

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-057447

Employee: Stephanie Weaver
Employer: Taco Bell
Insurer: ACE American Insurance Co.
c/o Gallagher Bassett Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: May 27, 2005
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated January 18, 2007.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge John K. Ottenad, issued January 18, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 31st day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Stephanie Weaver

Injury No.: 05-057447

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Taco Bell

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

Additional Party: Second Injury Fund (Open)

Insurer: ACE American Insurance Co.
C/O Gallagher Bassett Services

Hearing Date: September 28, 2006

Checked by: JKO

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: May 27, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was employed as a food line worker and cleaning captain for Employer, and developed bilateral hand complaints as a result of her repetitive hand-intensive work in those positions.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right and left hands and wrists
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Stephanie Weaver

Injury No.: 05-057447

- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$235.68
- 19. Weekly compensation rate: \$157.13 for TTD/ \$157.13 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

6 5/7 weeks of temporary total disability (June 3- July 13, 2005, and August 11-16, 2006)	\$1,055.02
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22. Second Injury Fund liability: Open

TOTAL: **\$1,055.02**

23. Future requirements awarded: **continued and on-going medical care for Claimant's right and left wrist bilateral carpal tunnel syndrome to cure and relieve her of the effects of the injury, as explained in the body of the Award.**

Each of said payments to begin immediately and to be payable and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% in favor of the following attorney for necessary legal services rendered to the claimant: Jerome L. Lefton.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Stephanie Weaver

Injury No.: 05-057447

Dependents: N/A

Before the
Division of Workers'

Employer: Taco Bell

Compensation

Additional Party: Second Injury Fund (Open)

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

Insurer: ACE American Insurance Co.
C/O Gallagher Bassett Services

Checked by: JKO

On September 28, 2006, the employee, Stephanie Weaver, appeared in person and by her attorney, Mr. Jerome L. Lefton, for a hearing for a temporary or partial award on her claim against the employer, Taco Bell, and its insurer, ACE American Insurance Co. C/O Gallagher Bassett Services. The employer, Taco Bell, and its insurer, ACE American Insurance Co. C/O Gallagher Bassett Services, were represented at the hearing by their attorney, Mr. Gregory T. Cook. The Second Injury Fund is a party to this case but was not represented at the hearing since the parties agreed to leave the Second Injury Fund claim open. Although Claimant was seeking a temporary or partial award, Employer requested that this be commuted into a final award if the issues were found in Employer's favor. At the same time this case was heard, evidence was also taken on Claimant's two companion Claims with Injury Numbers of 04-144333 and 05-057454. Separate Awards are being issued for those companion Claims. Additionally, at the outset of these proceedings, Claimant voluntarily dismissed another companion Claim with an Injury Number of 05-057452, per memorandum filed and approved. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) Stephanie Weaver (Claimant) has alleged an occupational disease claim with a date of injury of May 27, 2005.
- 2) Claimant was an employee of Taco Bell (Employer).
- 3) Venue is proper in the City of St Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$235.68, resulting in applicable rates of compensation of \$157.13 for total disability benefits and \$157.13 for permanent partial disability (PPD) benefits.
- 7) Employer has not paid any benefits to date.

ISSUES:

- 1) Did Claimant sustain an occupational disease?
- 2) Did the occupational disease arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints medically causally connected to her alleged injury at work on or about May 27, 2005?
- 4) Is Claimant entitled to future medical care?
- 5) Is Claimant entitled to TTD benefits from May 28, 2005 to July 16, 2005 (7 1/7 weeks) and from August 8, 2006 to August 17, 2006 (1 3/7 weeks)?
- 6) What is the nature and extent of Claimant's permanent partial disability attributable to this injury?
- 7) Did Employer fail to timely file an Answer to this Claim, and if so, what is the impact of that failure to timely answer this Claim?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Medical treatment records from Christian Hospital dated September 29, 2004
- B. Medical treatment records from Christian Hospital dated May 17, 2005
- C. Certified medical treatment records from Christian Hospital for EMG test dated May 31, 2005
- D. Medical treatment records from Dr. Richard O'Neill dated June 3, 2005 through August 11, 2006
- E. Deposition of Dr. Bruce Schlafly, with attachments, dated September 6, 2006
- F. Off- work slip from Dr. Richard O'Neill dated August 11, 2006
- G. Division of Workers' Compensation records for Injury No. 05-057447
- H. Division of Workers' Compensation records for Injury No. 04-144333
- I. Division of Workers' Compensation records for Injury No. 04-144333

Employer/Insurer Exhibits:

- 1. Deposition of Dr. Timothy G. Lang, with attachments, dated August 31, 2006

Notes: 1) Exhibits E and I were admitted subject to the objections contained in the records. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

2) Employer/Insurer objected to the admission of Exhibit F on relevancy grounds. Having now had the chance to review the record, I am overruling the objection. Exhibit F is admitted into evidence in this case.

3) Pursuant to the request of a party at hearing, I am taking Judicial, or more properly, Administrative Notice of the Division of Workers' Compensation files in Injury Numbers 05-057447, 05-057454, and 04-144333.

4) Some of the records submitted at hearing contain handwritten comments or other marks. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on September 28, 2006.

FINDINGS OF FACT:

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

- 1) **Claimant** is a 43-year old female who has worked for Employer since March 13, 2004. She started as a food line worker and then in April or May 2004 was assigned duties as the cleaning captain, in addition to her line work. As of the date of hearing, she continues to work for Employer.
- 2) Claimant's job as a food line worker included duties as a steamer, stuffer and expediter. As a steamer, she would use scoops and utensils to place meat and other items in the food that had been ordered. She said she was constantly gripping, as well as hitting the scoops on the back of the pans to level the contents off. She estimated that this job required 10+ use of the hands, on a scale of 1 to 10, with 10 being the most hand intensive. As a stuffer, she was putting the lettuce and tomatoes on the food items, so she was not really gripping like she would as a steamer. She estimated this job was a 5 on the hand intensive job scale described above. As an expediter, she would wrap the food up, and place it in a bag, or give it to the customer. She said this job was hand intensive because of the folding involved. There was not as much gripping though as a steamer. She still rated this job as a 10+ on the hand intensive job scale because of the folding. In addition to the duties associated with these jobs, she would set the line up and stock the top and bottom lines with the food. She said she could be doing any of these jobs for a continuous 6 hour day without any breaks. She testified she averaged 25 to 30 hours per week and worked 4 days per week at the

start, but then moved up to 5 days per week later in her employment.

