

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

Injury No.: 02-114848

Employee: Roger Alford
Employer: Hussmann Corporation
Insurer: Self-Insured
c/o ESIS
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged on or before April 26, 2002
Place and County of Accident: Alleged St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated November 30, 2005.

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

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued November 30, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 23rd day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: John J. Hickey, Member

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Roger Alford Injury No.: 02-114848
Dependents: N/A Before the
Employer: Hussmann Corporation **Division of Workers'**
Additional Party: Second Injury Fund **Compensation**
Insurer: Self-Insured c/o ESIS Department of Labor and Industrial
Hearing Date: September 7, 2005 Relations of Missouri
Checked by: KOB:tr Jefferson City, Missouri

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?
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: alleged on or before April 26, 2002
5. State location where accident occurred or occupational disease contracted: Alleged St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? 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 happened or occupational disease contracted: Claimant claims he is suffering from an occupational disease of the back and knees due to heavy lifting and requiring immediate treatment.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: N/A
14. Compensation paid to-date for temporary disability: \$0
15. Value necessary medical aid paid to date by employer/insurer? \$0
16. Value necessary medical aid not furnished by employer/insurer? \$0

Employee: Roger Alford Injury No.: 02-114848

- 17. Employee's average weekly wages: \$616.00
- 18. Weekly compensation rate: \$410.67 / \$329.42
- 19. Method wages computation: By agreement

COMPENSATION PAYABLE

20. Amount of compensation payable:

0 weeks of temporary total disability benefits	\$ 0
No additional medical treatment	

21. Second Injury Fund liability: No, for temporary award

TOTAL:	\$ 0
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22. Future requirements awarded: None

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

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

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A which is awarded above as costs of recovery of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Roger Alford	Injury No.: 02-114848
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Hussmann Corporation	Department of Labor and Industrial Relations of
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Missouri		
Insurer:	Self-Insured c/o ESIS	
		Checked by: KOB:tr

PRELIMINARIES

The matter of Roger Alford (“Claimant”) proceeded to hearing to determine whether Claimant is entitled to temporary benefits associated with an alleged occupational disease arising out of and in the course of his employment with Hussmann Corporation (“Employer”). Attorney Donald V. Fraser, Jr. represented Claimant. Attorney E. Thomas Liese represented Employer, which is self-insured c/o ESIS. The Second Injury Fund is a party to the underlying claim, but did not participate in this hearing because Claimant sought a temporary award.

The parties agreed that leading up to April 26, 2002, Claimant was an employee of Employer and earned an average weekly wage of \$616.00. The applicable rates of compensation are \$410.67 for total disability benefits and \$329.42 for permanent partial disability benefits. Venue, notice, and timeliness of the claim are not at issue. Employer paid no workers’ compensation benefits.

The Claimant, with Employer’s consent, specifically asked for a temporary award on the issues of additional medical treatment and temporary total disability (“TTD”). Therefore, within the narrow scope of the hearing, the issues to be determined are limited to the following:

1. Does Claimant have an occupational disease of the low back and/or knees arising out of and in the course of employment;
2. Is the current medical condition of Claimant’s low back and/or knees medically casually related to his job activities;
3. Is Claimant entitled to receive additional medical care to cure and relieve the effects of a work related disease; and
4. Is Claimant entitled to TTD benefits for any time between April 27, 2002, and the present?

Employer withdrew the potential defenses of notice and statute of limitations after the close of the evidence. Due to medical emergencies faced by both attorneys after this hearing, the Division did not receive the last proposed award until November 15, 2005, sixty-nine days after the last day of hearing.

SUMMARY OF THE EVIDENCE

Claimant is a married resident of Hillsboro, Missouri who began working for Employer in June 1966, and spent nearly his entire career as a Grade II Laborer/Forklift Operator in Employer’s commercial refrigeration operation. Most recently he worked on the “less than load” dock where he handled smaller loads for many different customers, including kit parts, and service orders of various shapes, sizes, and weights, varying from a few to several hundred pounds each. He used a forklift to manipulate and move the larger loads, but moved smaller loads by hand.

Claimant testified repeatedly that one could not perform the type of labor he did for over thirty years without having back pain on occasion. In 1992, Claimant complained of back pain and received treatment through the company doctor. He received conservative treatment and was off work approximately six weeks. The conservative treatment resolved Claimant’s pain to the back, hip, and top of the thigh. Claimant testified he went to the company doctor and was released, following a physical, to return to work.

In April 2002, Claimant began having sharp, intense pain in his right leg. He had an appointment with his doctor, Dr. Almiron, at the end of April, and received an x-ray of the leg, and physical therapy, but that made him worse. Dr. Almiron referred Claimant to Dr. Padda who provided pain management, an MRI, epidural injections to the back, which helped some, and physical therapy, which aggravated his symptoms. He also received five injections into each knee. Claimant underwent a minimally invasive surgical procedure, which provided some relief. He is still stiff, achy, and hurts all the time. His knees hurt all of the time. Claimant testified that Dr. Padda told him that his back shows evidence of continuous heavy lifting. He claims he did not know his back condition was work related until Dr. Padda told him in 2002. The treatment Claimant underwent consisted of nerve root injections, discogram, and a percutaneous decompression of L3-4 on September 27, 2002.

When his insurance was running out, Claimant questioned how he would obtain future treatment, and Dr. Padda said it should have been handled under workers’ compensation all along. Claimant then hired an attorney. Dr. Padda wanted to do another operation, and would not allow Claimant to be released to return to work. Claimant testified he never knew about filing an injury report and he does not remember any information signs regarding workers’ compensation posted on Employer’s premises. Claimant wants medical treatment and temporary total disability.

On cross-examination, Claimant testified that he has a few head of cattle on a farm, but he has other people to

take care of them. Over the years, he has done some work on a farm but nothing significant. When confronted with documentation of older back injuries in Exhibits 1, 2 and 3, Claimant acknowledged that he had some prior problems with his back and leg that were reported at work. Specifically, in 1998, Claimant acknowledged a report of injury that he made which involved a lower back injury with right leg pain following the lifting of broken parts. On a 1981 employment questionnaire, Claimant reported that he had back trouble, but had never had a back injury. In 1992 and 1993, Claimant reported lifting incidents to the nurse with complaints of back pain, and he reported back and right leg pain to Dr. Bailey, who took him off of work for several weeks.

Mike Boone is the manger of Employer's distribution operations, or shipping department, in which Claimant worked throughout most of his career. Mr. Boone confirmed that the size and weight of the boxes Claimant moved in his job varied greatly from very light weights to very heavy, large packages. As a Grade II Laborer/Operator, Claimant drove equipment, but he also lifted heavy weights. Exhibit 5 contains a job summary and analysis of Claimant's job including a listing of the physical requirements of the job. The summary description of Claimant's job is: "Employee's main task is operating the (power industrial) vehicle, not to lift, carry, push or pull. Those activities are varied and intermittent, occurring less than 10% of the shift." It also indicated fork lift operators such as Claimant never had to lift or carry more than 50 pounds, although they occasionally were called upon to push or pull heavier weights.

Dr. Gurpreet Singh Padda first saw Claimant as a referral from his primary care physician on June 6, 2002. Claimant presented with complaints of chronic intermittent low back pain with an exacerbation several months prior to the referral. The MRI showed degenerative disc disease at L3-4 with cord compression, which was consistent with his symptoms. The successful treatment plan included epidural steroid injections, an EMG, physical therapy, a discogram confirming L3-4 involvement, and ultimately, a closed disc compression or nucleoplasty in September 2002, which resulted in "100% resolution of his radicular component low back pain."

Dr. Padda testified that Claimant had chronic osteoarthritis of the knees, which he began to treat in October 2002 with facet joint and Hyalgan injections. Claimant gave no history of accidental injury to the knees. Dr. Padda cautioned against Claimant returning to his job because it has a high load bearing capacity, and Claimant should not be bearing loads greater than 50 pounds. Dr. Padda testified that from a bio-mechanical load standpoint, osteoarthritis such as Claimant's would be consistent with heavy lifting, more than any other activity, like running.

In response to Claimant's concerns over how he would afford treatment without insurance, Dr. Padda reviewed Claimant's history with him, and concluded that his heavy, repetitive, consistent lifting over many years was consistent with an L3-4 disk protrusion, and was a significant component of his low back pain. He explained further than unlike a L4-5 disk injury, which one could get from "just sitting here," L3-4 disk disease is fairly unusual without a lifting type event. Dr. Padda did not have the benefit of the job summary analysis (Exhibit 5), but relied solely on Claimant's description of his work.

After obtaining near-complete resolution of back symptoms in October 2002, and completing a series of knee injections in early January 2003, Claimant did not return to see Dr. Padda until December 2003 with complaints of sudden onset, increasing left leg L4-5/L5-S1 burning with foot drop for the last several weeks. Dr. Padda specifically noted that the symptoms in late 2003 were "significantly different than what (he) treated in 2002," because the pathology was at a different level. Nerve root blocks followed, with resolution of some symptoms. Dr. Padda next saw Claimant on August 10, 2005, the day the doctor gave his deposition. Dr. Padda reviewed a May 13, 2005 MRI that documented resolution of Claimant's left sided L3-4 bulge, with residual but improved right protrusion ("nothing serious"), and showed L4-5 protrusion with L5-S1 disk height loss. He testified that as of May 2005, Claimant symptoms are L5-S1 radiculopathic, not the L3 radicular symptoms he had in 2002.

According to Dr. Padda, regardless of whether he has a legal cause, Claimant is going to need regular medical treatment for his leg pain and back pain. He did not specify what treatment is necessary.

Dr. Raymond F. Cohen conducted a medical examination of Claimant. Considering the history given, which corresponded to the history at hearing, a physical exam, complaints, and records, he made several diagnosis, including overuse or cumulative trauma disorder of the lumbar spine, right lumbar radiculopathy, status post percutaneous decompression; annular tear at L5-S1, and degenerative joint disease of both knees. He felt the diagnoses were a direct result of a work related overuse syndrome in which work is a substantial factor. Dr. Cohen felt Claimant should be followed by a pain management specialist at the cost of up to \$2,500 per year for life, and should have further workup by a spine specialist to determine if any surgery is needed. He gave no treatment suggestions for the knees. Dr. Cohen provided permanency ratings, and felt Claimant was permanently and totally disabled.

Dr. Marvin Mishkin conducted an orthopedic examination of Claimant for Employer. His examination of Claimant on May 27, 2005 was essentially unremarkable. After a comprehensive review of the relevant information, Dr. Mishkin concluded Claimant suffers from chronic and progressive degenerative disc disease of multiple levels of the lumbar spine, and very minimal osteoarthritis of both knees with no functional impairment. With respect to both diagnoses, Dr. Mishkin insisted they were not related to or caused by his occupational activities. He relied in part on the diagnostic tests showing progressive degeneration since 1992. While there is a potential need for future, unspecified treatment at the direction of his personal physician, it would not be related to work.

From November 12, 2002 to January 16, 2004, Claimant was under the frequent care of a chiropractor, mostly for complaints of the upper back, neck, and shoulders. Dr. Cohen agreed these conditions were not related to work.

FINDINGS OF FACT

Based on a comprehensive review of the evidence, and the application of the Missouri workers' compensation law, I find that Claimant established the following facts:

1. Claimant worked for over 35 years moving parts of all sizes for Employer. His job responsibilities primarily involved the operation of a forklift to move product, but on occasion he had to lift parts of negligible to extremely heavy weight. I find that Claimant's testimony regarding the frequency, duration, and weight of his daily lifting conflicted with Employer's Job Summary Analysis (Ex. 5), which shows Claimant mostly drove, lifted or carried weights up to 60 pounds intermittently, and assisted the "loaders" when needed. While I believe Claimant often lifted weights much heavier than listing in his job analysis, I do not believe he did so "constantly" as his doctors understood.
2. Claimant suffers from a chronic and progressive degenerative condition of the lower back, which began to be symptomatic following a series of accidental injuries in the early 1990's, and continued through Claimant's career until years after Claimant stopped working.
3. In 2002, Claimant had an increase in symptoms, and was diagnosed with a damaged disc at L3-4, which Dr. Padda successfully treated with percutaneous decompression of L3-4 on September 27, 2002. The procedure resolved the symptoms.
4. In late 2003, symptoms of low back pain returned, but these were different, and involved the L4-5/L5-S1 levels of the spine. Claimant's current symptoms are the result of the new L4-5/L5-S1 defect, and are not related to the L3-4 disc.
5. Claimant has minimal osteoarthritis of both knees, with an onset of symptoms serious enough to require medical treatment in October 2002.
6. I find that the L4-5/L5-S1 disc defect is not causally connected to Claimant's work. The L4-5/L5-S1 symptoms began 20 months after Claimant stopped working, and nearly a year after successful treatment of Claimant's damaged L3-4 disc. Even Dr. Padda admitted that it is common for a disc bulge or herniation to occur at the L4-5/L5-S1 level without any known provocation. Given the elapsed time between Claimant's separation from work and the onset of his current symptoms, as well as the medical evidence establishing the ease with which many non-occupational activities of daily living could result in disc damage, I find that Claimant's current medical condition is not related to his work activities.
7. Claimant did not present clear evidence as to the treatment he seeks. Drs. Padda, Cohen and Mishkin all agree that Claimant's has the need for ongoing need for medical treatment to manage his symptoms. There is no suggestion that such treatment is needed to cure and relieve an immediate problem, but is rather to provide symptomatic relief for chronic symptoms. In other words, none of these doctors suggest Claimant will have improvement. Dr. Cohen goes the furthest in suggesting the possibility that additional testing and a surgical consult might lead to some sort of surgery, but his is a lone opinion unsupported by any other evidence of record.

RULINGS OF LAW

Based on the above findings of fact, the application of the Missouri Workers' Compensation law, and the stipulation of the parties to limit the scope of this award to the issues of additional medical treatment and temporary total disability, I find that Claimant had not established that he is entitled to the temporary workers' compensation benefits that he seeks. Specifically, I find:

1. Claimant did not establish that he suffers from an occupational disease of the low back or knees for which was causally related to his work activities.

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App.1991). Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Electric*, 885 S.W.2d 712, 716 (Mo.App. W.D.1994); *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 223 (Mo.App. W.D.1992); Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App.1992). A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999)(citations omitted).

On the issue of causation of Claimant's current low back condition, I find Dr. Padda's explanation enlightening, and consistent with that of Dr. Mishkin. Dr. Padda indicated that Claimant's current symptoms are clearly from an L4-5/L5-S1 disk defect. Such a lesion can happen with little or no provocation, and in this case, it occurred over one-and-one-half years after Claimant's successful treatment for his L3-4 disk defect, and twenty months after he stopped working. Like Dr. Mishkin opined, I find that the current problems in Claimant's back are the result of a chronic and progressive degenerative condition of the lower back. I find that work is not a substantial factor in the degenerative condition of the lower back at the level of L4-5/L5-S1. I do not find Dr. Cohen's testimony helpful on this issue.

In finding that Claimant's current condition of the low back is not the result of an occupational disease caused by work conditions, but is rather an ordinary disease of life, I make no finding as to whether Claimant's earlier back condition is an occupational disease causally connected to work.

Likewise, I find the opinion of Dr. Mishkin most credible on the issue of whether Claimant's minimal osteoarthritis of both knees is an occupational disease causally connected to his work duties. There is no compelling evidence that Claimant engaged in activities which might cause an overuse syndrome of the knees. Furthermore, the expert medical explanation of how the condition is work-related is lacking. Finally, despite treatment, the functional limitation associated with the knees is minimal. I find Claimant's minimal osteoarthritis of both knees is not an occupational disease causally connected to work, but is an ordinary disease of life.

2. Claimant is not entitled to additional medical treatment to cure and relieve the effects of an occupational disease or injury.

Claimant seeks medical treatment for his back. The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. S.D. 1996). However, Claimant cannot be considered an "injured worker" because he is not suffering from a work-related condition. If surgical or other treatment were necessary and reasonable, it is not due to a compensable work-related condition. There is no credible evidence supporting a current need for treatment of the knees. The claim for medical treatment is denied.

3. Claimant is not entitled to temporary total disability benefits for his current medical condition.

Claimant seeks temporary total disability ("TTD") benefits since his date of retirement over three years ago to the present. Temporary total disability benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo. App. W.D. 2000)(overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003)). Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id.* Claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. *Cooper v. Med. Ctr. of Independence*, 955 S.W.2d 570, 574-75 (Mo. App. W.D. 1997); *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 611, 621 (Mo. App. W.D. 2001).

Temporary benefits are not appropriate in this case. Despite his request for a temporary award, Claimant's own evidence established that he was at maximum medical improvement ("MMI"), and that a temporary award was not proper. In his August 23, 2004 report, despite his suggestion that another surgical spine work up might lead to further treatment, Dr. Cohen assigned "a 40% whole person disability from the over-use disorder" plus 5% preexisting, for a total of 45%. Similarly, he assigned 35% permanent partial disability, with 5% preexisting, for each knee. By assigning *permanent* disability ratings, Dr. Cohen concedes no further medical progress is expected. A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). Dr. Cohen's suggestion of pain management and a consultation for consideration of additional surgery, while speculative on the issue of future medical treatment, is not inconsistent with a finding of MMI. See, *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824, 828 (Mo.App. E.D.2005)(A finding of MMI is not inconsistent with the need for future medical treatment).

Furthermore, the finding that Claimant is not currently suffering from an occupational disease causally related to his work activities rendered the request for temporary total disability benefits moot. Because the parties limited the scope of the hearing to Claimant's current alleged condition, need for treatment, and associated benefits, this decision does not address whether Claimant was ever entitled to receive temporary total disability benefits.

CONCLUSION

By requesting a hearing on additional medical treatment and TTD only, with occupational disease and medical causation issues to be addressed only as they related to medical treatment, the parties drastically limited the permissible scope of this award. In sum, I find that the current condition of Claimant's back is not an occupational disease caused by his work duties. Rather it is a chronic and progressive degenerative condition related to life. So too is Claimant's knee condition. Neither medical treatment nor temporary total disability benefits are due on account of Claimant's current back and knee condition. Whether Claimant ever suffered from a work related occupational disease is not determined in this award of limited scope.

Claimant's claim for temporary benefits is denied.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[1] There was some uncertainty as to the body parts at issue. Initially, the ALJ listed only the low back when reciting the issues, but the

Claimant's attorney stated, "the knees are in question," to which the Employer's attorney agreed. The evidence focused on the back.