Missouri's Last Exposure Rule

By: Chris Archer, 2017

The "Last Exposure Rule" touted as a "rule of convenience" has been anything but convenient in its recent application. It is utilized to determine liability for an occupation disease among multiple employers or multiple insurers.

The Missouri General Assembly codified the last exposure rule in 1959. The current version is contained in Section 287.063 (2005). It states:

> **287.063.** 1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067, RSMo.
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> 2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.
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> **287.067** 8. 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 three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

The three-month rule defense outlined above in 287.067 8 is available only to a successive employer who might want to argue that the claimant's diagnosed repetitive trauma occupational disease was contracted by the Claimant's while exposed working for his/her immediate prior employer.

Successive carriers can not utilize the three-month rule at all based upon a recent Court of Appeals decision.

An Indemnity agreement can be drafted similar to the one enclosed that allows one or a number of carriers to tender the benefits subject to a later trial or settlement between the carriers. This agreement eliminates the potential conflict of interest that is present for attorneys representing an employer and separate carriers both of whom refuse to tender benefits. It also preserves the right to control the medical care, address return to work issues and reduces litigation expense.

WARNING: To be recalled is the broadening definition of what can be found to be a compensable repetitive trauma case. If there is medical evidence supporting that theory of recovery, the judicial trend has been to broaden the repetitive trauma category. Obviously, these cases are also subject to the last exposure rule and the three-month rule.

Historically, the last exposure rule affixed liability in traditional occupational disease cases such as asbestosis and silicosis. See generally **King v St. Louis Steel Casting Company**, 182 S.W.2nd 560 (Mo. 1944). In those cases, actual causation was very difficult to prove since workers were normally exposed while working at multiple job sites, for multiple employers, and experienced lengthy latency periods before diagnosis. The last exposure rule placed the liability on the employer who last exposed the claimant to the harmful or hazardous material.

In 1972, the Court of Appeals first decided that carpal tunnel syndrome, a repetitive trauma condition, was to be classified as an occupational disease. See **Collins v Nevel Luggage Manufacturing Company**, 481 S.W.2nd 548 (Mo. App. W.D. 1972). Cases that have been decided since have broadened the category of what constitutes a repetitive trauma condition and therefore what cases are subject to the last exposure rule.

Early Application of the Last Exposure Rule to Repetitive Trauma

The Missouri Courts' application of this "last exposure rule" to repetitive trauma cases has evolved from focusing on the timeline of the employee's symptoms, to focusing on the timeline of the pleadings.

There is a clear demarcation by the Courts in Missouri in cases decided before and since the Missouri Supreme Court decision in **Johnson v Denton Construction Company**, in 1995. 911 S.W.2d 286 (Mo.banc 1995).

In cases decided prior to **Johnson**, the Missouri appellate courts recognized that the last exposure rule would be equally applicable to consecutive carriers or insurers of the same employment. The question was how to affix liability in a repetitive trauma/occupation disease cases in which a claimant continues to work and continues to be exposed.

In **Tunstill v Eagle Sheet Metal Works**, 870 S.W.2d 264 (Mo.App. S.D. 1994) the claimant worked for one employer although the workers' compensation carrier had changed. The claimant was "exposed" for only a day after the change in coverage prior to first receiving medical treatment for his repetitive trauma condition. The Southern District found that the second carrier was responsible based upon the strict application of the last exposure rule. They decided that liability was affixed upon the first tendering of treatment for the condition. This occurred after the change in coverage.

It is difficult to reconcile the plain language of this decision affixing liability upon the date of treatment with the subsequent decisions which affixed liability based upon when the claimant became disabled from work. See: **Simmerly v Baily Corp.,** 890 S.W.2d 12 (Mo.App. S.D. 1994); **Lococo v Hornberger Electric, Inc**., 1914 S.W.2d 67 (Mo.App. E.D. 1996); **Oberg v American Recreational Products,** 916 S.W.2d 305 (Mo.App. E.D.1995).

Perhaps the only logical reconciliation that can be made is in the implied finding that the diagnosis, medical treatment and therefore disability would have been subsequent to the initial treatment tendered and the initial diagnosis that was made under the facts in **Tunstill**.

The Three-Month Rule

In 1993, the Missouri General Assembly added Section 287.067 commonly termed "The Three Month Rule".

Section 287.067(8) (RSMo. 2005) now states as follows:

287.067 [7.] 8. 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 three months and the evidence demonstrates that the exposure to the repetitive motion with [a] the immediate prior employer was the [substantial contributing] prevailing factor [to] in causing the injury, the prior employer shall be liable for such occupational disease.

Under the prior version of the three month rule, before SB 1 and 130 which became law in 2005, in **Janet Smith v Tiger Coaches Inc. and Insurance Company of the State of Pennsylvania c/o AIG Claim Services**, ED No. 79311, the court found that the three-month rule defense as outlined in section 287.067 RsMo cannot be used by a workers' compensation insurance carrier to hoist liability back onto the prior insurance carrier.

Another issue under the new statute is defining "the substantial contributing factor". The burden of proof to shift liability from a subsequent to a previous employer is clearly on the later employer/insurer; but how hard is it to shift?

In **Mayfield v Brown Shoe Company**, 941 S.W.2d 31 (Mo. App. S.D. 1997) the court stated that "the substantial contributing factor" language in 287.067.7 means "that factor which is the more responsible of the two contributing factors." Because the prior exposure would normally be of a longer duration, the burden here might be relatively easy to meet. However, this is an issue for medical evidence and medical testimony, and will consequently be fact specific. Also, the language in Mayfield suggests the burden on the employer is to demonstrate the earlier exposure contributed to cause at least 51% of the overall injury. This may be difficult depending on the facts of the case.

Another issue that has arisen is in calculating the three-month period. Clearly, if the claimant leaves his employment, is laid off or is placed in a different job, within the first three months of exposure, Section 287.067 can be used. Does the filing of a formal claim for compensation within the first three months of the secondary exposure close the three-month exposure window allowing the secondary employer to argue the three-month rule? See **Bissell v Paramount**, **Miller v Unitog Company and Carrollton**, and **Ron Owens v Wiese Drywall and Construction, Oswald and Endicott.** It may be the only thing that preserves the defense for a new employer although now that "disability" affixes liability evidence of disability probably also preserves the potential application of the defense.

In **Ron Owens v Wiese Drywall and Construction,** (MO App Eastern District 11/98), the court affirmed the holding that the filing of a formal claim for compensation during the first three months of exposure for an employer preserves the three month rule defense; allowing the employer to present evidence that the prior exposure was the substantial contributing factor in causing the condition. It limited the inquiry however to the immediate prior employer's exposure. The revision to the Act in SB 1 and 130 codifies this holding: limiting the exception for potential liability only for the immediate prior employer.

Another case decided in March, 1999 was that of **Dorothy Arbeiter v National Supermarkets.** In that decision, the Court of Appeals found the first employer, National Supermarkets liable based upon the diagnosis of carpal tunnel syndrome (CTS) coming the first day that the claimant became an employee of the second employer, Schnucks Super Markets. They stated that the three-month rule was applicable because the diagnosis of CTS came within the first three months of the subsequent exposure. The three-month rule applied despite the fact the claim for compensation was filed well past three month of subsequent exposure at Schnucks. Troublesome to those of us liking consistency and predictability in decisions is the fact that the opinion misquotes **Bissell**, discussed above. The Court attempted to assert that their decision in **Arbeiter** was consistent with **Bissell** stating the three-month rule was inapplicable in **Bissell** because the diagnosis of CTS came after the subsequent three months of exposure. Actually, the original clinical diagnosis of CTS in **Bissell** came before the subsequent exposure. **Arbeiter** was recently overruled by the Supreme Court in **Endicott** and **Oswald**.

In a similar case also decided by the Eastern District Court of Appeals, **Jaycox v President Riverboat Casino,** (Mo. App. E.D. 1999) the Court affirmed the Industrial Commission and ALJ who found the three month rule was inapplicable despite several physician arriving at a clinical diagnosis of CTS before the change in employment but nerve conduction studies were negative. The later positive nerve conduction studies came after three months of exposure and therefore the defense was not available according to the ALJ, the Commission and the Court of Appeals. One would think that a clinical diagnosis of CTS or any other repetitive trauma condition would suffice to preserve a three-month rule defense. See also **Maxon v Leggett and Platt**; a case that reached the same conclusion that the three month rule was not preserved based upon an indefinite diagnosis of carpal tunnel syndrome made before the change in employment.

In the case of **Cuba v State of Missouri**, (September, 2000) the Court found a first employer liable for CTS for a claimant who was diagnosed within two weeks after her change in

employment by nerve conduction studies. The Court attempted to distinguish the holdings of **Crabill** and **Bissell** stating that for cases decided with consideration of the three-month rule of 287.067, "the legislature intended the three month rule time frame to refer to the date of diagnosis." The Court went on however to state:

Before the Missouri Division of Workers' Compensation
Department of Labor and Industrial Relations

Claimant	)	
V	)	
Employer	)	Injury No.
And	)	
Insurer 1	)	
And	)	
Insurer 2	)	

Indemnity Agreement

Comes now the parties to the above-referenced cases and stipulate and agree to the following:

1. That the claimant has brought two claims for compensation noted above for carpal tunnel syndrome.

2. That _____Insurance had the coverage for this employer till 4-15-98.

3. That _____ Indemnity had coverage for this employer from 4-15-98 till present.

4. For the benefit of the claimant and the employer, it is agreed that _____will advance TTD and medical benefits for the claimant's bilateral hand complaints with the understanding and agreement that the liability for these benefits and any other benefits to which the claimant may be entitled will be determined at a later proceeding or be subject to a later agreement.

5. That when liability is ultimately determined by hearing after appeals, that the Insurer found liable for benefits will reimburse the other Insurer for benefits it paid for either case.

6. That neither the claimant nor the Insurers will settle either case without the explicit consent and agreement of all the parties, including both Insurers.

7. That the claimant agrees to cooperate in testifying in this case at hearing to resolve the issue of liability.

8. Any argument as to the jurisdiction of the DWC and Industrial Commission to enforce this agreement is hereby waived by the parties.

_____	_____	_____
Attorney for ER/IR #1	Attorney for ER/IR #2	Attorney for Claimant