- 3) In April or May 2004, Claimant was given the job as a cleaning captain in addition to her work on the food line. She said she did her cleaning captain duties from 7:30 a.m. to 12 noon, and then worked on the food line from 12 noon to 2:00 p.m. Her job as a cleaning captain included mopping the whole store, which took 45 minutes to an hour each day. She would have to sweep the whole store and the parking lot, which would take approximately 45 minutes each day. She was responsible for taking the trash out, which might take 15 to 30 minutes per day. She said she would have to get a good grip on the bag, pull it out of the trash can, and then take it out. She said sometimes the bags were heavy and she would have to use both hands. She cleaned up the drive thru and the parking lot, including picking up trash. She also had to wipe and clean the whole inside of the restaurant, including the tables, booths, walls, vents and ceiling fixtures. She said she would use a towel and a pail of water. She estimated it normally took her 45 minutes to an hour to do this task. On the hand intensive scale described above, she estimated the sweeping and mopping was an 8 because of the gripping, and the rest of the cleaning jobs were a 10 because of the amount of hand usage required. She testified all of the jobs at Employer were hand intensive.
- 4) Claimant testified she first noticed right hand problems when she switched from just working the food line to the cleaning captain responsibilities. She said that in March and April 2004, she did not have any problems with her hands. Then from June to August 2004, she started noticing problems with her hands as she was working both jobs at Employer. She said between June 2004 and December 2004 her right hand was getting worse. She also had problems during this time with her left hand, but the right was worse. She said she was getting numbness in the hands.
- 5) Claimant testified there was an incident on September 1, 2004 where the mop bucket slipped as she was emptying it, and she twisted her wrist. She said she hurt her hand because of that incident.
- 6) Medical treatment records from **Christian Hospital** (Exhibit A) document an emergency room visit Claimant had at that facility on September 29, 2004. Claimant was complaining of right hand pain for the last 2 months that radiates up to the forearm. The note indicates she was "not sure of injury." She was reporting tenderness and swelling at the base of the thumb into the palm, as well as tenderness at the wrist. X-rays of the right hand were negative, although there was a note indicating there was a possible subluxation of the first carpal/metacarpal joint consistent with a joint sprain. She was diagnosed with a right thumb sprain, and given medication and a Velcro wrist splint.
- 7) Claimant also described an incident on January 27, 2005 when she was lifting a silver tray in the sink, which jerked her arm down and made her left hand complaints worse.
- 8) Claimant testified that she first told her supervisor about her right hand complaints in August 2004 and she later asked if he could pull her off of the maintenance duties. She also testified that she first reported left hand complaints in January 2005. She thought it might have been after the incident with the sink. She thought that was when she injured the right shoulder. She testified she knew her supervisor called in a claim in May 2005 for her shoulder. She admitted, however, that she has no right shoulder complaints now.
- 9) Claimant said she continued working in early 2005. She first missed time from work because of her hands from May 28, 2005 until July 16, 2005. She said she had pain all the time in her hands and also had problems sleeping. She described complaints including swelling, and a jumping sensation from what felt like an electrical shock in the hands. She said she tried a heating pad and ice to treat her complaints. When she came back to work in July 2005, she could not do the cleaning captain job and so they placed her on the line. She said she had to go back to work at this point because she needed the money. Claimant said she had a hard time because the line work was not really less hand intensive, but she had to go back and work. She noted that when she was off work, she did not notice any improvement in her hand condition, but they did get worse after she went back to work in July.
- 10) Medical treatment records from **Christian Hospital** (Exhibit B) document an emergency room visit Claimant had at that facility on May 17, 2005. Claimant provided a history of right wrist pain since September 2004 for which she was given a splint. She also described right shoulder and left wrist pain for the last two weeks prior to the visit. The note indicates she does a lot of repetitive work in the maintenance department and her complaints are worse at the end of her shift, but better on her days off work. She complained of intermittent tingling with radiation to all of her fingers. Claimant reported pain in both wrists with palpation. The doctor noted that physical exam of the wrists could barely be conducted because

she was guarded, apparently due to the pain. She shook her hands to help with the pain. She did have a positive Tinel's sign bilaterally, but the Finkelstein's test could not be performed because Claimant refused to bend her thumb. Circulation, motor and sensory function was intact bilaterally. Claimant was diagnosed with arthritis of the right shoulder and carpal tunnel syndrome. She was given cock-up wrist splints for both wrists. She was also prescribed some medication and told to follow-up with Dr. O'Neill.

- 11) Claimant admitted that during this time she never asked Employer for medical treatment. She said she told them she was having problems, but they never sent her for treatment either.
- 12) Claimant testified she eventually came under the care of Dr. O'Neill who told her she had carpal tunnel syndrome, and gave her medications. She said he recommended that she see a hand specialist, but she did not go because she could not afford it. She did remember seeing Dr. Margolis for hand studies, but she said she has not undergone surgery for her hands.
- 13) Medical records from **Christian Hospital** (Exhibit C) document the EMG/nerve conduction study taken of Claimant's right arm on May 31, 2005. The note indicates she has had swelling and numbness in the hand for 8 months. Dr. Margolis found that it was a normal nerve conduction study for the right upper extremity.
- 14) Medical records from **Dr. Richard O'Neill** (Exhibit D) document treatment he provided to Claimant from June 3, 2005 through August 11, 2006. At his first examination on June 3, 2005, he noted a history from Claimant of pain in both hands that has been going on for the last several months. He noted that she does repetitive activities and custodial work. The note also refers to right shoulder complaints from an incident in August when she was lifting and dumping. He noted she had tenderness and a positive Tinel's sign bilaterally. He recommended a nerve conduction study and an orthopedic consultation. The note indicates, "We will keep off her work until she receives medical clearance." She next followed-up with Dr. O'Neill on July 13, 2005 for her "carpal tunnel syndrome and shoulder pain." She had not seen an orthopedist, but asked to go back to work light duty, with restrictions of no carrying or work above shoulder height. When she was next seen on November 7, 2005, she reported still having problems with both hands. She said she had seen the company doctor and was wearing wrist splints. Dr. O'Neill again recommended an orthopedic consultation for her bilateral persisting hand pain. Although Claimant was seen on November 28, 2005 and March 23, 2006, neither of those notes contained any reference to hand complaints. Her last visit was August 11, 2006 when she was again complaining of problems with her carpal tunnel syndrome. There are numerous references in these records to the doctor's recommendation that she quit using alcohol and cigarettes.
- 15) Claimant testified that she missed a second period of time from work from August 8, 2006 until August 17, 2006. She said Dr. O'Neill took her off work, because when she went to him he already thought she was not working. Claimant identified the **off- work slip from Dr. Richard O'Neill dated August 11, 2006** (Exhibit F) as what the doctor gave her to take her off work because of her hands during that period of time. The slip excuses Claimant from work from August 11, 2006 until August 16, 2006.
- 16) Regarding her continuing complaints to her hands, Claimant testified that she has right hand (palm and wrist) swelling. She said when she tried to make a full fist, she gets an electrical shock sensation into all of her fingers, even the small one. She testified her right hand hurts worse because she is right handed. She said it is hard to cook, and also hard to turn a doorknob or a key. Her hands wake her up constantly. She said she continues to wear a splint on the right hand. Claimant testified there is nothing she can do to alleviate the problems she has with her hands.
- 17) Claimant was cross-examined extensively about some alleged inconsistencies between her testimony at hearing and her deposition testimony. At hearing she testified that her hand complaints started when the cleaning captain job was added to her responsibilities. In her deposition she apparently testified that she had no right hand problems until the September 1, 2004 mop bucket incident, and no left hand complaints until the January 27, 2005 sink incident. She admitted she was confused and actually meant to say that those incidents made her hands worse, but her problems did not begin with those incidents.
- 18) Claimant was seen by **Dr. Bruce Schlafly** for an independent medical examination on September 12, 2005. The deposition of Dr. Schlafly was taken by Claimant to make his opinions in this case admissible at hearing. (Exhibit E) Dr. Schlafly examined Claimant one time at the request of her attorney and provided no medical treatment. Dr. Schlafly is board certified in hand surgery and orthopedic surgery. Claimant

provided a consistent history of no hand problems initially, and then an onset of problems when she was switched to the maintenance and custodial position. She also described complaints of pain and numbness in the hands that wakes her up at night. Dr. Schlafly opined these were classic symptoms of carpal tunnel syndrome. On physical examination, Dr. Schlafly found bilateral positive Tinel's signs. She could not tolerate the Phalen's test because that wrist position was too painful for her. She had decreased grip strength and decreased sensation to pinwheel in the index fingers, but normal two point discrimination at the fingertips. She had limited thumb flexion bilaterally, and a questionable bony swelling around the base of the right thumb. Dr. Schlafly diagnosed bilateral carpal tunnel syndrome, and opined that her repetitive work for Employer was the substantial factor in the cause of the bilateral carpal tunnel syndrome and the need for treatment. He recommended further evaluation and treatment by a hand surgeon, including perhaps electrical studies of the left hand and repeat studies for the right hand, as well as medication, therapy, injections, and perhaps surgery. He noted she could continue working with her splints, but she may find it necessary to come off work for a period of time because of her hand condition. Finally, he noted that she has considerable disability in her hands, but he did not provide specific ratings because of his belief that she was in need of further treatment.

- 19) There was no reference in Dr. Schlafly's report or deposition testimony to any specific incident or accident at work involving the right hand on September 1, 2004 or the left hand on January 27, 2005. Consequently, he provided no opinions on medical causation for alleged hand injuries from those incidents.
- 20) On cross-examination, Dr. Schlafly admitted that he had no specific knowledge of the amount of time during her shift that she would perform the sweeping, mopping, wiping, cleaning or pulling trash. It was his understanding though that when she was assigned those duties, it constituted the bulk of her job duties.
- 21) Claimant was seen by **Dr. Timothy G. Lang** for an independent medical examination on October 4, 2005. The deposition of Dr. Lang was taken by Employer to make his opinions in this case admissible at hearing. (Exhibit 1) Dr. Lang examined Claimant one time at the request of Employer/Insurer and provided no medical treatment. Dr. Lang is board certified in orthopedic surgery, specializing in treatment of the hand. Claimant provided Dr. Lang a history of the two incidents at work, with the mop bucket involving her right hand, and with the tray in the sink involving her left hand. Dr. Lang's physical examination revealed a negative Tinel's and negative Finkelstein's maneuver bilaterally. He found intact light touch to all digits, as well as intact capillary refill and intact radial arteries. He did not find any palpable or visible masses in the hand or wrist area. He also found significant thumb CMC joint pain, right worse than left, with some crepitance on the right side. Dr. Lang diagnosed bilateral thumb CMC joint synovitis and possible early osteoarthritis with negative X-rays on the right previously. He did not believe she had any specific injury at work that would account for this type of condition. On that basis, he did not believe this condition was work related. He opined that she had had adequate treatment for this condition and he did not believe she sustained any permanent partial disability, despite her discomfort. Dr. Lang confirmed in his testimony that the incident with the mop bucket may have caused complaints, but he did not believe it was a substantial factor in the development of thumb CMC joint synovitis or carpal tunnel syndrome. He provided the same opinions regarding the other hand with the incident with the tray in the sink. Dr. Lang also confirmed that based on Claimant's complaints to him, her history and his physical examination, he found no evidence of carpal tunnel syndrome in either wrist. In fact, carpal tunnel syndrome was hardly even mentioned in the doctor's report that he generated after his examination on October 4, 2005, and there was no description of the job activities she had at Employer. When presented with a brief hypothetical on direct examination that included a cursory description of her job at Employer, Dr. Lang concluded that her job duties were not a substantial factor in developing carpal tunnel syndrome.
- 22) On cross-examination, Dr. Lang testified that in his opinion, the cause of most carpal tunnel syndrome was idiopathic. He did agree though that a job with multiple gripping with a large amount of force could cause carpal tunnel syndrome. He did not believe Claimant had such a job with enough force to cause it. He did admit that with the time line of her complaints, it did appear that her job activities caused the synovitis in the thumbs to first develop. He did not believe, however, her job was a substantial factor in the development. Regarding the Tinel's test, he noted that different physicians can get different results, but he did not know why he was the only physician to get a negative result, when everyone else got a positive result. He also admitted that he did not do the Phalen's test for carpal tunnel syndrome because he "concentrated less" on it and "didn't go into the carpal tunnel as much" after he saw the first note from the emergency room focused on thumb joint synovitis. He had the diagnosis on the thumb that he felt was correct and so he went with that and did not spend as much time on any possible carpal tunnel syndrome.

23) Claimant's Claim for her date of injury of May 27, 2005 was assigned Injury Number 05-057447. The Claim against Employer alleges injury to the right hand, left hand, right forearm, left forearm and MAW. It states Claimant was employed as a cleaning captain and she sustained injury as a result of an accident or series of accidents or occupational disease in connection with repetitive work activity with her Employer. The Claim was acknowledged by the Division of Workers' Compensation on June 30, 2005. (Exhibit G) Employer/Insurer's Answer to this Claim was dated August 25, 2005, and was acknowledged by the Division of Workers' Compensation on August 30, 2005. (Exhibit G)

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence described above, including Claimant's testimony, the expert medical opinions and depositions, the medical records, and my personal observations of Claimant at hearing, I find the following:

Since this is a threshold issue, I will deal with this one first.

Issue 7: Did Employer fail to timely file an Answer to this Claim, and if so, what is the impact of that failure to timely answer this Claim?

Once a Claim for Compensation has been filed, the Division of Workers' Compensation has set up specific rules for the timeliness of the filing of Answers, and the effect of the failure to timely file such an Answer. According to **Division Rule 8 CSR50-2.010(8)(B)**:

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.

In interpreting this rule and its effect on cases, Courts have held that the rule only applies to facts alleged in the claim, and it does not result in the admission of legal conclusions contained in the pleading. *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720 (Mo.App. E.D. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In this case, the Division acknowledged the Claim on June 30, 2005. Employer/Insurer's Answer to this Claim was dated August 25, 2005, and was acknowledged by the Division of Workers' Compensation on August 30, 2005. There were no extensions previously granted, and so the 30 day period of time in which to timely file an Answer expired before the Answer was filed. Employer's Answer was thus not timely filed and the statements of fact in the Claim for Compensation are deemed admitted.

Claimant alleged in the Claim; "Claimant employed as Cleaning Captain. Claimant sustained injury as a result of an accident or series of accidents or occupational disease in connection with repetitive work activity with her employer." Claimant further alleged in the Claim that the parts of her body injured were "right hand, left hand, right forearm, left forearm and MAW." As a result of Employer's failure to file a timely Answer, these facts are deemed admitted in this case.

However, there was no allegation that Claimant suffered *carpal tunnel syndrome, or any other specific diagnosis*, as a result of the repetitive activity at Employer. There was no allegation that *carpal tunnel syndrome, or any other specific diagnosis, was an occupational disease*. There was no allegation that Claimant suffered a *compensable occupational disease*, or that work was a *substantial factor* in causing the carpal tunnel syndrome, or any other specific diagnosis.

In that respect, although some of the factual admissions because of the late Answer will lead to findings on issues in favor of Claimant, these admissions do not eliminate Claimant's burden of proof on issues such as medical causation, need for future medical care, liability for TTD and nature and extent of permanent partial disability.

Given the nature of this Claim and the evidence submitted, these three issues in this case can be addressed at the same time.

Issue 1: Did Claimant sustain an occupational disease?

Issue 2: Did the occupational disease arise out of and in the course of employment?

Issue 3: Are Claimant's injuries and continuing complaints medically causally connected to her alleged injury at work on or about May 27, 2005?

Under **Mo. Rev. Stat. § 287.067.1 (2000)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, under **Mo. Rev. Stat. § 287.067.2 (2000)**, “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. An occupational disease is not compensable merely because work was a triggering or precipitating factor.” An injury is defined as clearly work related under **Mo. Rev. Stat. § 287.020.2 (2000)** “if work was a substantial factor in the cause of the resulting medical condition or disability.”

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo.App. E.D. 1999), explained the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that she contracted an occupationally induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the work place. More specifically, employee must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Id.* at 48. Finally, the Court noted, “where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Id.*

Considering the competent and substantial evidence listed above, I find that Claimant met her burden of proving the presence of an occupational disease that arose out of and in the course of employment for Employer, and which was medically causally connected to it.

In arriving at this conclusion, I first considered the testimony provided by Claimant. I find that Claimant credibly described her job duties and the problems with her right and left hands and wrists that arose because of those repetitive job duties. She consistently explained at hearing and in the medical records that her problems with her hands and wrists began when she was given the extra maintenance responsibilities over and above her food line work. Employer presented no evidence to dispute Claimant's testimony regarding the nature of her job duties. Although Employer attempted to impeach her credibility with some responses in her deposition about the onset of her complaints, I believe Claimant when she testified that she was confused by those questions, and that her complaints began with the change in job duties. Additionally, her medical treatment records from Dr. O'Neill and Christian Hospital confirm her history of doing repetitive maintenance work. Finally, there is the admission from the Claim, because of the late Answer, that Claimant did “repetitive work activity with her employer.” All of these factors lead to the finding that Claimant did sustain an occupational disease, due to repetitive job duties, arising out of and in the course and scope of her employment.

In addition to Claimant's credible testimony, in order to meet her burden of proof, Claimant also needed to present credible medical evidence to support her claim that there was an occupational disease that arose out of and in the course and scope of her employment and which was medically causally connected to it. In this case, there were opinions from two medical experts submitted at trial, who disagreed on the diagnosis of Claimant's condition, its relationship to work and whether or not it was medically causally connected to it. Dr. Bruce Schlafly testified on behalf of Claimant that the bilateral carpal tunnel syndrome was related to her work, while Dr. Timothy Lang testified that her bilateral thumb CMC joint synovitis was not related to work at all.

After consideration of all of the evidence regarding Claimant's job duties, as well as after a thorough review of the basis of each doctor's opinion, I find that Dr. Schlafly's opinions on medical causation and the relationship of the bilateral carpal tunnel syndrome to her work at Employer, are more credible and persuasive than the opinions of Dr.

Lang.

As I reviewed Dr. Lang's report and testimony, I found his opinions lacking credibility and persuasiveness for many reasons. First, a number of his findings on physical examination simply did not correspond to other physical examinations in the contemporaneous medical records. He was the only doctor to find a negative Tinel's test. Dr. O'Neill, Dr. Schlafly and the doctor at Christian Hospital all recorded a positive Tinel's test for carpal tunnel syndrome. Dr. Lang reported a negative Finkelstein's maneuver, while the doctor from Christian Hospital reported the maneuver could not even be used because of Claimant's pain complaint while trying to perform the test. Dr. Lang found no palpable or visible masses in the hand or wrist area, while Dr. Schlafly found such a mass and Christian Hospital reported swelling at the base of the thumb.

Second, Dr. Lang admittedly did not perform a thorough evaluation for carpal tunnel syndrome. He did not do a Phalen's test, nor apparently a pinwheel or two-point discrimination test. According to his testimony, he saw the first note from Christian Hospital mentioning the thumb and did not go into the carpal tunnel syndrome as much. This lack of a thorough evaluation for carpal tunnel syndrome is even more troubling when you consider the other physicians who examined Claimant (Christian Hospital, Dr. O'Neill and Dr. Schlafly) all formulated the same carpal tunnel syndrome diagnosis.

Finally, although Dr. Lang provided an opinion that even if she had carpal tunnel syndrome it would not be related to work, that opinion does not appear to be based on any clear understanding of her job duties and responsibilities at Employer. There is no discussion of her job duties in his report, nor any indication that he was aware of the specifics of what she did on a regular basis, and how long she did it. Given his lack of a thorough physical examination, test results and diagnoses at odds with every other physician in this case, and his failure to obtain a complete job history upon which to base his opinions on medical causation, Dr. Lang's opinions lack credibility and persuasiveness, and cannot be used as a basis for an Award in this case.

On the other hand, Dr. Schlafly's opinions on the presence of an occupational disease, its relationship to work and whether or not it was medically causally connected to it, are credible and persuasive because of his thorough examination, complete history, and consistent diagnosis. Dr. Schlafly's diagnosis of carpal tunnel syndrome is consistent with the treating physicians (Dr. O'Neill and Christian Hospital) who examined and treated Claimant independent of this Claim for Workers' Compensation benefits. His physical examination is also more consistent with findings of those physicians. He had an understanding of her job duties and the timing of the onset of the complaints with the addition of the maintenance responsibilities. He provided a competent opinion that her repetitive work for Employer was the substantial factor in the development of this condition. In that respect, I believe he established that the carpal tunnel syndrome was caused by conditions in the workplace. All in all, I found his opinion to have a more solid basis and also found him to have more persuasive explanations for his opinions than Dr. Lang had.

Accordingly, on the basis of Claimant's credible testimony and the credible and persuasive testimony of Dr. Bruce Schlafly, I find that Claimant met her burden of proving the presence of an occupational disease (carpal tunnel syndrome) that arose out of and in the course and scope of employment for Employer, and which was medically causally connected to it.

Issue 4: Is Claimant entitled to future medical care?

Pursuant to **Mo. Rev. Stat. § 287.140 (2000)**, Employer is required to furnish "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." Just as Claimant must prove all of the other material elements of her claim, the burden is also on her to prove entitlement to future medical treatment. ***Dean v. St. Luke's Hospital***, 936 S.W.2d 601, 603 (Mo.App. 1997) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Claimant is entitled to an award of future medical treatment if she shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. ***Concepcion v. Lear Corporation***, 173 S.W.3d 368, 372 (Mo.App. 2005).

I find Claimant has met her burden of proving that she is entitled to additional (future) medical care to cure and relieve her from the effects of the carpal tunnel syndrome that is medically, causally related to her work for Employer.

Relying on much of the same reasoning described above for why I find Dr. Schlafly's opinions more credible

and persuasive than those of Dr. Lang, I again rely on Dr. Schlafly's opinion regarding this issue. Dr. Schlafly recommended further evaluation and treatment by a hand surgeon, including perhaps electrical studies of the left hand and repeat studies for the right hand, as well as medication, therapy, injections, and perhaps surgery. I find his opinion in that regard more competent and persuasive than the opinion of Dr. Lang.

I find that Employer is responsible for providing continued and on-going medical care for Claimant's right and left wrist bilateral carpal tunnel syndrome to cure and relieve her of the effects of the injury. This treatment should include, but is not limited to, referral to an orthopedic hand surgeon for possible electrical studies of each hand and wrist, medication, therapy, injections, and perhaps surgery. Employer's responsibility for treatment will continue until Claimant is placed at maximum medical improvement and released by the doctors for this injury.

Issue 5: Is Claimant entitled to TTD benefits from May 28, 2005 to July 16, 2005 (7 1/7 weeks) and from August 8, 2006 to August 17, 2006 (1 3/7 weeks)?

Employer is responsible under the statute for payment of temporary total disability benefits pursuant to **Mo. Rev. Stat. § 287.170 (2000)** during the continuance of such disability at the appropriate weekly rate of compensation. The statute also defines "total disability" under **Mo. Rev. Stat. § 287.020.7 (2000)** as the "inability to return to any employment and not merely... (the) inability to return to the employment in which the employee was engaged at the time of the accident." Claimant bears the burden of proof on this element of her claim just as on any other element.

In this case, there are two distinct periods of time for which past due TTD benefits are sought. Claimant alleges entitlement to TTD benefits from May 28, 2005 until July 16, 2005 (7 1/7 weeks), and then from August 8, 2006 until August 17, 2006 (1 3/7 weeks).

Regarding the first period of alleged TTD benefits, Claimant testified that she worked in early 2005 up until May 28, 2005 when she first missed time because of her hands. She testified she was off work from May 28, 2005 until July 16, 2005. Medical records from Dr. Richard O'Neill confirm that he took her off work at the time of his first examination on June 3, 2005. When she was seen again on July 13, 2005, she was given a light duty restriction release to go back to work.

Regarding the second period of alleged TTD benefits, Claimant testified that she was off work under the care of Dr. Richard O'Neill from August 8, 2006 until August 17, 2006. The off-work slip from Dr. Richard O'Neill dated August 11, 2006 (Exhibit F) documents an excuse from work from August 11, 2006 until August 16, 2006. Claimant testified and the medical records confirm that this time of work was ordered because of her hand complaints.

For the periods of time documented in the medical treatment records, June 3, 2005 through July 13, 2005 and August 11, 2006 through August 16, 2006, I find Claimant was unable to return to any employment in the open labor market as a result of her bilateral hand complaints related to her job at Employer. This finding is not only supported by Claimant's testimony, but also the medical treatment records of Dr. O'Neill. Dr. Schlafly also did opine that she may find it necessary to be off work for a period of time because of her hand condition. His opinion in this regard also supports my finding on this issue.

I find Claimant has met her burden of proving that she is entitled to TTD benefits from June 3, 2005 through July 13, 2005, and from August 11, 2006 through August 16, 2006. Accordingly, Claimant is awarded a total of 6 5/7 weeks of TTD from Employer. I do not believe Claimant has provided the necessary medical proof to substantiate TTD benefits for the days outside of these time periods.

Given the other findings in this case, and specifically given the order for future medical treatment to cure and relieve Claimant of the effects of this bilateral carpal tunnel syndrome, it is premature to address Issue 6 on the nature and extent of permanent partial disability.

CONCLUSION:

Claimant met her burden of proving that she sustained a compensable injury/occupational disease arising out of and in the course of her employment for Employer, and which was medically causally connected to it. Claimant has also met her burden of proving an entitlement to TTD for the two periods of time from June 3, 2005 through July 13,

2005 and from August 11, 2006 through August 16, 2006. Employer is to pay 6 5/7 weeks of TTD. Employer is also responsible for providing continued and on-going medical care for Claimant's right and left wrist bilateral carpal tunnel syndrome to cure and relieve her of the effects of the injury, as explained in the body of the Award. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Jerome L. Lefton, for necessary legal services.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation