurate Superior Scale*, 952 S.W.2d 755 (Mo. App. 1997), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Rather, an employee with an occupational disease is compensably injured when the employee suffers a demonstrated loss of earning capacity, such as an inability to perform various vocational tasks. *Loven*, 63 S.W.3d at 284-285; *Coloney*, 952 S.W.2d at 760. Requiring that the harm tangibly affect the

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employee's earning ability upholds the intent of the Law, which is to provide indemnity for loss of earning power and disability to work. *Coloney*, 952 S.W.2d at 760.

Generally, such a condition becomes apparent when an employee is medically advised that he or she can no longer physically continue in the work environment. A compensable injury occurs when the disease causes the employee to become disabled and unable to work. *Wiele v. National Super Markets, Inc.*, 948 S.W.2d 142 (Mo. App. 1997), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

An employee is not expected to file a workers' compensation claim until the employee has reliable information that his or her condition is the result of his or her employment. The employee is entitled to rely on a physician's diagnosis of the employee's condition rather than his or her own impressions. This rule is not, however, absolute. Under certain circumstances, it can be foreseen the time should begin to run without having an expert's opinion in the employee's hands. The facts of each case will have to be determined on a case-by-case basis in this uncertain area, all under the existing doctrine of construing the workers' compensation law liberally. *Rupard*, 114 S.W.3d at 396-397.

Applying the analysis described above, we conclude that as of August 27, 2005, employee had sustained no disability triggering the running of the statute of limitations.

The legislature changed the tolling provision for the filing of occupational disease claims with the 2005 amendments to the Workers' Compensation Law. Beginning August 28, 2005, the two year period begins to run when "it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure,..." § 287.063.3 RSMo (2005). The evidence reveals that employee was aware her carpal tunnel syndrome was related to her nursing duties as of August 28, 2005.

"[T]here is no vested right in the maintenance in force of the statute in effect when the claim accrued. It is possible to shorten the statute of limitations applicable to an existing claim. If any such attempt is made, however, those who have pending and unbarred claims at the time the new statute becomes effective must be afforded a reasonable time within which to file suit." *Goodman v. St. Louis Children's Hospital*, 687 S.W.2d 889, 891 (Mo. 1985)

"No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions [including] those which have accrued or are pending and future actions." *State ex rel. Clay Equipment Corp. v. Jensen*, 363 S.W.2d 666, 669 (Mo. 1963).

Applying the principals enunciated in *Goodman* and *Clay Equipment*, employee had no vested right in the tolling provision as contained in the previous version of § 287.063. As such, the two year period within which employee could timely file a claim began to run simultaneously with the effective date of the amendment to the tolling provision – August 28, 2005.

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In April 2007, employee first filed a claim naming TMC. The claim was assigned Injury No. 07-030979. The April 12, 2007, claim was filed within two years after August 28, 2005. Injury No. 07-030979 was tried with the instant claim. That matter is still pending before the Division because the administrative law judge issued a Temporary Award on April 21, 2009.

In September 2008, employee added TMC to the claim in the instant matter. The attempted amendment is barred by the statute of limitation (statute of extinction) set forth in § 287.430.

Although both claims for compensation allegedly arise from exposure to the hazards of carpal tunnel syndrome, no party has requested that we combine Injury Nos. 02-144321 and 07-030979 into a single claim. If the claims had been combined, we could fully resolve the issues remaining between the parties. Instead, the parties will have to proceed to final award in Injury No. 07-030979 before the Division to determine if employee is entitled to compensation from either employer.

For the foregoing reasons, we reverse the Temporary Award of the administrative law judge issued April 21, 2009. We issue this Final Award denying compensation in the instant claim.

Given at Jefferson City, State of Missouri, this 2nd day of December 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Amy Walters

SEPARATE OPINION

Concurring in Part and Dissenting in Part

I agree with the award of the majority that if this claim were combined with the claim in Injury No. 07-030979, we could resolve the merits of employee's claim against Truman Medical Center (TMC) for medical treatment now. I disagree that the matter must go back to the Division of Workers' Compensation for resolution. I would combine the claims and issue an award directing TMC to provide immediate treatment for employee's work-related carpal tunnel syndrome. This employee should not have to wait any longer for the medical treatment from TMC to which she is clearly entitled.

John J. Hickey, Member

TEMPORARY AWARD

Employee: Amy Walters Injury No: 02-144321
Dependents: N/A
Employer 1: Children's Mercy Hospital
Insurer 1: Self Insured c/o Thomas McGee
Employer 2: Truman Medical Center
Insurer 2: Self Insured c/o Corporate Claims Management
Additional Party: Treasurer of the State of Missouri as the Custodian of the Second Injury Fund
Hearing Date: February 04, 2009
Record closed March 25,2009

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: July 28, 2002.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes, as to Truman Medical Center
7. Did employer receive proper notice? n/a
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee performed repetitive work with her upper extremities resulting in injury thereto.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Bilateral Upper Extremities

14. Nature and extent of any permanent disability: Not Determined
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? Children' Mercy Hospital: \$1,051.41; Truman Medical Center: \$0
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Children's Mercy Hospital \$670.17; Truman Medical Center \$1,145.60
19. Weekly compensation rate: Children's Mercy Hospital \$ \$446/ \$340.12; Truman Medical Center \$675.90/\$354.05
20. Method wages computation: by stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A
22. Second Injury Fund liability: N/A
23. Future requirements awarded: Reasonable and Necessary Medical Treatment; Temporary Total Disability if Claimant is rendered temporarily but totally disabled by such treatment; and All Benefits Under the Law.
24. The compensation awarded shall be subject to a lien in favor of Claimant's Attorney David Slocum for 25% of all benefits warded herein..

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Amy Walters Injury No: 02-144321
Dependents: N/A
Employer 1: Children's Mercy Hospital
Insurer 1: Self Insured c/o Thomas McGee
Employer 2: Truman Medical Center
Insurer 2: Self Insured c/o Corporate Claims Management
Additional Party: Treasurer of the State of Missouri as the Custodian of the Second Injury Fund
Hearing Date: February 04, 2009
Briefs Filed: February 25, 2009 Checked by:

On February 04, 2009, the employee and employers appeared for a temporary hearing. The employee, Ms. Amy Walters, appeared in person and with counsel, David A. Slocum. Employer, Children's Mercy Hospital, appeared through counsel, Peter Chung. Employer, Truman Medical Center, appeared through counsel, Michelle Haskins. The Second Injury Fund is a party to the case, but was not represented at the hearing as no issue involved it in this temporary hearing. The Division has jurisdiction to hear this case pursuant to §287.110.

STIPULATIONS

The parties stipulated that:

1. Ms. Walters was an employee of Children's Mercy Hospital (hereinafter CMH) through September 12, 2004, and that at all times in question, Children's Mercy Hospital was an employer operating subject to Missouri's Workers' Compensation law as an authorized self-insured entity;
2. Ms. Walters was an employee of Truman Medical Center (hereinafter TMC) beginning on October 27, 2003 to present, and that at all times in question, Truman Medical Center was an employer operating subject to Missouri's Workers' Compensation law as an authorized self-insured entity;

3. At all times in question that Ms. Walters was employed by either employer, she was working subject to the law in Kansas City, Jackson County, Missouri;
4. Ms. Walters notified Children's Mercy Hospital of her alleged injury and filed her claim, with respect to Children's Mercy Hospital within the time allowed by law;
5. CMH has provided medical care for Ms. Walters' injuries totaling \$1,051.41, and CMH has not provided Mr. Walters with any benefits under the applicable Missouri Workers' Compensation statutes.
6. AWW of CMH During her employment with TMC, Ms. Walters earned an average weekly wage sufficient to qualify for the maximum compensation rates for both temporary total and permanent partial disability benefits.

ISSUES

The parties requested the Division to determine:

1. Whether Ms. Walters sustained an occupational disease arising out of and in the course of her employment at either employer?
2. If so, which, if any, of her employers is liable for benefits under the workers' compensation law?
3. Whether either employer must provide the employee with additional medical care?
4. Whether Ms. Walters' claim for compensation was filed in the time allowed by law with respect to Truman Medical Center?
5. Whether Ms. Walters notified Truman Medical Center of an injury within the time allowed by law?

FINDINGS

Ms. Walters testified on her own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A - Medical Report, Lynn D. Ketchum, MD, 03/20/08
- Exhibit B - Addendum Report, Lynn D. Ketchum, MD, 06/19/08
- Exhibit C - Addendum Report, Lynn D. Ketchum, MD, 07/03/08
- Exhibit D - CV of Dr. Lynn D. Ketchum
- Exhibit E - Medical Records, OHS
- Exhibit F - Medical Records, Aurora Plastic and Hand Surgery
- Exhibit G - Medical Records, Heartland Primary Care
- Exhibit H - Medical Records, Independence Regional Health Center

- Exhibit I - Medical Records, St. Mary's Medical Center
- Exhibit J - Medical Records, Centerpoint Medical Center
- Exhibit K - Medical Records, Rehab Specialists
- Exhibit L - Medical Records, Research Medical Center
- Exhibit M - Medical Records, Todd A. Statsny Medical Associates
- Exhibit N - Deposition of Amy Walters, 09/24/08 with exhibits attached
- Exhibit O - Original Claim for Compensation Received 04/07/05
- Exhibit P - Original Claim for Compensation Received 03/12/07
- Exhibit Q - Amended Claim for Compensation Received 04/12/07
- Exhibit R - Amended Claim for Compensation Received 09/26/08
- Exhibit S - Original Claim for Compensation Received 04/12/07
- Exhibit T - Amended Claim for Compensation Received 09/25/08
- Exhibit U - Withdrawn

Children's Mercy Hospital presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1 - Deposition of Bradley Storm, M. D., 01/08/09 with exhibits attached

Truman Medical Center presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1A- Medical Records, Todd A. Stastney Medical Associates

Based on the above exhibits and the testimony of Mr. Walters, I make the following findings:

Ms. Walters is a 37 year-old female who currently resides in Blue Springs, MO. In December 1994, Ms. Walters received a bachelor's degree in nursing from Central Missouri State University. Ms. Walters has worked in the nursing profession for various employers over the last thirteen years.

Even though Ms. Walters' job titles and employers have changed over her employment as a nurse, her job duties have remained relatively consistent. Each of Ms. Walters' employments has required her to perform the following hand intensive activities to varying degrees: data entry and computer work; starting IV's; completing paperwork; and performing patient care. Ms. Walters testified that the most time she spent performing data entry work at either TMC or CMH was 75% of her day from 1998 to July 2002 when she was a charge nurse at CMH. The lowest amount of time that Ms. Walters spent doing data entry type work during her employments at TMC or CMH was from 2004 to 2006 when she was a discharge nurse coordinator at TMC. At that time, Ms. Walters performed data entry work for roughly 25-30% percent of her day. Throughout the rest of Ms. Walters' employments with TMC and CMH, her data entry workload consisted of approximately 50% of her day.

Ms. Walters testified that she first began to notice subtle symptoms in her bilateral upper extremities in late 2001 to early 2002. Ms. Walters was working full time at CMH and only at CMH during that time period. At that time, Ms. Walters began to notice her fingers would

sometimes lock up when she was on the computer, and that occasionally she would have trouble working with the IV tubes. It was when Ms. Walters transferred to the observation floor at CMH in July of 2002 that she began to notice more consistent symptoms. At that time, Ms. Walters had problems opening and twisting certain things. As the year progressed Ms. Walters noticed her symptoms more. In approximately November 2002, Ms. Walters' bilateral upper extremity condition had progressed to the point where she was not able to open Jell-O containers. Around that same time, Ms. Walters noticed that she was unable to palpitate the pedal pulses of the cardiac cath patients as well as she had in the past. In addition, Ms. Walters noted that her arms would ache at night, and on many nights her arms would become numb up to her shoulder, this was more prevalent on her right side. For her condition, Ms. Walters went to her family physician for an evaluation of her upper extremities on January 07, 2003.

The medical records from Todd A. Stastny Medical Associates record that at her appointment on January 07, 2003, Ms. Walters complained of pain in her right and left wrists. According to the records, the pain was almost every day and included pain and numbness in the fingertips. At that time, Ms. Walters symptoms increased when she worked all day at the computer, and decreased on her weekends off. Dr. Francis diagnosed Ms. Walters with bilateral carpal tunnel syndrome and ordered bilateral nerve conduction studies. Ms. Walters testified that Dr. Francis told her that her condition was work related and that she should contact her employer because he thought her treatment should go through their doctor.

Immediately after her appointment with Dr. Francis Ms. Walters contacted her CMH to discuss her condition. She was then referred to OHS for treatment. Ms. Walters was evaluated by Dr. J. Ralph Payne at OHS on January 07, 2003, the same day that Ms. Walters was examined by Dr. Francis. Dr. Payne's records state that after notifying the work comp people at CMH, Ms. Walters was referred for "...complains of numbness and tingling in her hands, primarily her right hand, over the last several months. It becomes worse during her active days which a great deal of time is spent doing data entry in a computer for scheduling and ordering supplies and other nursing administrative responsibilities." For her condition, Dr. Payne recommended a regional assessment to identify potential strength deficits in grips and pinching. Dr. Payne felt that if these conditions were present, Ms. Walters would require physical therapy. On January 09, 2003, Ms. Walters return to see Dr. Payne after completing the regional assessment. According to the records, Ms. Walters gave consistent effort on her testing, and demonstrated "...grip strengths bilaterally were at 50% below average for age and gender. Left hand averages 50-86 lbs. Her grip strength was 25 lbs. Right hand averaged 60-98 lbs and her average was 31 lbs. Pinching strength was well below average as well." At that point, Dr. Payne ordered physical therapy.

Ms. Walters was released from treatment on her upper extremities by Dr. Payne on February 26, 2003. Dr. Payne's note from that day state "[Ms. Walters] has completed physical therapy for bilateral forearm numbness and tingling, right greater than left....Grip strength is about equal bilaterally, but still somewhat reduced. Range of motion is full of the wrists, forearms and hands/digits....Numbness and tingling of forearms, somewhat improved since originally seen. The patient was advised to continue with home treatments, as noted above." The home treatments referenced consisted of over-the-counter anti-inflammatory medications and ice in the afternoons and evenings. Ms. Walters testified that at the time of her release her complaints of pain and aching were improved, but only because she was taking Motrin around

the clock. When she did not take the Motrin her pain returned. Ms. Walters also felt that although not back to normal, her strength had improved somewhat. Unfortunately, her numbness complaints did not improve. Ms. Walters testified that at the time of her release, despite the fact that she continued to have complaints, she was told to resume normal work activities and do her at-home exercises. She was told that if she did this, her complaints would eventually resolve. They did not.

Ms. Walters returned to see Dr. Payne on March 07, 2003. Dr. Payne's records indicate that she was still having symptoms and believed that she was prematurely dismissed on February 26, 2003. She was concerned about the persistent pain in her left wrist. Dr. Payne advised Ms. Walters to continue with her stretching exercises and return in one month or sooner if symptomatic. On her own, Ms. Walters went for an EMG on March 14, 2003. This was performed by Dr. Kumar at St. Mary's Hospital of Blue Springs. Dr. Kumar's impression of the EMG results was that the "patient's study at the moment is within normal limits and does not reveal any definite electrophysiological abnormality." When Ms. Walters returned to see Dr. Payne on April 07, 2003, she was released in "good condition." Ms. Walters testified that at the time her release she was not symptom free, and was never referred to a hand or plastic surgery specialist for her complaints. According to Ms. Walters she continued to have occasional pain at night and numbness.

From April 2003 to October 2003, Ms. Walters continued to treat her symptoms with the at home stretching program and Motrin as recommended by Dr. Payne; however, she continued to have problems with her arms. In October 2003, while still working for CMH, Ms. Walters emailed CMH's occupational health nurse, Deb Quirarte and told her that she was having an increase in problems with her wrists due to a lengthy typing assignment she was given. In her email, Ms. Walters asked Ms. Quirarte to contact her and direct her on whether she was to go back to OHS, or if she was to consult her own doctor for treatment of these symptoms. Ms. Quirarte did not respond to Ms. Walters' email.

Beginning October 27, 2003, Ms. Walters became a full-time employee of TMC and changed her employment status at CMH to a part-time employee. In other words, Ms. Walters had an employment overlap from October 27, 2003 through her last date of employment with CMH on September 12, 2004.

In December 2003, while an employee of both CMH and TMC, Ms. Walters tried again to contact Ms. Quirarte at CMH to seek medical treatment of her condition. On that day, Ms. Walters left a phone message with the CMH occupational health clerk. Ms. Quirarte did not return Ms. Walters' phone call.

In February 2004, Ms. Walters again tried to reach Ms. Quirarte to discuss treatment of her upper extremities. Again, Ms. Walters was not able to speak with her. However, Ms. Walters did speak with Deb. Rivera, occupational health nurse with CMH. In this conversation, Deb Rivera advised Ms. Walters that she did not see any need for Ms. Walters to return to the doctor and that she should continue with her exercises and Motrin use.

Ms. Walters' employment with CMH ended on September 12, 2004. At that time, Ms. Walters was working full-time at TMC where she is presently employed.

Ms. Walters next attempted to pursue treatment of her condition in early April of 2005. At that time, Ms. Walters contacted CMH to let them know that she was still having problems. On April 08, 2005, Ms. Walters was directed to contact Sammy at Thomas McGee. Ms. Walters called Thomas McGee on that day, and left a message for Sammy to call her back. After speaking with a legal advisor at the Division of Workers' Compensation, Ms. Walters filed her original claim for compensation for her bilateral upper extremities on her own behalf on April 08, 2005. Her claim was acknowledged by the Division on April 12, 2005.

In her claim for compensation, Ms. Walters alleged injuries to her arms and hands and tingling in both arms greater in the right. Ms. Walters also alleged that her injuries were sustained at her employment with CMH through 07/28/02. It should be noted that CMH's Answer to Claim for Compensation was not filed with the Division of Workers' Compensation until June 14, 2005, over sixty days after receipt of Ms. Walters' claim was acknowledged.

Some time later, Ms. Walters received notice from the Division of Workers' Compensation that her claim was scheduled on the certified docket. To prepare for this setting, Ms. Walters was evaluated by Dr. O. Allen Guinn, III, M.D., of Aurora Plastic and Hand Surgery on March 08, 2007. Ms. Walters testified that from the time she was released from Dr. Payne, to the time that she saw Dr. Guinn, she continued to have problems with her arms. She also testified that during this time period she was following the treatment regiment recommended by Dr. Payne. Based on his examination, Dr. Guinn felt that Ms. Walters' "work as an RN is the prevailing factor in her symptoms, and as such, the problem should be treated under the [workers' compensation] system." Dr. Guinn recommended repeat bilateral NCS/EMG's, and follow up for further evaluation and treatment. Based on Dr. Guinn's report, Ms. Walters filed another claim for compensation on March 12, 2007.

In her claim for compensation filed on March 12 2007, Ms. Walters alleged continued numbness in her hands, especially in the right hand, and that her doctor said it should have been treated years ago. Under date accident or occupational disease, Ms. Walters wrote 07/28/02, and alleged that her employer was Children's Mercy Hospital.

In April of 2007, following the certified docket, The Eppright Law office filed several claims on Ms. Walters' behalf. An amended claim for injury number 02-144321 was filed on April 12, 2007. The amended claim changed the accident date to a series of injuries up to 07/28/02, alleged that Ms. Walters' injury resulted from repetitive use of her bilateral upper extremities and continued to name CMH as Ms. Walters' employer. The Eppright Law office also filed a new claim alleging additional injury to Ms. Walters' bilateral upper extremities from repetitive use up to through and including 04/09/07. This new claim named TMC as Ms. Walters' employer. Both of these claims were amended in September of 2008. The '07 claim was amended to add CMH as an employer, and the '02 claim was amended to add TMC as an employer.

At the request of her attorneys, Ms. Walters was examined by Dr. Lynn D. Ketchum on March 20, 2008. In his report, Dr. Ketchum opined that the EMG results in 2003 revealed borderline right carpal tunnel syndrome, were negative on the left, and showed no other neuropathies. Dr. Ketchum also opined that Ms. Walters' work at TMC did not make her

symptoms worse, but prolonged her complaints. Dr. Ketchum diagnosed right carpal tunnel syndrome and left overuse syndrome. For these conditions, Dr. Ketchum recommended right carpal tunnel release, and a Kenalog injection for stenosing tenosynovitis or her right fourth digit. Dr. Ketchum felt that all of Ms. Walters' complaints related back to her work at CMH. In later reports, Dr. Ketchum opined that Ms. Walters' work activities at CMH were a substantial factor in causing her condition, and that generally, Ms. Walters work activities were not only the substantial factor but the prevailing factor in causing her work-related injuries.

Ms. Walters was evaluated by Brad W. Storm M.D., at CMH's request on November 17, 2008. Following his examination, Dr. Storm authored a report stating that he agreed that Ms. Walters suffers from carpal tunnel syndrome, and possibly tenosynovitis issues as well. Dr. Storm recommended open carpal tunnel release and tenosynovectomy and an epineurotomy if indicated. Dr. Storm also stated in his report "In terms of causation, symptoms started while working at Children's Mercy. This is fairly well documented even though her EMG was negative. EMG's are sometimes falsely negative in perhaps 10 percent of patients. We also know that splints and anti-inflammatory agents and change in work habits are very unlikely to prevent progression of the disease statistically. I believe that her work at Children's Mercy was the primary cause of the disease process. Her work at TMC certainly did not improve the situation...In short, I believe that the work at Children's Mercy was the cause of the disease process it is likely it would have continued to worsen to the point that it required surgery regardless of subsequent work activities..." In an addendum report dated December 01, 2008, Dr. Storm opined "...I would consider the Truman Medical Center work a substantial contributing factor in the subsequent development of her carpal tunnel syndrome...the likelihood of the progression of the disease or certainly at the very least the pace of the progression of the disease, was affected by her work at Truman Medical Center." In his deposition, Dr. Storm confirmed that in his opinion, Ms. Walters' work at CMH was the prevailing factor in causing her condition, but that her work at TMC was a substantial contributing factor in causing her carpal tunnel syndrome.

To date, Ms. Walters has not received any of the treatment recommended by doctors Storm, Ketchum, or Guinn.

RULINGS

The first issue to be determined by this Court is whether Ms. Walters sustained an occupational disease arising out of and in the course and scope of her employment. Based on the testimony of Ms. Walters and the medical evidence provided by the parties, I find that Ms. Walters did sustain a compensable occupational disease arising out of and in the course and scope of her employment.

The question of whether Mr. Walters sustained a compensable occupational injury is truly a multifaceted inquiry. First, the Court must determine which of the two standards of causation is appropriately applied to this claim, next the Court must determine if that standard of causation is met after considering the evidence. I find that the appropriate standard of causation to be applied in this claim is whether Ms. Walters' work activities at either of her employments were a "substantial factor" in causing her condition. Based on the testimony of Ms. Walters and

the medical evidence, I find that the work activities at both employments were, in fact, substantial factors in causing her bilateral carpal tunnel syndrome.

According to RSMo. § 287.067(2), “An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020.” According to RSMo. § 287.020(2), “An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.” RSMo. § 287.020(3)(1) adds that, “...injury is hereby defined to be an injury which has arisen out of and in the course scope employment. The injury must be incidental to and not independent of the relation of employer and employee....” In order to arise out of and in the course and scope of employment an injury must be “(a)...reasonably apparent upon consideration of all circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of work; and (c) It can be fairly traced to employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.” RSMo. § 287.020(3). These statutes were amended in August 2005, changing the “substantial factor” language to “prevailing factor.”

Prospective application of a statute is presumed unless the legislature evidences a clear intent to apply the amended statute retroactively, or where the statute is procedural in nature. Files v. Watterau, Inc., 998 S.W.2d 95 (Mo. App. 1999). “There is no express language stating that it was the intent of the legislature to apply either section 287.020 or section 287.067 retroactively, nor did the legislature state that its rejection of the common law interpretations of the previous definitions applied retroactively. Instead, it appears from the plain language of the statute, the legislature merely intended to clarify its intent to amend the definitions and apply those definitions prospectively.” Lawson v. Ford Motor Co., 217 S.W.3d 345 (Mo. App. 2007). Therefore, because the legislature did not expressly intend to have the changes in the standard of causation apply retrospectively, the only way for these changes to apply to claims filed before August 2005 is if the changes are deemed procedural in nature. The Court has addressed this question as well, stating “the change in the standard of causation to qualify as a compensable injury pursuant to the statutes did not merely affect the procedure or mechanism through which a suit is pursued. The definition of compensable injury is the very core of a claimant’s right to compensation....The amended language, using the term “prevailing factor,” resulted in a substantive change in the law which affected a claimant’s right to compensation. Therefore, the law could not be applied retroactively....” Lawson at 350.

Ms. Walters filed her initial claim for compensation on April 08, 2005. At that time, the standard of causation was “substantial factor.” Because the amendment changing the standard of causation was not intended by the legislature to be applied retroactively, and the changes are substantive, I find that the correct standard of causation to be applied to Ms. Walters’ claim is: whether her work at the liable employer was a substantial factor in causing her condition.

Ms. Walters testified to the numerous activities she performed in her employment with both CMH and TMC which required her to repetitively use her upper extremities. These activities included various tasks such as: data entry and computer work; starting IV’s; completing paperwork; and performing patient care. While the intensity of Ms. Walters’ hand

use at both jobs varied from time to time, Ms. Walters testified that her duties remained relatively consistent throughout her employments. There was no evidence introduced to the contrary; and, I find Ms. Walters' testimony credible regarding the extensive use of her upper extremities at her employments.

In addition to Ms. Walters' testimony, doctors Guinn, Ketchum and Storm provided expert medical evidence that confirm that Mr. Walters' job duties were a substantial factor in causing her upper extremity conditions. Specifically, Dr. Guinn opined Ms. Walters' "work as an RN is the prevailing factor in her symptoms, and as such, the problem should be treated under the [workers' compensation] system." After evaluating Ms. Walters, Dr. Ketchum opined that Ms. Walters' work activities at CMH were a substantial factor in causing her condition, and that generally, Ms. Walters work activities were not only the substantial factor but the prevailing factor in causing her work-related injuries. In his deposition Dr. Storm testified that Ms. Walters' work at CMH was the prevailing factor in causing her condition, but that her work at TMC was a substantial contributing factor in causing her carpal tunnel syndrome. I find credible each of the doctor's opinions. I find that each doctor's opinion supports the finding that Ms. Walters' work activities as a nurse at each employer were substantial factors in the development of her current bilateral upper extremity conditions. There was no evidence introduced to the contrary.

Therefore, based on the preponderance of the credible evidence presented, I find that Ms. Walters' work activities as a nurse at each of her employers were substantial factors in causing the occupational diseases in her bilateral upper extremities.

The next question for this Court to determine is which of Ms. Walters' employers, if any, is liable for benefits under the applicable workers' compensation statutes. However, it is first necessary for this Court to determine what the appropriate date of accident for this claim is. I find, based on the evidence presented, stipulations and admissions of the parties that the appropriate date of accident for this claim is July 28, 2002, as alleged by Ms. Walters in her original claim for compensation. Therefore, I find that Children's Mercy Hospital is liable for all benefits under the applicable workers' compensation law.

8 CSR 50-2.010.8(B) states "Unless the Answer to Claim for Compensation is filed within thirty (30) days from the date the division acknowledges receipt of the claim or any extension previously granted, the statements of fact in the Claim for Compensation shall be deemed admitted for any further proceedings." The Court addressed this issue in Lumbard-Bock v. Winchell's Donut Shop, 939 S.W.2d 456. In Lumbard-Bock, the Court determined that as a matter of law, when an employer fails to file a timely answer to a claim for compensation, the employer admits all factual allegations contained within the claim. The date of accident is a factual determination.

In her original Claim for Compensation, Ms. Walters alleged injuries to her arms and hands and tingling in both arms greater in the right. Ms. Walters alleged that the injury was sustained at her employment with CMH through 07/28/02. Ms. Walters' Claim for Compensation was acknowledged by the Division of Workers' Compensation on April 12, 2005. CMH had thirty days from that date to file their Answer to Claim for Compensation. It was not. CMH did not file an Answer to Ms. Walters' claim until June 14, 2005, over sixty days after

receipt of Ms. Walters' claim was acknowledged by the Division. Therefore, all factual allegations contained in Ms. Walters' Claim for Compensation are deemed admitted by CMH. In light of these factual admissions, this Court is bound by law to find that the Ms. Walters' injuries were sustained on July 28, 2002 at CMH. As a result, the proper date of accident in this claim is July 28, 2002.

On July 28, 2002, Ms. Walters was employed by CMH, and only by CMH. As discussed above, I find that Ms. Walters' work activities are the substantial contributing factor in causing her upper extremity injuries; therefore, because I find that the appropriate date of injury in this claim is July 28, 2002, I find Children's Mercy Hospital liable for all benefits under the act.

Because I find CMH liable for all benefits due under the act, I do not need to address the issues raised by TMC at the hearing.

The final question for this Court to determine is whether CMH is liable for medical treatment necessitated by Ms. Walters's work related injuries.

According to RSMo. § 287.140, "In addition to all other compensation, the employee shall receive and the employer shall provide 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 from the effects of the injury."

In this case, Dr. Guinn recommended that Ms. Walters undergo repeat nerve testing. Doctors Ketchum and Storm both opined that Ms. Walters is a candidate for carpal tunnel release surgery.

In addition to the expert testimony, Ms. Walters testified to her current physical complaints that she associates with her work injuries. Her testimony includes complaints such as pain, aching, and numbness in both upper extremities. No evidence was introduced to contradict Ms. Walters' testimony, and I find Ms. Walters' testimony credible on this issue.

Based on the preponderance of credible evidence, I find that Ms. Walters continues to suffer from debilitating pain and limitations as a result of the work related injuries sustained at her employment at CMH. Accordingly, I find CMH liable to provide Ms. Walters with all benefits due under workers' compensation law, including but not limited to, the treatment necessary to cure and relieve her from the effects of her injuries. Specifically, CMH is to immediately provide Ms. Walters with treatment from a physician who is licensed and specialized in treating upper extremity complaints as recommended by doctors Guinn, Ketchum and Storm.

Further should Ms. Walters become temporarily and totally disabled during the course of said treatment CMH shall be liable for all Temporary Total Disability Benefits during such time.

This court further awards to Employee's attorney David Slocum, 25% of all benefits awarded herein.

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Amy Walters

Injury No: 02-144321

Date: _____

Made by: _____

Emily Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation