

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

Injury No.: 99-177478

Employee: Christopher Hickman

Employer: McCarthy Interface

Insurer: TIG Insurance Company

Date of Accident: December 3, 1999

Place and County of Accident: St. Francois County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 20, 2006. The award and decision of Administrative Law Judge Jack H. Knowlan, Jr., issued January 20, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 27th day of July 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Christopher Hickman

Injury No. 99-177478 and 00-086244

Dependents: N/A

Employer: McCarthy Interface

Additional Party: Second Injury Fund (Injury # 00-086244)

Insurer: TIG Insurance Company

Hearing Date: August 2, 2005

Checked by: JK/kh

Hearing Completed: October 12, 2005

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes (Benefits awarded under both claims)
2. Was the injury or occupational disease compensable under Chapter 287? Yes, as to both claims.
3. Was there an accident or incident of occupational disease under the Law? Yes, as to both claims.
4. Date of accident or onset of occupational disease? December 3, 1999 for injury # 99-177478 and July 13, 2000 for injury # 00-086244.
5. State locations where accidents occurred or occupational disease contracted: St Francis County Missouri.
6. Was above employee in employ of above employer at time of alleged accidents or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: For the 1999 claim, employee developed bilateral carpal tunnel syndrome as a result of his repetitive use of his hands and arms while working as an ironworker with McCarthy Interface. For the 2000 claim, the employee injured his low back while lifting boards from under a tractor-trailer.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right and left upper extremities for the 1999 claim and low back for the 2000 claim.
14. Nature and extent of any permanent disability: 15% of each wrist plus 15% multiplicity for 1999 claim and 10 % of the body as a whole for the injury to the employee's low back under the 2000 claim.
15. Compensation paid to date for temporary total disability: None under the 1999 claim and \$513.20 paid for the 2000 claim.
16. Value necessary medical aid paid to date by employer-insurer: \$126.57 paid for the 1999 claim and \$5,159.94 paid under the 2000 claim.
17. Value necessary medical aid not furnished by employer-insurer: \$1,235.15 awarded for previously incurred medical expenses under the 1999 claim.
18. Employee's average weekly wage: \$838.46
19. Weekly compensation rate: \$558.97 as the TTD rate for both claims and permanent partial disability rates of \$303.01 for the 1999 claim and \$314.26 for the 2000 claim.
20. Method wages computation: By agreement

21. Amount of compensation payable:

Injury # 99-177478

Previously incurred medical expenses: \$ 1,235.15

5 4/7 weeks of temporary total disability at \$558.97 per week: \$3,114.26

60.375 weeks of permanent partial disability at \$303.01 per week: \$18,294.23

Total amount awarded under injury # 99-086244: \$22,643.64

Injury # 00-086244

40 weeks of permanent partial disability (10% of the body as a whole) at \$314.26 per week: \$12,570.40

Total amount awarded under injury # 00-086244: \$12,570.40

22. Second Injury Fund liability: Employee's claim against the Second Injury Fund under injury 00-086244 was left open by agreement, but since it does not appear that the employee's claim meets the statutory threshold, the employee is encouraged to voluntarily dismiss his claim against the Second Injury Fund.

23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Gary G. Matheny

FINDINGS OF FACT AND RULINGS OF LAW

On August 2, 2005, the employee, Christopher Hickman, appeared in person and by his attorney, Gary Matheny, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Mr. Kevin Leahy. At the time of the hearing, the parties requested a consolidated evidentiary hearing for the employee's claims under injury # 99-177478 and injury # 00-086244. The parties further agreed on certain undisputed facts and identified the issues that were in dispute for each claim. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

Injury # 99-177478:

1. On or about December 3, 1999, McCarthy Interface was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by TIG Insurance Company.
2. On or about December 3, 1999, Christopher Hickman was an employee of McCarthy Interface, and was working under the provision of the Missouri Workers' Compensation Act.
3. The employer had notice of the employee's alleged accident or occupational disease.
4. The employee's claim for compensation was filed within the time allowed by law.
5. The employee's average weekly wage was approximately \$838.46 per week, and his rate of compensation is \$559.97 for temporary total disability and \$303.01 for permanent partial disability.
6. The employer-insurer furnished medical aid in the amount of \$126.57.
7. No temporary total disability benefits were paid by the employer-insurer.

Injury # 00-086244:

1. On or about July 13, 2000, McCarthy Interface was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by TIG Insurance Company.
2. On or about July 13, 2000, Christopher Hickman was an employee of McCarthy Interface, and was working under the provisions of the Missouri Worker's Compensation Act.
3. On or about July 13, 2000, the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.

5. The employee's average weekly wage was approximately \$838.46, and his rate of compensation is \$558.97 per week for temporary total disability and \$314.26 for permanent partial disability.
6. The employer-insurer furnished medical aid in the amount of \$5,159.94.
7. The employer-insurer paid temporary total disability benefits in the amount of \$513.20.

ISSUES:

Injury # 99-177478:

1. Accident or occupational disease
2. Medical causation
3. Additional medical aid
4. Temporary total disability and permanent partial disability

Injury # 00-086244:

1. Statute of Limitations
2. Medical causation
3. Permanent partial disability

SUMMARY OF THE EVIDENCE:

The employee, Christopher Hickman has worked since 1973 as either an ironworker or a boilermaker. His duties as an ironworker included erecting structural steel beams, hand rails and other items made of steel or iron. The employee's duties as a boilermaker included welding and other related duties on boilers, vessels, precipitators and powerhouses. In 1993, the employee joined Local # 469 out of Jackson, Mississippi, and thereafter followed a pattern of working for a number of different employers. The employee prepared a list of the employers that he worked for in 1998 and 1999 that was admitted as employee's exhibit A.

The employee started working for McCarthy Interface on October 22, 1999 at the Corrections Center in Bonne Terre, Missouri. The employee's job at the Corrections Center was tying rods. The employee described this job as being a repetitive, hand intensive job, which required him to pull wire from a spool, push the wire through the rods and twist them with a pair of pliers. The employee emphasized that the wire was construction grade wire that was coarse and difficult to work with. He initially used his left hand to push the wire through the rods and his right hand to twist the wire with pliers. When his right hand started bothering him, he switched the pliers to his left hand. After three or four weeks, the employee started developing pain, cramps and swelling in both hands.

At some point in late November of 1999, the employee reported his hand symptoms to his foreman and later to his superintendent. On December 3, 1999, the employee reported his injury to Mr. Tom Tomson, who was the safety director for McCarthy Interface. A supplemental report of accident was prepared as a result of this conversation that was admitted as employee's exhibit B.

The only significant factual difference between the positions of the employee and the employer-insurer on this claim is whether the employee had experienced similar symptoms in his hands and wrists prior to the McCarthy Interface job. According to Mr. Tom Tomson, the employee advised him on two different occasions that his symptoms first started during the summer of 1999 while he was working for Superior Rigging out of Atlanta, Georgia (Employer-insurer exhibit 1). The supplementary report of accident contains a sentence, which states "Superior Rigging when noticed first symptoms. Summer of 1999", but the employee testified that he did not recall making that statement, and did not write that portion of the accident report. It should be noted that the last sentence under the heading "Describe Injury in Detail Indicating Body Part Affected" appears to be written with a different ink pen and in a different hand writing style (See employee's exhibit B).

The employee initially sought medical treatment from Dr. John Long in Hazelhurst, Mississippi. Dr. Long saw the employee on December 6, 1999. The employee was complaining of pain, swelling and numbness in his hands, and Dr. Long noted he had been working as an ironworker. Dr. Long diagnosed the employee as having carpal tunnel syndrome and treated the employee with an injection and medication (Employee's exhibit C).

Dr. Long then referred the employee to Dr. Aubrey Lucus with Plastic and Hand Surgery Associates, PLLC in Jackson, Mississippi. Dr. Lucus' records from December 7, 1999 indicate that Dr. Lucus diagnosed the employee with advanced right carpal tunnel syndrome and moderate left carpal tunnel syndrome. Although, Dr. Lucus indicated that he wanted to wait a few days to see if the injection helped relieve the employee's symptoms, his record makes it clear that he discussed the possibility of surgery with the employee on December 7, 1999, and the employee was interested in having the surgery performed before the end of the year (December 7, 1999 records in Employee's exhibit B).

The employee testified that he did not have the surgery recommended by Dr. Lucus because his health insurance

company thought it was a work related injury and would not agree to pay for the surgery. The May 1, 2000 memo from Tom Tomson confirms that the employee talked with Mr. Tomson on that date and requested additional medical treatment. In response to this request, Mr. Tomson wrote, "McCarthy was not going to pay for this service". Mr. Tomson's decision to deny medical treatment was apparently based on the employee's statement that his symptoms began during the summer of 1999 while working for Superior Rigging (Employer-insurer's exhibit 1).

During this time period the employee was also seen by a Dr. Mullen in Bonne Terre, Missouri. A Form 9 surgeon's report dated May 17, 2000 indicates that the employee stated that he had been twisting and clipping wire that caused bilateral arm numbness. Although he was changed to another job welding, the numbness had continued and gotten worse. Under question 8 of this form, the doctor responded "yes" to the question "Is accident above referred to the only cause of patient's condition?" The physician who completed the surgeon's report prescribed medication and hand splints, and recommended a nerve conduction study for both of the employee's hands. Although the employee recalled having a nerve conduction study at the time, these records were apparently not located by either party (Employee's exhibit C).

After the employee received the conservative treatment in Bonne Terre, Missouri, the employee continued working as an ironworker for McCarthy Interface and other employers, and did not seek additional medical treatment until he returned to Dr. Lucus on July 8, 2003. In his July 8, 2003 medical record, Dr. Lucus noted the employee had continued experiencing symptoms in both of his hands since his last visit. Based on the employee's description of his work as an ironworker/welder, Dr. Lucus stated, "based on his description of his job, which he has performed for 30 years, I do think it has a relationship to his carpal tunnel syndrome".

Based on the employee's continued complaints and his failure to respond to conservative treatment, Dr. Lucus performed a bilateral carpal tunnel release at River Oaks Hospital in Jackson, Mississippi on July 25, 2003. Dr. Lucus' record from August 4, 2003 indicates he offered to keep the employee off for a total of 6 – 8 weeks, but the employee stated that because of financial reasons he would need to return to work in September of 2003 (Employee's exhibit D).

At the time of the hearing, the employee testified that his hands and wrists felt like the carpal tunnel syndrome might be coming back. He noted that the surgery helped, but approximately one year later, he started experiencing pain and occasional numbness. The employee did not believe he had any weakness in his hands, but noted there were some things he could no longer do with one hand. Although his range of motion was good in both hands, the employee emphasized that he still experienced some pain and discomfort in both hands.

The employee's second claim for compensation under injury # 00-86244 is based on an accident that occurred on July 13, 2000. The employee was still working for McCarthy Interface at the Bonne Terre Prison. The employee testified that he was picking up 4x4s that were 8 feet long from underneath a tractor-trailer when his "back went out". The employee indicated that he heard a loud noise and experienced severe pain in his back below the belt line.

After reporting his back injury, the employer-insurer authorized treatment with Dr. Dennis Sumski in Farmington, Missouri. Dr. Sumski diagnosed the employee as having an acute sacroiliac strain. After two months of conservative treatment failed to relieve all of the employee's complaints, Dr. Sumski ordered an MRI, which was performed on August 31, 2000. The radiology report indicates the employee had a diffuse bulging disc at the L5S1 with degenerative changes throughout the lumbar spine, but he did not have a focal disc protrusion, disc herniation or spinal canal stenosis (Employee's exhibit F).

Following the MRI, the employee was authorized to see Dr. Allen H. Morris for a second opinion. Dr. Morris is an orthopedic surgeon in St. Louis Missouri. Dr. Morris' report dated October 25, 2000 indicates that although the employee was getting better, he still experienced low back pain with occasional numbness in both legs. Although these symptoms were not constant, the employee indicated that bending or rapid movement or sitting for extended periods of time still produced low back pain.

After reviewing the MRI and x-rays, Dr. Morris concluded that the employee's lifting incident of July 13, 2000 was the substantial contributing factor to the employee's lumbosacral sprain. Other than recommending that the employee continue with his current exercise regimen, Dr. Morris did not recommend any additional treatment (Employee's exhibit G).

Employee's conservative treatment from Dr. Sumski and Dr. Morris for his low back injury included medication and epidural steroid injections. After his release by Dr. Morris, the employee has not sought additional medical treatment. His current back complaints include occasional pain and numbness in his legs. The employee's biggest concern, however, is that his low back and legs sometimes "go out" and cause him to fall. The employee indicated that this happened one time the week before the hearing and has occurred three times in the last two months. The employee emphasized that he has not had any new injuries to his back since July of 2000, and did not have any problems with his back prior to the July 13, 2000 accident.

The employee's medical evidence for both claims was offered through a February 2, 2005 report of Dr. Shawn L. Berkin. Based on Dr. Berkin's examination of the employee and his review of the medical records, Dr. Berkin diagnosed the employee as having bilateral carpal tunnel syndrome and a lumbosacral strain with bulging of the L5S1 intervertebral disc. Dr. Berkin concluded that the hand intensive activities performed by the employee during the course of his employment as an

ironworker with McCarthy Interface was a substantial factor in causing the employee's bilateral carpal tunnel syndrome. Dr. Berkin also concluded that the employee's accident on July 13, 2000 was a substantial factor in causing the employee's lumbosacral strain, associated with a bulging disc at the L5S1 (Employee's exhibit H).

On the issue of permanent partial disability, Dr. Berkin rated the employee as having a 35% permanent partial disability of each upper extremity at the level of the wrist. Because his disabilities included both hands, Dr. Berkin also suggested that the employee's injuries combined to create a greater disability, and a loading factor should therefore be applied.

On the July 13, 2000 back injury; Dr. Berkin rated the employee as having a 25% permanent partial disability of his body as a whole at the level of the lumbosacral spine (Employee's exhibit H).

At the conclusion of the hearing, the employer-insurer requested that the record be left open and the hearing be continued to allow the employer-insurer to submit additional medical evidence on the disputed issues. The parties also wanted additional time to check the payment records to determine the validity of the statute of limitations defense on the 2000 claim. By letter dated September 21, 2004, the employer-insurer's attorney advised that based on the payment history he had obtained, the employer-insurer was waiving its statute of limitations defense on the July 13, 2000 claim.

On October 14, 2005 the employer-insurer submitted two additional reports from Dr. Aubrey Lucas that were admitted as employer-insurer's exhibit 3. In his report dated September 13, 2005, Dr. Lucas stated, "It is possible for activities within a 90 day frame to contribute significantly to carpal tunnel syndrome. I am not aware of his activities to such a specific nature that I can make a comment on Mr. Hickman and activities within a 90 days period, but welding would be considered high risk and if he was performing that activity, it could contribute" (September 13, 2005 report admitted as Employer-insurer's exhibit 3).

In a supplemental report dated October 4, 2005, Dr. Lucas attempted to answer additional questions posed by the employer-insurer's attorney. Dr. Lucas commented, "etiology is the most difficult issue to shed light on regarding conditions such as carpal tunnel syndrome". After restating that welding could be considered a high risk activity for aggravating and/or developing carpal tunnel syndrome, Dr. Lucas stated "exposure to welding would be a risk, regardless of who he worked for during the exposure, whether it was one employer or twenty employers".

Dr. Lucas was also apparently questioned about the gap in treatment between 1999 and 2003. In response to this question Dr. Lucas stated, "I don't have any information that Mr. Hickman's symptoms went away between 1999 and 2003. If the symptoms went away for a significant period of time, and then reoccurred with a known exposure, then I would opine that the exposure coinciding with the reoccurrence would be significant and important regarding aggravation or causation, and important in the decision for treatment and surgery".

It is significant to note that none of the statements by Dr. Lucas appear to refute the conclusion of Dr. Berkin that the employee's work as a boilermaker and an ironworker was a substantial factor in causing his bilateral carpal tunnel syndrome. There is also no information in Dr. Lucas' report to support a finding that the employee's repetitive work with prior employers was the substantial contributing factor to his bilateral carpal tunnel syndrome.

After the hearing was concluded with the admission of the employer-insurer's exhibit 3, the record was closed. Both attorneys subsequently decided not to submit briefs on the disputed issues.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Prior employment history
- B. Supplement report of accident from McCarthy Interface
- C. Medical records of Dr. John Long
- D. Medical records of Dr. Aubrey Lucas
- E. Statement from Health Management Associates
- F. Medical records from Dr. Dennis Sumski
- G. Medical report of Dr. Allen Morris
- H. Medical reports of Dr. Shawn Berkin

Employer-Insurer's Exhibits

1. May 1, 2000 letter from Tom Tomson
2. Report of Injury
3. Medical reports of Dr. Aubrey Lucas

FINDINGS OF FACT AND RULINGS OF LAW:

Injury # 99-177478:

Issue 1 and Issue 2 - Accident and Medical Causation

The employee has alleged that his work as an ironworker was a substantial contributing factor in causing his bilateral carpal tunnel syndrome and the resulting surgery performed by Dr. Lucas. The employee believed that his symptoms of pain, swelling and numbness were directly related to the repetitive work of tying rods in October and November of 1999. The employee's testimony and other evidence also indicate that the employee's normal duties as an ironworker or boilermaker required repetitive use of his hands and arms. A short list would include welding, operating a cutting torch, operating grinders and other tasks typically performed by ironworkers and boilermakers.

The employer-insurer's decision to deny the employee's claim for bilateral carpal tunnel syndrome appears to be based solely on the fact that the employee may have stated that his symptoms started on a job in the summer of 1999 with a prior employer. This denial demonstrates a lack of understanding on the part of the employer-insurer of the last exposure rule.

Under Section 287.063 the statute provides "an employee shall be conclusively deemed to have been exposed to the hazards to an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazards of the disease exist subject to the provisions relating to occupational disease due to repetitive motion, as set forth in subsection 7 of Section 287.067, RSMo." Thus, even though the employee may have worked for a number of different employers and may have experienced some symptoms of carpal tunnel syndrome prior to his work with McCarthy Interface, the legislature has elected to simplify the issue of medical causation by placing the responsibility for the occupational disease on the last employer to expose the employee to the work which caused the occupational disease.

The only exception to the last exposure rule is set forth under subsection 7 of 287.067. This section provides as follows:

7. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than 3 months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

In this case the employee's claim for compensation was filed on June 14, 2000. The evidence supports a finding that the employee was still working with McCarthy at the time this claim was filed. The employee's credible testimony also establishes that his symptoms did not become severe and disabling until he began pulling tie rods for McCarthy Interface in October and November of 1999. The employee testified that he had not pulled any tie rods for other employers for 15 or more years prior to that date.

The evidence unequivocally supports a finding that McCarthy Interface was the last employer prior to the date of the employee's claim to expose the employee to the hazards and type of work that caused his carpal tunnel syndrome. Therefore, even if the employer-insurer's position is accurate and the employee's symptoms first appeared in the summer of 1999 while working for another employer, this fact would not relieve the employer-insurer of liability unless there is evidence to support a finding that this prior exposure was "the substantial contributing factor to the injury".

The employer-insurer has offered no evidence, either medical or otherwise, to support a finding under the "90 day rule" that would relieve the employer-insurer from liability. The employee's testimony clearly indicates that the rod tying work at McCarthy Interface was the substantial contributing factor, and the employer-insurer has offered no evidence to refute that conclusion.

I therefore find that the employee's work as an ironworker and boilermaker was a substantial contributing factor in the cause of the employee's bilateral carpal tunnel syndrome and his resulting medical treatment. I further find that McCarthy Interface is liable for the employee's work related injury under the last exposure rule, and there is no evidence to support a finding that any of the employee's work with a prior employer was the substantial contributing factor in causing the carpal tunnel syndrome.

Based on these findings, I further find that the employee did suffer a compensable accident or occupational disease on or about December 3, 1999, and the employee's bilateral carpal tunnel syndrome is medically causally related to his accident or occupational disease.

The evidence supports a finding that, as a result of his July 13, 2000 accident, the employee suffered a low back sprain or strain and either a bulging disc or an aggravation of a pre-existing degenerative condition. Based on the employee's testimony and the medial evidence admitted, I find that the employee has a 10% permanent partial disability of his body as a whole as a result of the July 13, 2000 accident. The employer-insurer is therefore directed to pay to the employee the sum of \$314.26 per week for 40 weeks for a total award of permanent partial disability equal to \$12,570.40.

ATTORNEY'S FEE:

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

INTEREST:

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

Date: _____

Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 00-086244

Employee: Christopher Hickman

Employer: McCarthy Interface

Insurer: TIG Insurance Company

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

Date of Accident: July 13, 2000

Place and County of Accident: St. Francois County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission

(Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 20, 2006. The award and decision of Administrative Law Judge Jack H. Knowlan, Jr., issued January 20, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 27th day of July 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Christopher Hickman

Injury No. 99-177478 and 00-086244

Dependents: N/A

Employer: McCarthy Interface

Additional Party: Second Injury Fund (Injury # 00-086244)

Insurer: TIG Insurance Company

Hearing Date: August 2, 2005

Checked by: JK/kh

Hearing Completed: October 12, 2005

SUMMARY OF FINDINGS

24. Are any benefits awarded herein? Yes (Benefits awarded under both claims)
25. Was the injury or occupational disease compensable under Chapter 287? Yes, as to both claims.
26. Was there an accident or incident of occupational disease under the Law? Yes, as to both claims.
27. Date of accident or onset of occupational disease? December 3, 1999 for injury # 99-177478 and July 13, 2000 for injury # 00-086244.
28. State locations where accidents occurred or occupational disease contracted: St Francis County Missouri.

29. Was above employee in employ of above employer at time of alleged accidents or occupational disease? Yes
30. Did employer receive proper notice? Yes
31. Did accident or occupational disease arise out of and in the course of the employment? Yes
32. Was claim for compensation filed within time required by law? Yes
33. Was employer insured by above insurer? Yes
34. Describe work employee was doing and how accident happened or occupational disease contracted: For the 1999 claim, employee developed bilateral carpal tunnel syndrome as a result of his repetitive use of his hands and arms while working as an ironworker with McCarthy Interface. For the 2000 claim, the employee injured his low back while lifting boards from under a tractor-trailer.
35. Did accident or occupational disease cause death? No
36. Parts of body injured by accident or occupational disease: Right and left upper extremities for the 1999 claim and low back for the 2000 claim.
37. Nature and extent of any permanent disability: 15% of each wrist plus 15% multiplicity for 1999 claim and 10 % of the body as a whole for the injury to the employee's low back under the 2000 claim.
38. Compensation paid to date for temporary total disability: None under the 1999 claim and \$513.20 paid for the 2000 claim.
39. Value necessary medical aid paid to date by employer-insurer: \$126.57 paid for the 1999 claim and \$5,159.94 paid under the 2000 claim.
40. Value necessary medical aid not furnished by employer-insurer: \$1,235.15 awarded for previously incurred medical expenses under the 1999 claim.
41. Employee's average weekly wage: \$838.46
42. Weekly compensation rate: \$558.97 as the TTD rate for both claims and permanent partial disability rates of \$303.01 for the 1999 claim and \$314.26 for the 2000 claim.
43. Method wages computation: By agreement
44. Amount of compensation payable:

Injury # 99-177478

Previously incurred medical expenses: \$ 1,235.15
5 4/7 weeks of temporary total disability at \$558.97 per week: \$3,114.26
60.375 weeks of permanent partial disability at \$303.01 per week: \$18,294.23

Total amount awarded under injury # 99-086244: \$22,643.64

Injury # 00-086244

40 weeks of permanent partial disability (10% of the body as a whole) at \$314.26 per week: \$12,570.40

Total amount awarded under injury # 00-086244: \$12,570.40

45. Second Injury Fund liability: Employee's claim against the Second Injury Fund under injury 00-086244 was left open by agreement, but since it does not appear that the employee's claim meets the statutory threshold, the employee is encouraged to voluntary dismiss his claim against the Second Injury Fund.
46. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Gary G. Matheny

FINDINGS OF FACT AND RULINGS OF LAW

On August 2, 2005, the employee, Christopher Hickman, appeared in person and by his attorney, Gary Matheny, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Mr. Kevin Leahy. At the time of the hearing, the parties requested a consolidated evidentiary hearing for the employee's claims under injury # 99-177478 and injury # 00-086244. The parties further agreed on certain undisputed facts and identified the issues that were in dispute for each claim. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

Injury # 99-177478:

8. On or about December 3, 1999, McCarthy Interface was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by TIG Insurance Company.
9. On or about December 3, 1999, Christopher Hickman was an employee of McCarthy Interface, and was working under the provision of the Missouri Workers' Compensation Act.
10. The employer had notice of the employee's alleged accident or occupational disease.
11. The employee's claim for compensation was filed within the time allowed by law.
12. The employee's average weekly wage was approximately \$838.46 per week, and his rate of compensation is \$559.97 for temporary total disability and \$303.01 for permanent partial disability.
13. The employer-insurer furnished medical aid in the amount of \$126.57.
14. No temporary total disability benefits were paid by the employer-insurer.

Injury # 00-086244:

8. On or about July 13, 2000, McCarthy Interface was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by TIG Insurance Company.
9. On or about July 13, 2000, Christopher Hickman was an employee of McCarthy Interface, and was working under the provisions of the Missouri Worker's Compensation Act.
10. On or about July 13, 2000, the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
11. The employer had notice of the employee's accident.
12. The employee's average weekly wage was approximately \$838.46, and his rate of compensation is \$558.97 per week for temporary total disability and \$314.26 for permanent partial disability.
13. The employer-insurer furnished medical aid in the amount of \$5,159.94.
14. The employer-insurer paid temporary total disability benefits in the amount of \$513.20.

ISSUES:

Injury # 99-177478:

5. Accident or occupational disease
6. Medical causation
7. Additional medical aid
8. Temporary total disability and permanent partial disability

Injury # 00-086244:

4. Statute of Limitations
5. Medical causation
6. Permanent partial disability

SUMMARY OF THE EVIDENCE:

The employee, Christopher Hickman has worked since 1973 as either an ironworker or a boilermaker. His duties as an ironworker included erecting structural steel beams, hand rails and other items made of steel or iron. The employee's duties as a boilermaker included welding and other related duties on boilers, vessels, precipitators and powerhouses. In

1993, the employee joined Local # 469 out of Jackson, Mississippi, and thereafter followed a pattern of working for a number of different employers. The employee prepared a list of the employers that he worked for in 1998 and 1999 that was admitted as employee's exhibit A.

The employee started working for McCarthy Interface on October 22, 1999 at the Corrections Center in Bonne Terre, Missouri. The employee's job at the Corrections Center was tying rods. The employee described this job as being a repetitive, hand intensive job, which required him to pull wire from a spool, push the wire through the rods and twist them with a pair of pliers. The employee emphasized that the wire was construction grade wire that was coarse and difficult to work with. He initially used his left hand to push the wire through the rods and his right hand to twist the wire with pliers. When his right hand started bothering him, he switched the pliers to his left hand. After three or four weeks, the employee started developing pain, cramps and swelling in both hands.

At some point in late November of 1999, the employee reported his hand symptoms to his foreman and later to his superintendent. On December 3, 1999, the employee reported his injury to Mr. Tom Tomson, who was the safety director for McCarthy Interface. A supplemental report of accident was prepared as a result of this conversation that was admitted as employee's exhibit B.

The only significant factual difference between the positions of the employee and the employer-insurer on this claim is whether the employee had experienced similar symptoms in his hands and wrists prior to the McCarthy Interface job. According to Mr. Tom Tomson, the employee advised him on two different occasions that his symptoms first started during the summer of 1999 while he was working for Superior Rigging out of Atlanta, Georgia (Employer-insurer exhibit 1). The supplementary report of accident contains a sentence, which states "Superior Rigging when noticed first symptoms. Summer of 1999", but the employee testified that he did not recall making that statement, and did not write that portion of the accident report. It should be noted that the last sentence under the heading "Describe Injury in Detail Indicating Body Part Affected" appears to be written with a different ink pen and in a different hand writing style (See employee's exhibit B).

The employee initially sought medical treatment from Dr. John Long in Hazelhurst, Mississippi. Dr. Long saw the employee on December 6, 1999. The employee was complaining of pain, swelling and numbness in his hands, and Dr. Long noted he had been working as an ironworker. Dr. Long diagnosed the employee as having carpal tunnel syndrome and treated the employee with an injection and mediation (Employee's exhibit C).

Dr. Long then referred the employee to Dr. Aubrey Lucus with Plastic and Hand Surgery Associates, PLLC in Jackson, Mississippi. Dr. Lucus' records from December 7, 1999 indicate that Dr. Lucus diagnosed the employee with advanced right carpal tunnel syndrome and moderate left carpal tunnel syndrome. Although, Dr. Lucus indicated that he wanted to wait a few days to see if the injection helped relieve the employee's symptoms, his record makes it clear that he discussed the possibility of surgery with the employee on December 7, 1999, and the employee was interested in having the surgery performed before the end of the year (December 7, 1999 records in Employee's exhibit B).

The employee testified that he did not have the surgery recommended by Dr. Lucus because his health insurance company thought it was a work related injury and would not agree to pay for the surgery. The May 1, 2000 memo from Tom Tomson confirms that the employee talked with Mr. Tomson on that date and requested additional medical treatment. In response to this request, Mr. Tomson wrote, "McCarthy was not going to pay for this service". Mr. Tomson's decision to deny medical treatment was apparently based on the employee's statement that his symptoms began during the summer of 1999 while working for Superior Rigging (Employer-insurer's exhibit 1).

During this time period the employee was also seen by a Dr. Mullen in Bonne Terre, Missouri. A Form 9 surgeon's report dated May 17, 2000 indicates that the employee stated that he had been twisting and clipping wire that caused bilateral arm numbness. Although he was changed to another job welding, the numbness had continued and gotten worse. Under question 8 of this form, the doctor responded "yes" to the question "Is accident above referred to the only cause of patient's condition?" The physician who completed the surgeon's report prescribed medication and hand splints, and recommended a nerve conduction study for both of the employee's hands. Although the employee recalled having a nerve conduction study at the time, these records were apparently not located by either party (Employee's exhibit C).

After the employee received the conservative treatment in Bonne Terre, Missouri, the employee continued working as an ironworker for McCarthy Interface and other employers, and did not seek additional medical treatment until he returned to Dr. Lucus on July 8, 2003. In his July 8, 2003 medical record, Dr. Lucus noted the employee had continued experiencing symptoms in both of his hands since his last visit. Based on the employee's description of his work as an ironworker/welder, Dr. Lucus stated, "based on his description of his job, which he has performed for 30 years, I do think it has a relationship to his carpal tunnel syndrome".

Based on the employee's continued complaints and his failure to respond to conservative treatment, Dr. Lucus performed a bilateral carpal tunnel release at River Oaks Hospital in Jackson, Mississippi on July 25, 2003. Dr. Lucus' record from August 4, 2003 indicates he offered to keep the employee off for a total of 6 - 8 weeks, but the employee stated that because of financial reasons he would need to return to work in September of 2003 (Employee's exhibit D).

At the time of the hearing, the employee testified that his hands and wrists felt like the carpal tunnel syndrome might

be coming back. He noted that the surgery helped, but approximately one year later, he started experiencing pain and occasional numbness. The employee did not believe he had any weakness in his hands, but noted there were some things he could no longer do with one hand. Although his range of motion was good in both hands, the employee emphasized that he still experienced some pain and discomfort in both hands.

The employee's second claim for compensation under injury # 00-86244 is based on an accident that occurred on July 13, 2000. The employee was still working for McCarthy Interface at the Bonne Terre Prison. The employee testified that he was picking up 4x4s that were 8 feet long from underneath a tractor-trailer when his "back went out". The employee indicated that he heard a loud noise and experienced severe pain in his back below the belt line.

After reporting his back injury, the employer-insurer authorized treatment with Dr. Dennis Sumski in Farmington, Missouri. Dr. Sumski diagnosed the employee as having an acute sacroiliac strain. After two months of conservative treatment failed to relieve all of the employee's complaints, Dr. Sumski ordered an MRI, which was performed on August 31, 2000. The radiology report indicates the employee had a diffuse bulging disc at the L5S1 with degenerative changes throughout the lumbar spine, but he did not have a focal disc protrusion, disc herniation or spinal canal stenosis (Employee's exhibit F).

Following the MRI, the employee was authorized to see Dr. Allen H. Morris for a second opinion. Dr. Morris is an orthopedic surgeon in St. Louis Missouri. Dr. Morris' report dated October 25, 2000 indicates that although the employee was getting better, he still experienced low back pain with occasional numbness in both legs. Although these symptoms were not constant, the employee indicated that bending or rapid movement or sitting for extended periods of time still produced low back pain.

After reviewing the MRI and x-rays, Dr. Morris concluded that the employee's lifting incident of July 13, 2000 was the substantial contributing factor to the employee's lumbosacral sprain. Other than recommending that the employee continue with his current exercise regimen, Dr. Morris did not recommend any additional treatment (Employee's exhibit G).

Employee's conservative treatment from Dr. Sumski and Dr. Morris for his low back injury included medication and epidural steroid injections. After his release by Dr. Morris, the employee has not sought additional medical treatment. His current back complaints include occasional pain and numbness in his legs. The employee's biggest concern, however, is that his low back and legs sometimes "go out" and cause him to fall. The employee indicated that this happened one time the week before the hearing and has occurred three times in the last two months. The employee emphasized that he has not had any new injuries to his back since July of 2000, and did not have any problems with his back prior to the July 13, 2000 accident.

The employee's medical evidence for both claims was offered through a February 2, 2005 report of Dr. Shawn L. Berkin. Based on Dr. Berkin's examination of the employee and his review of the medical records, Dr. Berkin diagnosed the employee as having bilateral carpal tunnel syndrome and a lumbosacral strain with bulging of the L5S1 intervertebral disc. Dr. Berkin concluded that the hand intensive activities performed by the employee during the course of his employment as an ironworker with McCarthy Interface was a substantial factor in causing the employee's bilateral carpal tunnel syndrome. Dr. Berkin also concluded that the employee's accident on July 13, 2000 was a substantial factor in causing the employee's lumbosacral strain, associated with a bulging disc at the L5S1 (Employee's exhibit H).

On the issue of permanent partial disability, Dr. Berkin rated the employee as having a 35% permanent partial disability of each upper extremity at the level of the wrist. Because his disabilities included both hands, Dr. Berkin also suggested that the employee's injuries combined to create a greater disability, and a loading factor should therefore be applied.

On the July 13, 2000 back injury; Dr. Berkin rated the employee as having a 25% permanent partial disability of his body as a whole at the level of the lumbosacral spine (Employee's exhibit H).

At the conclusion of the hearing, the employer-insurer requested that the record be left open and the hearing be continued to allow the employer-insurer to submit additional medical evidence on the disputed issues. The parties also wanted additional time to check the payment records to determine the validity of the statute of limitations defense on the 2000 claim. By letter dated September 21, 2004, the employer-insurer's attorney advised that based on the payment history he had obtained, the employer-insurer was waiving its statute of limitations defense on the July 13, 2000 claim.

On October 14, 2005 the employer-insurer submitted two additional reports from Dr. Aubrey Lucas that were admitted as employer-insurer's exhibit 3. In his report dated September 13, 2005, Dr. Lucas stated, "It is possible for activities within a 90 day frame to contribute significantly to carpal tunnel syndrome. I am not aware of his activities to such a specific nature that I can make a comment on Mr. Hickman and activities within a 90 days period, but welding would be considered high risk and if he was performing that activity, it could contribute" (September 13, 2005 report admitted as Employer-insurer's exhibit 3).

In a supplemental report dated October 4, 2005, Dr. Lucas attempted to answer additional questions posed by the employer-insurer's attorney. Dr. Lucas commented, "etiology is the most difficult issue to shed light on regarding conditions

such as carpal tunnel syndrome". After restating that welding could be considered a high risk activity for aggravating and/or developing carpal tunnel syndrome, Dr. Lucus stated "exposure to welding would be a risk, regardless of who he worked for during the exposure, whether it was one employer or twenty employers".

Dr. Lucus was also apparently questioned about the gap in treatment between 1999 and 2003. In response to this question Dr. Lucus stated, "I don't have any information that Mr. Hickman's symptoms went away between 1999 and 2003. If the symptoms went away for a significant period of time, and then reoccurred with a known exposure, then I would opine that the exposure coinciding with the reoccurrence would be significant and important regarding aggravation or causation, and important in the decision for treatment and surgery".

It is significant to note that none of the statements by Dr. Lucus appear to refute the conclusion of Dr. Berkin that the employee's work as a boilermaker and an ironworker was a substantial factor in causing his bilateral carpal tunnel syndrome. There is also no information in Dr. Lucus' report to support a finding that the employee's repetitive work with prior employers was the substantial contributing factor to his bilateral carpal tunnel syndrome.

After the hearing was concluded with the admission of the employer-insurer's exhibit 3, the record was closed. Both attorneys subsequently decided not to submit briefs on the disputed issues.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Prior employment history
- B. Supplement report of accident from McCarthy Interface
- C. Medical records of Dr. John Long
- D. Medical records of Dr. Aubrey Lucus
- E. Statement from Health Management Associates
- F. Medical records from Dr. Dennis Sumski
- G. Medical report of Dr. Allen Morris
- H. Medical reports of Dr. Shawn Berkin

Employer-Insurer's Exhibits

4. May 1, 2000 letter from Tom Tomson
5. Report of Injury
6. Medical reports of Dr. Aubrey Lucus

FINDINGS OF FACT AND RULINGS OF LAW:

Injury # 99-177478:

Issue 1 and Issue 2 - Accident and Medical Causation

The employee has alleged that his work as an ironworker was a substantial contributing factor in causing his bilateral carpal tunnel syndrome and the resulting surgery performed by Dr. Lucus. The employee believed that his symptoms of pain, swelling and numbness were directly related to the repetitive work of tying rods in October and November of 1999. The employee's testimony and other evidence also indicate that the employee's normal duties as an ironworker or boilermaker required repetitive use of his hands and arms. A short list would include welding, operating a cutting torch, operating grinders and other tasks typically performed by ironworkers and boilermakers.

The employer-insurer's decision to deny the employee's claim for bilateral carpal tunnel syndrome appears to be based solely on the fact that the employee may have stated that his symptoms started on a job in the summer of 1999 with a prior employer. This denial demonstrates a lack of understanding on the part of the employer-insurer of the last exposure rule.

Under Section 287.063 the statute provides "an employee shall be conclusively deemed to have been exposed to the hazards to an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazards of the disease exist subject to the provisions relating to occupational disease due to repetitive motion, as

set forth in subsection 7 of Section 287.067, RSMo.” Thus, even though the employee may have worked for a number of different employers and may have experienced some symptoms of carpal tunnel syndrome prior to his work with McCarthy Interface, the legislature has elected to simplify the issue of medical causation by placing the responsibility for the occupational disease on the last employer to expose the employee to the work which caused the occupational disease.

The only exception to the last exposure rule is set forth under subsection 7 of 287.067. This section provides as follows:

7. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than 3 months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

In this case the employee’s claim for compensation was filed on June 14, 2000. The evidence supports a finding that the employee was still working with McCarthy at the time this claim was filed. The employee’s credible testimony also establishes that his symptoms did not become severe and disabling until he began pulling tie rods for McCarthy Interface in October and November of 1999. The employee testified that he had not pulled any tie rods for other employers for 15 or more years prior to that date.

The evidence unequivocally supports a finding that McCarthy Interface was the last employer prior to the date of the employee’s claim to expose the employee to the hazards and type of work that caused his carpal tunnel syndrome. Therefore, even if the employer-insurer’s position is accurate and the employee’s symptoms first appeared in the summer of 1999 while working for another employer, this fact would not relieve the employer-insurer of liability unless there is evidence to support a finding that this prior exposure was “the substantial contributing factor to the injury”.

The employer-insurer has offered no evidence, either medical or otherwise, to support a finding under the “90 day rule” that would relieve the employer-insurer from liability. The employee’s testimony clearly indicates that the rod tying work at McCarthy Interface was the substantial contributing factor, and the employer-insurer has offered no evidence to refute that conclusion.

I therefore find that the employee’s work as an ironworker and boilermaker was a substantial contributing factor in the cause of the employee’s bilateral carpal tunnel syndrome and his resulting medical treatment. I further find that McCarthy Interface is liable for the employee’s work related injury under the last exposure rule, and there is no evidence to support a finding that any of the employee’s work with a prior employer was the substantial contributing factor in causing the carpal tunnel syndrome.

Based on these findings, I further find that the employee did suffer a compensable accident or occupational disease on or about December 3, 1999, and the employee’s bilateral carpal tunnel syndrome is medically causally related to his accident or occupational disease.

Issue 3 – Additional Medical Aid

The employee has submitted an itemized bill from Health Management Associates totaling \$1, 235.15. Based on the employee’s testimony and the medical records admitted, I find that these medical bills resulted from the surgery performed by Dr. Lucas, and were reasonable and necessary to cure and relieve the employee from the effects of his bilateral carpal tunnel syndrome. I further find that these medical bills are causally related to the employee’s bilateral carpal tunnel syndrome.

The employer-insurer has also denied these bills on the issue of medical authorization. Both the testimony of the employee and the May 1, 2000 memo from Tom Tomson confirm, however, that the employer-insurer denied treatment based on the employee’s comment that his symptoms started in the summer of 1999 while working for Superior Rigging.

Based on this denial of treatment by the employer-insurer, I find that the employer-insurer waived its right to select and approve the treating physician, and cannot therefore deny responsibility for these bills based on a claim that they were not provided by authorized treating physicians.

The employer-insurer is directed to pay the employee the sum of \$1,2035.15 for previously incurred medical expenses as reflected in employee’s exhibit E.

Issue 4 – Temporary Total Disability and Permanent Partial Disability

The employee has requested an award of temporary total disability for the time period following his surgery by Dr. Lucas. The testimony of the employee and the medical records of Dr. Lucas confirm that the employee was off work after his surgery from July 25, 2003 through September 1, 2003. Based on this evidence, I find that the employee was temporary and totally disabled for 5 4/7 weeks after his bilateral carpal tunnel release. The employer-insurer is therefore directed to pay to the employee the sum of \$558.97 per week for 5 4/7 weeks for a total of \$3,114.26.

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Patricia "Pat" Secret
Director
Division of Workers' Compensation