

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

Injury No.: 00-145150

Employee: Dolores Woolery
Employer: Sedalia Democrat/Missouri Freedom Newspapers, Inc.
Insurer: Self-Insured c/o Sedgwick Claims Management Services
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, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award. The award and decision of Administrative Law Judge Vicky Ruth, issued June 3, 2009, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award, and decision herein.

Preliminaries

The issues stipulated in dispute at trial were medical causation, accident or occupational disease arising out of and in the course of employment, nature and extent of permanent disability, liability of the employer/insurer for future medical care, liability of the Second Injury Fund, and whether the employee's spouse should be joined as a party.

The administrative law judge determined and concluded that employee is not entitled to compensation because employee failed to meet her burden of proof to establish that she sustained an accident or occupational disease that arose out of and in the course of her employment. Additionally, the administrative law judge denied employee's motion to join her husband as an additional party in this case, based on the conclusion that a finding of dependency could not be made because employee was still alive and not a deceased employee, and because § 287.240(4) RSMo defines dependency for purposes of Chapter 287 as "a relative by blood or marriage of a deceased employee."

The Commission affirms all findings and conclusions of the administrative law judge, but for the administrative law judge's failure to find that employee's husband was her dependent as of August 22, 2000, the date asserted by employee as the date of onset of her alleged occupational disease.

For the reasons set forth in this award and decision, the Commission modifies the administrative law judge's award.

Persons Dependent upon Employee for Support

The administrative law judge concluded that, because employee was still alive at the time the administrative law judge issued her award, employee's motion to join her

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husband as an additional party could not be granted. We disagree. In *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007), the Court stated:

Section 287.240.4, which applies to the entire workers' compensation chapter, states that "[t]he word '**dependent**' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, *who is actually dependent for support, whole or part, upon his or her wages at the time of the injury.*" (emphasis added). As such, any "dependent" would have to be born and dependent at the time of injury.

Id. at 902.

In addition, § 287.240.4 RSMo provides, in pertinent part:

The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents:

- (a) A wife upon a husband with whom she lives or who is legally liable for her support, and a husband upon a wife with whom he lives or who is legally liable for his support; provided that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefits under this chapter.

The Missouri legislature abrogated the holding in *Schoemehl* at § 287.230.2 RSMo, effective June 26, 2008. See *Lawson v. Treasurer of Mo.*, 281 S.W.3d 851, 853 (Mo. App. 2009). Nevertheless, in *Bennett v. Treasurer of Missouri*, 271 S.W.3d 49 (Mo. App. 2008), the Western District recognized that "recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date the Missouri Supreme Court issued its decision in *Schoemehl*, and June 26, 2008, the effective date of [the amendments abrogating *Schoemehl*]." *Id.* at 53.

Here, employee's claim was pending during the relevant time period. Employee's claim for compensation was filed October 22, 2001. The award by the administrative law judge was not issued until June 3, 2009. Thus, employee's claim was pending during the time period recognized in *Bennett* for purposes of recovery under *Schoemehl*.

Employee provided evidence that she had persons dependent upon her for support on August 22, 2000, the alleged time of onset of occupational disease. Employee testified that she was married to Robert Harvey Woolery. Employee further provided a marriage certificate that was entered into evidence. Applying the conclusive presumption of § 287.240.4(a) RSMo, employee provided sufficient evidence to establish that her husband, Robert Harvey Woolery, was dependent upon her for support at the alleged time of onset of occupational disease. Consequently, although employee is not yet deceased, we are able to make a finding that if any permanent and total disability payments had been awarded in this matter, Robert Harvey Woolery would have been entitled to such payments in the event that Robert Harvey Woolery survived employee.

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Conclusion

Based on the foregoing, the Commission concludes and determines that the competent and substantial evidence supports a finding that employee's husband, Robert Harvey Woolery, is a dependent of employee for purposes of § 287.040(4) RSMo.

All remaining findings of fact and conclusions of law are affirmed.

The award and decision of Administrative Law Judge Vicky Ruth issued June 3, 2009, as modified, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

Given at Jefferson City, State of Missouri, this 9th day of February 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

Employee: Dolores Woolery

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AWARD

Employee: Dolores Woolery

Injury No. 00-145150

Dependents: N/A

Employer: Sedalia Democrat

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-insured, c/o Sedgwick
Claims Management Services

Hearing Date: March 4, 2009

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged August 22, 2000.
5. State location where accident occurred or occupational disease was contracted: Sedalia, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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:
The claimant worked in the mailroom of a newspaper publisher. She inserted flyers into newspapers, and sorted, strapped, and stacked the papers.
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/wrists, shoulder/upper extremities.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? \$2,835.71.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$265.00.
19. Weekly compensation rate: \$176.67.
20. Method of wages computation: Per agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dolores Woolery

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Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Sedalia Democrat

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

Additional Party: Second Injury Fund

Insurer: Self-insured, c/o Sedgwick Claims
Management Services

On March 4, 2009, the claimant, the employer/insurer, and the Second Injury Fund appeared for a final award hearing. The claimant, Dolores Woolery, was represented by Truman Allen. The employer/insurer was represented by Bart Eisfelder. The Second Injury Fund (the Fund) was represented by Jason Lloyd. The claimant and the employer/insurer submitted briefs by the deadline of March 31, 2009. The Fund chose not to submit a brief.

STIPULATIONS

The parties stipulated to the following:

1. On or about August 22, 2000, the claimant was an employee of the *Sedalia Democrat* (the employer).
2. The employer and the employee were operating subject to the provisions of Missouri Workers' Compensation law.
3. The employer's liability for workers' compensation was self-insured, c/o Sedgwick Claims Management Services.
4. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Pettis County is proper.
5. The employer received notice of an alleged accident, series of accidents, or occupational disease.
6. A claim for compensation was timely filed.
7. The claimant's average weekly wage was \$265.00, yielding a compensation rate of \$176.67 for both temporary and permanent disabilities.
8. Medical aid has been provided in the amount of \$2,835.71.

ISSUES

The parties agreed that the issues to be resolved in this proceeding are as follows:

1. Medical causation.

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2. Accident or occupational disease arising out of and in the course of employment.
3. Nature and extent of the liability of the employer/insurer, if any.
4. Liability, if any, of the employer/insurer for future medical care.
5. Liability, if any, of the Second Injury Fund.
6. Whether the claimant's spouse should be joined as a party.

EXHIBITS¹

On behalf of the claimant, the claimant, the following exhibits were entered into evidence:

- | | |
|-----------|-----------------------------------|
| Exhibit A | Deposition of Gary Weimholt. |
| Exhibit B | Deposition of Dr. David Volarich. |
| Exhibit C | Deposition of Dr. Douglas Kiburz. |
| Exhibit D | Marriage license of claimant. |
| Exhibit E | Miscellaneous medical records. |

The employer/insurer offered the following exhibits, which were admitted into the record:

- | | |
|------------|--|
| Exhibit 1 | Deposition of Mary Titterington. |
| Exhibit 2 | Deposition of Dr. Anne Rosenthal. |
| Exhibit 3 | Deposition of Dr. Allen Parmet. |
| Exhibit 4 | Video of job at the <i>Sedalia Democrat</i> . |
| Exhibit 5 | Surveillance video dated July 19-20, 2007. |
| Exhibit 6 | Surveillance video dated July 20, 2007 (1 of 9). |
| Exhibit 7 | Surveillance video dated July 20, 2007 (2 of 9). |
| Exhibit 8 | Surveillance video dated July 20, 2007 (3 of 9). |
| Exhibit 9 | Surveillance video dated July 21, 2007 (4 of 9). |
| Exhibit 10 | Surveillance video dated July 21, 2007 (5 of 9). |
| Exhibit 11 | Surveillance video dated July 21, 2007 (6 of 9). |
| Exhibit 12 | Surveillance video dated July 21, 2007 (7 of 9). |
| Exhibit 13 | Surveillance video dated July 21, 2007 (8 of 9). |
| Exhibit 14 | Surveillance video dated July 21, 2007 (9 of 9). |

The Second Injury Fund did not offer any exhibits of its own.

The claimant, the employer/insurer, and the Second Injury Fund submitted the following as a joint exhibit:

- | | |
|------------|---|
| Exhibit 15 | Stipulations regarding the surveillance videos and the job video. |
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Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

¹ All depositions were admitted subject to any objections contained therein.

FINDINGS OF FACT

Based upon the above exhibits and the testimony presented at the hearing, I make the following findings:

1. The claimant was born on April 12, 1955, and is 53 years old. She is 4 feet 10 inches tall and is overweight; at the time of the alleged accident, August 22, 2000, she weighed about 244 pounds. She has been married to Robert Woolery since February 18, 1989. They have lived together continually since that time.
2. She graduated from high school and took courses at State Fair Community College in order to become a legal secretary. She did not complete a degree program at the community college. She has some typing and basic computer skills.
3. The pending claim involves the claimant's employment at the *Sedalia Democrat*, where she began working in March 1995. She worked there approximately five years. Her employment history before working at the newspaper includes the following:
 - Immediately before working at the *Sedalia Democrat*, the claimant and her sisters operated a restaurant in the Sedalia area. At the restaurant, she worked as a cook, waitress, and cashier. She also ordered supplies and did bookkeeping.
 - Prior to working at the restaurant, the claimant worked at ConAgra on the set-up line making TV dinners. She worked as a lead person.
 - She has worked in a grocery store as a cashier. She also did miscellaneous paperwork, including processing timecards, and she ordered supplies, did inventory, and performed billing tasks.
4. At the *Sedalia Democrat*, the claimant worked in the mailroom doing inserts and assembling newspapers. The claimant described her work activities at length on a day-by-day basis.
5. The claimant testified that because she is so short, there were numerous occasions when she had to work overhead. For example, when she worked with the overhead belt, she had to reach up to about 5 feet and pull papers off of the belt.
6. During the summer of 2000, the claimant noticed complaints in both upper extremities. She reported her complaints to Kathy Booze, the shift manager at the *Sedalia Democrat*, who told her to wait and see if the complaints improved. When they did not improve, the claimant told Henry Hotzclaw, the manager. The employer referred her to Dr. Alan Allmon,² who diagnosed carpal tunnel syndrome and placed her in a hand splint.³ Dr. Allmon also referred her for an EMG, which was negative.

² This doctor was referred to as both "Dr. Allman" and "Dr. Allcorn." However, the documentary evidence submitted at the hearing indicates that his name is actually "Dr. Allmon."

³ Claimant's Exhibit E.

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7. The claimant was then referred to Dr. Douglas Kiburz, an orthopedic surgeon. Dr. Kiburz saw the claimant on or about October 16, 2000, and diagnosed Madelung's deformity bilaterally.⁴ Dr. Kiburz noted that Madelung's deformity is a congenital problem and not a developmental or degenerative one. Dr. Kiburz indicated that Madelung's deformity is quite rare, and he has probably seen one or two cases in his life. He indicated that the claimant is greatly predisposed to having ongoing problems with heavy lifting, reaching, pushing, and pulling. He recommended splints, and indicated that her lifting limit is probably going to be five or ten pounds. He referred the claimant to Dr. Barry Gainor for a second opinion.
8. The claimant saw Dr. Gainor on December 29, 2000, who confirmed the diagnosis of Madelung's deformity.⁵ He treated her with medications.
9. The claimant's current problems consist of pain in the hands, wrists, and forearms on an intermittent basis, but which are present at some point every day. She also complains of intermittent shoulder pain that is dependent upon the use of her shoulders; the shoulder pain is less frequent than the pain in her hands. She takes the prescription drug Maloxican for pain.
10. The claimant testified that her daily activities consist of personal care, fixing simple meals, vacuuming about once per week, doing laundry, and washing a few dishes. She does grocery shopping with her husband or her teenaged daughter. She drives her youngest grandchild to school, which is approximately one mile each way, and watches her older grandchildren for about 15 minutes before school each day. She picks up her youngest grandchild from school at 1:00 p.m. and cares for him until his mother arrives around 3:30 p.m. They generally spend this time watching television or resting.
11. The claimant suffered a prior back injury when she fell from a chest-style freezer in about 1989. She still has occasional back pain with stooping, bending, and lifting. She admitted to a prior hearing loss of 100% in the left ear. She testified that her hearing loss impacted her employment, as she often could not hear people speak to her if they were to her back and left side. She specifically recalled a reprimand at ConAgra when she did not appear for an early shift after a supervisor told her to appear. It was ultimately determined that she failed to appear because she did not hear that person instruct her to come to work early. While at the *Sedalia Democrat*, the claimant's co-workers and supervisors were aware of her condition and made a point to get her attention before telling her anything.
12. The claimant's other medical conditions include high cholesterol and diabetes, for which she takes medication.
13. The claimant testified that on or about January 2, 2001, she voluntarily quit her employment at the *Sedalia Democrat*. She testified that it was her understanding that if she didn't quit, she would be fired. She has not been employed since that date.

⁴ Claimant's Exhs. C and E.

⁵ Claimant's Exh. E.

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14. The claimant belongs to an organization called the Robert Woolery, Sr., Memorial Pow Wow, which is a gathering of Native Americans. The group meets yearly in Sedalia, Missouri, for a three-day festival. They participate in singing, dancing, visiting, eating, and selling trinkets. She volunteers each year at the Pow Wow. In 2007 and 2008, she was in charge of the concession booth, where they sell hot dogs, hamburgers, Indian tacos, and Native American fry-bread. Her duties included ordering supplies, such as soda, ice, and buns, and helping prepare some of the food.
15. In 2007, several people who normally assisted with the Pow Wow's concession booth were not able to attend. Therefore, the claimant had to make the dough for the Indian tacos. Over the two-and-one-half days of the Pow Wow, she made approximately six or seven batches of dough. She would place the ingredients in a ten-inch bowl and use a fork to mix it by hand. She would drop the dough by spoonfuls onto the floured table, where it was cut into smaller pieces, patted out, and fried. The claimant did not do the frying. She testified that at the Pow Wow she was not constantly busy. She would mix up dough when it was needed, and then she would wander around visiting people, looking at the vendors' goods, and she would sit and talk to people. Even though she took pain medication daily during the Pow Wow, her hands were very painful for two or three weeks afterwards from gripping the fork and mixing the dough. She had to rest her hands and do absolutely nothing with her hands in order for the pain to ease.
16. In 2008, the claimant's work at the concession booth was more of a supervisory nature, including helping order supplies and watching other people do the hands-on work.
17. The claimant is currently on Social Security Disability.
18. The claimant admitted that the surveillance videos from 2007 (Exhs. 5-13) include scenes of various activities at the Pow Wow, although she testified that she is not in all of the scenes. Moreover, she stated that several scenes actually focus on her sister. The claimant is uncertain as to whether she appears in the 2008 video (Exh. 14), as she has not viewed the entire video.
19. Dr. Kiburz's deposition was taken on April 10, 2007.⁶ Dr. Kiburz testified that the claimant has Madelung's deformity, which is a congenital condition. She has Madelung's deformity in both wrists. This condition limits mobility in all directions because the joints are not formed normally and they cannot handle the normal forces of life activities. Dr. Kiburz opined that the claimant's work at the *Sedalia Democrat* did not cause the condition but was an aggravating factor. He further opined that she had a 40-50% impairment of both the left and right upper extremities with 10% due to the work aggravation.
20. At the referral of her attorney, the claimant saw Dr. David Volarich for an Independent Medical Exam (IME) on May 7, 2002.⁷ Dr. Volarich is not an orthopedic physician; in describing his practice he indicated that about half of his time is spent performing and interpreting diagnostic imaging studies; about a quarter of his day is spent taking care of

⁶ Claimant's Exh. C.

⁷ Claimant's Exhs. B and E.

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patients, where such care is generally limited to the nonsurgical treatment of musculoskeletal problems; and the final quarter of his time is spent performing independent medical exams. Dr. Volarich believes that before examining the claimant, he had never seen a patient with Madelung's deformity. He did, however, briefly review a medical journal or article to "look at exactly what the cause of the deformity was."⁸ When questioned by counsel for the employer/insurer, Dr. Volarich's testimony included the following:

Q: What are the types of symptoms that are involved with Madelung's deformity?

A: Usually none. It's a congenital problem that develops in adolescents, and patients get along pretty well.

Q: Are you telling me that generally there are no symptoms at all associated with Madelung's deformity?

A: From what I've read, yes.⁹

21. Dr. Volarich also opined that the claimant suffered overuse repetitive trauma injuries to her upper extremities. He testified that her work at the newspaper was a substantial contributing factor in the aggravation of her Madelung's deformity and caused additional injury to the hands, forearms, and shoulders. He acknowledged that Madelung's deformity is a congenital condition that pre-existed the claimant's work at the newspaper; however, he believes that her employment caused a change in medical condition in that it caused the claimant's hands to become symptomatic.
22. Although Dr. Volarich diagnosed shoulder impingement attributable to the claimant's job duties with the employer, he was unaware that the claimant had suffered a prior traumatic accident involving her shoulders on or about December 13, 1999.
23. Dr. Volarich opined that as a direct result of the injuries sustained while employed by the *Sedalia Democrat*, the claimant has a 30% disability at the right upper extremity at the forearm, 30% of the left upper extremity at the forearm, 15% of the right upper extremity at the shoulder, and 15% of the left upper extremity at the shoulder, as well as 15% permanent partial disability of the body as a whole due to a multiplicity factor from the combination of injuries to both upper extremities. Dr. Volarich recommended certain restrictions with regard to the claimant's forearms/wrists/hands.
24. The claimant saw Gary Weimholt, a vocational counselor, on June 11, 2002.¹⁰ Mr. Weimholt opined that the claimant did not have any transferable job skills, and that she was not employable in the open labor market. He did state that if the restrictions imposed by Dr. Volarich were removed, that could change the outcome of her employability status. Mr. Weimholt was of the opinion that the claimant's inability to return to work was because of a combination of the Madelung's deformity, her chronic lumbar syndrome, and deafness. The impingement of the shoulders was also factored into his decision.

⁸ Claimant's Exh. B, p. 25.

⁹ *Id.*, p. 26.

¹⁰ Claimant's Exhs. A and E.

25. Mary Titterington, also a vocational counselor, testified on behalf of the employer/insurer.¹¹ She evaluated the claimant on August 31, 2006. She found that the claimant had transferrable skills that would lead to employability in other occupations, including typing at 41 words per minute with 100 percent accuracy, with a peak typing speed of 54 words per minute. She has other transferable skills, such as computer knowledge, being a lead person at Banquet Foods, and experience owning her own business. Testing showed the claimant to have academic skills that were well preserved. The intelligence testing put her in an average range of intellectual abilities. In Ms. Titterington's opinion, the claimant is capable of employment in the open labor market and she believes that a prospective employer would hire her. Her opinion is based on looking at the claimant's natural abilities, skills, and talents, including college credit, office skill, academic skills, and transferrable skills. Ms. Titterington believes that the claimant is functioning in many academic categories much better than the average person, so she could do entry-level jobs that did not even require transferable skills.
26. Dr. Anne Rosenthal examined the claimant on June 20, 2005, at the request of the employer/insurer.¹² She testified by deposition on May 3, 2006. Dr. Rosenthal is an orthopedic surgeon with an emphasis or specialty in hand surgery. She testified that the claimant has Madelung's deformity with prominent ulnar heads on the styloids. Although the Madelung's deformity is uncommon, Dr. Rosenthal testified that she has treated probably 20 to 30 such cases. She stated that people with this condition develop wrist pain, usually starting as a teenager or in the early twenties; the problems gradually worsen. The pain is related to the mechanics of the bone structure and the fact that the joint does not function properly. The disease may limit range of motion.
27. Dr. Rosenthal noted that the claimant had limited range of motion of her wrists; the range of motion of her elbows was good. There was no evidence of carpal tunnel syndrome or of cubital tunnel syndrome. Dr. Rosenthal testified that there was no evidence of any occupational disease.
28. Dr. Rosenthal stated that she has treated and evaluated people with Madelung's deformity.
29. Dr. Rosenthal testified that the claimant's work activities at the *Sedalia Democrat* did not cause any change in the physical pathology of her arms and wrists. She stated that the work activities did not constitute a substantial factor in causing the Madelung's deformity to become symptomatic. According to Dr. Rosenthal, the symptoms would have developed regardless of the claimant's work activity and due to her exposure to everyday life. In Dr. Rosenthal's opinion, the claimant does not have any disability because of her work activities at the *Sedalia Democrat*, and the claimant does not have a worker's compensation injury. The doctor acknowledged that the claimant may have a disability, but she determined that the claimant is not disabled from working. Dr. Rosenthal testified that treatment for the claimant would consist of wearing splints and changing what she does with her hands.

¹¹ Employer/insurer Exh. 1.

¹² Employer/insurer Exh. 2.

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30. On behalf of the employer/insurer, Dr. Allen Parmet performed an IME on the claimant on September 21, 2007. Dr. Parmet's deposition was taken on July 7, 2008. He specializes in occupational medicine and aerospace medicine. He issued two reports: one on September 24, 2007, and an amendment on November 13, 2007. The doctor noted that the claimant presented with complaints of pain in both arms, which she related to her work at the *Sedalia Democrat*. He determined that she has Madelung's deformity, which is a genetic abnormality. Because of the Madelung's deformity, the claimant's carrying angle of her wrist is abnormal. He found that the claimant's range of motion was quite well preserved at the joints, the shoulders, elbows, forearms, and wrist. Nonetheless, he did state that the claimant has some limitations at the elbow because the adipose (fat) tissue in her upper arms restricts her movements. He noted that testing was reasonably normal, although the claimant's grip strength was a little low. He clarified this observation by noting that he does not have any norms for somebody of her short stature (58 inches).
31. Dr. Parmet viewed a job-duplication video of the claimant; he also viewed, on fast-forward speed, approximately 13 hours of surveillance videos of the claimant. He noted that in the surveillance videos the claimant was standing behind a counter in a commercial operation and cutting or chopping food, operating a food processor, stirring batter, and walking around talking to people. In his opinion, the activities on the video were inconsistent with the claimant's presentation in his office because she reported that she could not sustain any activity and had not had any employment.
32. Dr. Parmet opined that based on his examination, and based on the medical records and the video tapes of her food preparation activities, it is his opinion that the claimant could engage in employment in the open labor market. He determined that the claimant's work activity at the *Sedalia Democrat* was not a substantial contributing factor in causing, aggravating, or accelerating her condition. In his opinion, the substantial cause of the claimant's limitations of grip strength, and perhaps on her range of motion, was her obesity; therefore, the limitations are not related to her work activity or any work injury. He opined that the claimant does not have a work disability secondary to her job activity. He did, however, rate the claimant for Madelung's deformity at 30% of each elbow at the 210-week level. He stated that she does not need any additional treatment and is not permanently and totally disabled under the Workers' Compensation Act.
33. Dr. Parmet noted that some of the records provided to him were records of an Evelyn Woolery and not of the claimant, Delores Woolery. He testified that removing those records from his consideration does not change his opinion. Moreover, even if the surveillance videos were taken away, his opinion is still that the claimant does not have a disability attributed to her work activity.
34. On behalf of the employer/insurer, Dr. Anne Rosenthal testified by deposition (Exh. 2). She is an orthopedic surgeon with an emphasis or specialty in hand surgery. Dr. Rosenthal conducted an IME on the claimant on June 21, 2005. Dr. Rosenthal determined that the claimant has typical Madelung's deformity with prominent ulnar heads on the styloids; the left wrist was worse than the right one. The claimant has limited range of motion of her wrists, although the range of motion for her elbows was good. There was no evidence of carpal tunnel syndrome or of cubital tunnel syndrome. Dr. Rosenthal explained that with

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Madelung's deformity, the ulnar side, or the small finger side, of the wrist is much more prominent. The doctor noted that x-rays of the wrists and forearms show that from the elbow to the wrist the claimant has increased bowing or an increased curve of her radius. The claimant also has arthritis of the wrist bones.

35. After reviewing the medical records, taking a history from the claimant, and performing an exam, Dr. Rosenthal determined that the claimant's complaints are from Madelung's deformity. Dr. Rosenthal testified that she is familiar with this condition, and has treated 20 to 30 people with Madelung's deformity. She stated that people with Madelung's deformity develop wrist pain that usually starts when they are teenagers or in their early twenties. The pain gradually worsens. This is the natural history of the disease. The wrist pain is related to the mechanics of the bone structure in that the wrist of someone with Madelung's deformity does not function normally. The disease may limit range of motion, and the pain from the disease may limit what the claimant is able to do.
36. Dr. Rosenthal opined that the claimant's work activities at the Sedalia Democrat did not cause any change in the physical pathology of the claimant's arms or wrists. She testified that the work activities did not constitute a substantial factor in causing the claimant's Madelung's deformity to become symptomatic. Dr. Rosenthal contends that the symptoms would have developed regardless of the claimant's work activity. In Dr. Rosenthal's opinion, the claimant does not have any disability as a result of her work activities at the Sedalia Democrat. The doctor acknowledged that the claimant might have a disability, but she states that the claimant is not disabled because of any work injury or work activity.
37. Dr. Rosenthal stated that treatment for the claimant's Madelung's deformity would consist of wearing splints and changing what the claimant does with her hands. The doctor noted that in order to correct Madelung's deformity, you have to do the surgical procedures before a person has finished growing. Any surgery that might be done now would be more of a salvage nature; moreover, even with the surgery, the claimant would probably not have a pain-free wrist.
38. According to Dr. Rosenthal, there is no reason why the claimant could not do a job that is less stressful to her hands.

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable laws of the state of Missouri, I find the following:

Under Missouri workers' compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.¹³ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹⁴ Medical causation not

¹³ *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. E.D. 1990); *Grime v. Altec Indus.* 83 S.W.3d 581, 583 (Mo. App. W.D. 2002) overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003);

¹⁴ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

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within lay understanding or experience requires expert medical evidence.¹⁵ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹⁶

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁷ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹⁸

The claimant must establish a causal connection between the accident and the injury.¹⁹ The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence.²⁰ "Arising out of employment" means that a causal connection exists between the employee's duties and the injury for purposes of workers' compensation.²¹ An injury is compensable only if it is clearly work related, and an injury is clearly work related only if work was a substantial factor in the cause of the injury and the resulting medical condition. However, an injury is not compensable if work was merely a triggering or precipitating factor.²²

This claim concerns an alleged occupational disease from before the 2005 statutory changes; therefore, the 2000 version of Section 287.067 applies and it defines occupational disease as follows:

[a]n identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

An occupational disease is not compensable merely because work was a "triggering or precipitating factor."²³ It must be shown that work is a "substantial factor" in the cause of the resulting medical condition or disability.²⁴ Work that is merely a triggering or precipitating factor is not deemed to be compensable.²⁵

¹⁵ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹⁶ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. S.D. 1984).

¹⁷ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1984).

¹⁸ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. E.D. 1992) overruled on other grounds by *Hampton; Hutchinson v. Tri State Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986) overruled on other grounds by *Hampton*.

¹⁹ *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 198 (Mo. App. E.D. 1990).

²⁰ *Id. at 199*.

²¹ *Cruzan v. City of Paris*, 922, S.W.2d 473 (Mo. App. E.D. 1996), overruled on other grounds by *Hampton*.

²² Section 287.020.2, RSMo. 2000.

²³ Section 287.067.2, Section 287.020.2, and Section 287.020.3, RSMo.

²⁴ Section 287.020.2, RSMo.

²⁵ *Id.*

Section 287.020.3 defines an “injury” to be one that “has arisen out of and in the course of employment.” In addition, the “injury must be incidental to and not independent of the relation of the employer and employee. Ordinarily, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.”²⁶

The opinions of Drs. Kiburz, Volarich, Rosenthal, and Parmet were entered into evidence. These physicians all conclude that the claimant has a pre-existing congenital condition, Madelung’s deformity, which involves both of her wrists. Dr. Volarich and Dr. Kiburz indicate that the claimant’s work was a substantial factor in the cause of the claimant’s injury - the aggravation of the asymptomatic condition of Madelung’s deformity. Dr. Rosenthal and Dr. Parmet disagree. I find that the testimony and opinions of Dr. Rosenthal and Dr. Parmet are more credible and convincing than those of Dr. Kiburz and Dr. Volarich.

Of all the physicians that examined the claimant, Dr. Rosenthal clearly has the most experience and expertise with Madelung’s deformity. Dr. Rosenthal has actually seen and treated 20 to 30 patients with this condition. Her testimony was thorough, credible, and convincing. I find that substantial and competent evidence from Dr. Rosenthal establishes that the claimant’s upper extremity complaints were a natural progression of her Madelung’s deformity and that work was not a substantial factor in causing her complaints. After examining the claimant, reviewing the medical records, and reviewing the claimant’s job description, Dr. Rosenthal concluded that the claimant’s employment with the *Sedalia Democrat* was not a substantial factor in causing the Madelung’s deformity to become symptomatic. Dr. Rosenthal provided detailed information and analysis regarding Madelung’s deformity and the natural progression of the condition. She described in detail the various bones that make up the wrist joint, how Madelung’s deformity develops, and its impact on the activities of daily living. Dr. Rosenthal testified credibly that the claimant’s condition was unchanged by her work activities. She testified that the claimant’s complaints were due to the mechanics of her bone structure, and that her job activities with the employer did not cause any change in physical pathology or cause the claimant to become symptomatic. Dr. Rosenthal testified that the claimant would have developed symptoms regardless of her work activities.

Dr. Parmet also opined that the claimant’s work activity at the newspaper was not a substantial contributing factor in causing, aggravating, or accelerating her condition.

Dr. Kiburz’s testimony is less credible than that of Dr. Rosenthal. Dr. Kiburz is a general orthopedic surgeon and not a hand or upper extremity specialist. He has seen only one patient with Madelung’s deformity. He offered no clear explanation as to why the work activities were a substantial factor in allegedly aggravating the claimant’s symptoms. He did not testify about the progression of Madelung’s deformity, nor did he testify in detail about how the condition in its natural progression causes pain and increased disability, even in the absence of vocational activity. He opined that the claimant would be able to return to gainful employment. However,

²⁶ Section 287.020.3, RSMo.

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he did assign 10% impairment to both the right and left upper extremities due to work being an “aggravating factor.”²⁷

Dr. Volarich is not an orthopedic surgeon. Before examining the claimant, he had never seen a patient with Madelung’s deformity, but he did briefly review a medical journal or article on the condition. He testified that based on what he read, there are no symptoms associated with Madelung’s deformity. When viewed in the light of Dr. Rosenthal’s testimony, it is clear that Dr. Volarich’s opinion regarding the absence of symptoms is erroneous and not persuasive.

In addition to diagnosing the claimant with Madelung’s deformity, Dr. Volarich diagnosed the claimant with bilateral shoulder impingement that he opined was caused by the claimant’s repetitive use of her arms and overhead activity for her employer. Dr. Volarich did not, however, describe any overhead activity in the claimant’s job description. He admitted that there were no x-rays or other diagnostic tests that confirmed a diagnosis of impingement syndrome, and there was no documentation of a diagnosis of right shoulder impingement in the medical records. He did not know when the claimant’s right shoulder symptoms began and did not recall any other physician documenting right shoulder complaints. In fact, Dr. Volarich was the only doctor to diagnosis the claimant with right shoulder impingement syndrome.

The substantial and competent evidence shows that the claimant’s work activities were, at best, a triggering or precipitating factor of her pain. This does not rise to the level of a substantial factor entitling the claimant to compensation. The claimant has failed to establish through expert testimony that the workplace activities caused the “injury” of pain and decreased mobility in the claimant’s upper extremities. A review of the medical evidence establishes that it is more likely than not that her complaints were merely the natural progression of her Madelung’s deformity.

As the claimant has failed to meet her burden of proof to establish that an accident or occupational disease that arose out of and in the course of her employment, her claim fails and all other issues are moot. I will, however, briefly address the claimant’s renewed motion to join her husband, Robert Harvey Woolery, as an additional party in this case.²⁸ The claimant contends that her husband “was a dependent spouse at the time of this injury and continues in this status and may have an interest if he survives Dolores Woolery,” and that as such, he should be added as an additional party. Section 287.240(4) states, in part: “The word ‘dependent’ as used in this chapter shall be construed to mean a relative by blood or marriage *of a deceased employee*, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury.” [Emphasis added.] As the employee, Dolores Woolery, is not deceased, Robert Harvey Woolery does not meet the statutory definition of “dependent” at this time; moreover, he may never meet the statutory definition of “dependent.” Therefore, I find no basis for the granting of the requested relief. The claimant’s motion to join an additional party is again denied.

Any pending objections not expressly ruled on in this award are overruled.

²⁷ Claimant’s Exh. C, pp. 21-23.

²⁸ The claimant previously filed a *Motion to Join Additional Party*. That motion was denied by order issued February 5, 2009. The claimant renewed her motion at the hearing.

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Date: _____

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation