

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

Injury No.: 15-052691

Employee: Alex Amato
Employer: Shade Tree Service Company
Insurer: North River Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated April 7, 2016.

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 § 287.510 RSMo.

The award and decision of Administrative Law Judge Linda J. Wenman, issued April 7, 2016, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of August 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Alex Amato Injury No.: 15-052691
Dependents: N/A Before the
Employer: Shade Tree Service Company **Division of Workers'**
Compensation
Additional Party: None Department of Labor and Industrial
Relations of Missouri
Insurer: North River Insurance Company Jefferson City, Missouri
Hearing Date: January 26, 2016 Checked by: LJW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 6, 2015
5. State location where accident occurred or occupational disease contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: While pruning a tree limb, Employee felt pain in his right shoulder.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right shoulder
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? None
16. Value necessary medical aid not furnished by employer/insurer? Unknown

Employee: Alex Amato

Injury No.: 15-052691

- 17. Employee's average weekly wages: \$977.09
- 18. Weekly compensation rate: \$651.39 / \$464.58
- 19. Method wages computation: Stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	Unknown
27 weeks of past temporary total disability (or temporary partial disability)	\$17,587.53*
TOTAL:	UNKNOWN

*Reflects past TTD only, ongoing TTD as outlined in this award.

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 25% of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Dean L. Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Alex Amato	Injury No.: 15-052691
Dependents:	N/A	Before the
Employer:	Shade Tree Service Company	Division of Workers’ Compensation
Additional Party:	None	Department of Labor and Industrial Relations of Missouri
Insurer:	North River Insurance Company	Jefferson City, Missouri
		Checked by: LJW

PRELIMINARIES

The above referenced Workers’ Compensation claim was heard by the undersigned Administrative Law Judge on January 26, 2016. Alex Amato seeks issuance of a temporary award ordering medical treatment under §287.510 RSMo., and 8 CSR 50-2.010(13). Post-trial briefs were received by the parties on February 23, 2016. Attorney Dean Christianson represented Alex Amato (Claimant). Attorney Christianson seeks a fee of 25% on any benefits granted. Shade Tree Service Company (Employer) is insured by North River Insurance Company, and represented by Attorney Ross Ball. The Second Injury Fund is not a party to the case.

Prior to the start of the hearing, the parties identified the issues for disposition in this case: accident; arising out of and in the course of employment; medical causation; liability of Employer for future medical expenses; liability of Employer for past temporary total disability (TTD); and liability of Employer for future TTD. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers’ Compensation.

Claimant offered Exhibits 1-4, and Employer offered Exhibits A-B. All exhibits were admitted without objection. All markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be summarized.

1. Claimant is 26 years old, worked for Employer as a tree trimmer, and at times as a crew foreman. As a tree trimmer, depending on the size of the tree, Claimant worked on a ladder or in a bucket lift. When trimming a tree, Claimant used a tree pruner, a long pole with a cutting device on its end and a cord which was pulled to cut the tree limb.
2. On July 6, 2015, Claimant was working as a tree trimmer in a three person crew. Claimant was approximately 17 feet off the ground on a ladder, and when reaching up to make a cut, he

pulled the cord on the pruner and felt pain in his right shoulder. Claimant testified he notified the crew foreman, Mr. Jeremy Burke, but didn't request medical treatment as he thought the pain would subside.¹ On July 7, 2015, Mr. Burke recorded Claimant was experiencing pain in his shoulder and would give it a couple of days to see if it would resolve. Mr. Burke promptly notified his site foreman, Mr. Rooney.

3. July 13, 2015, Claimant was seen at his primary care physician's office by Anna Rademann, a nurse practitioner. Ms. Rademann noted Claimant presented with "right shoulder pain worsening over the last week." It was also noted that Claimant "does work in tree trimming and uses arms/lifts frequently. Patient does not recall any specific injury." Claimant was diagnosed with a shoulder sprain and acute muscle spasm. Claimant was placed on medication and given a note for work. For approximately 1 week, Mr. Burke had Claimant performing lighter work. (Exhibit 3)

4. On July 21, 2015, Mr. Burke recorded in his journal that Mr. Rooney was told "about Alex's shoulder again." (Exhibit 2, depo ex 1)

5. On July 22, 2015, Claimant was taken by Mr. Rooney to see Dr. Collard due to continued right shoulder complaints. Claimant completed a patient history form for Dr. Collard, and indicated the shoulder complaints have been present for "2 weeks," the date of the injury was July 13, 2015, the injury occurred at "work" while performing "normal tree clearance." (Exhibit B, depo ex 1). Dr. Collard noted in his progress note that the injury occurred on July 3, 2015 when Claimant "woke up with increasing right shoulder pain."² (Exhibit B, depo ex B). Dr. Collard further noted Claimant reported "no direct injury that he can remember." Dr. Collard diagnosed right diffuse shoulder pain, and possible labral vs. rotator cuff pathology. Dr. Collard opined "as the patient denies any significant injury in regards to his shoulder and just reports that it is secondary to working hard, I still do not find any prevailing factor in his shoulder pain as it relates to his work." While not finding causation, Dr. Collard indicated Claimant was in need of further work-up including a possible MRI, which he should utilize his private insurance to obtain.

6. Claimant did not return to work after July 22, 2015, as Employer would not let him return until he had a full medical clearance. Claimant seeks medical treatment for his right shoulder. Claimant's testimony was clear and credible.

7. On October 13, 2015, Claimant was examined at his request by Dr. Emanuel, an orthopedic surgeon. Dr. Emanuel noted Claimant's injury occurred on July 6, 2015, and happened while working 17 feet above ground using a pruning device when Claimant felt pain on the top of his right shoulder. Following his examination, Dr. Emanuel opined Claimant's "subjective complaints match his physical exam and objective findings, as well as, the description of his work injury is consistent with the mechanism of injury that could tear the cartilaginous homolog of the acromion clavicular joint." (Exhibit 1, depo ex 2). Dr. Emanuel further opined the July 6, 2015 work injury was the prevailing factor in causing a tear of the cartilaginous homolog of the

¹ During testimony and deposition testimony, Claimant confused dates as to when he informed crew and site foreman of the injury. Claimant referred to his written notes and Mr. Burke's notes to correct his testimony both during deposition and at trial. Notice is not an issue at trial.

² During deposition testimony, Dr. Collard corrects the date of injury to be July 6, 2015.

right a.c. joint. Dr. Emanuel recommended Claimant undergo a MRI of his right shoulder and additional treatment following the MRI. Dr. Emanuel indicated Claimant could work under the following restrictions: no climbing above ground height; and no repetitive shoulder height or above pushing, pulling, or lifting.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to accident, arising out of and course scope of employment, and medical causation

An accident is defined by §287.020.2 RSMo., as a “traumatic event or unusual strain identifiable by time and place occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” Under §287.020.3(2) RSMo., an injury is deemed to arise out of and in the course of employment if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) it can be seen to follow as a natural incident of the work; and
- (c) it can be fairly traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to employment to which workers would have been equally exposed outside of and unrelated to the employment in normal unemployment life.

Claimant bears the burden of proving the essential elements of his claim by producing evidence from which it may be reasonably found that an injury resulted from the cause for which the employer would be liable. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697 (Mo.App. 1973). Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert’s testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

In the instant case, Claimant credibly testified he was engaged in pruning a tree limb when he felt pain in his right shoulder. Claimant did not use the word “injury” to describe the event as he was performing his normal job duties when the event occurred. Not using the word “injury” is not dispositive of whether a work related injury occurred. How the injury occurred is supported by the nurse practitioner and Dr. Emanuel. Dr. Collard’s opinion regarding how the injury occurred is suspect as it is contrary to what Claimant reported on his patient intake form. I find the credible testimony of Claimant and the causation opinion of Dr. Emanuel to be

persuasive, and find Claimant sustained an accident on July 6, 2015 that arose out of and in the course and scope of his employment with Employer. I further find Claimant met his burden to establish medical causation.

Issues related to past TTD benefits

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). Employer has paid no TTD benefits to date. Claimant seeks TTD benefits beginning July 22, 2015 through the date of hearing. Employer refused to let Claimant come back to work until he had a full doctor's release. In October 2015, Dr. Emanuel did not provide that complete release. Accordingly, I find Employer is liable for 27 weeks or \$17,587.53 in past TTD benefits.

Issues related to medical treatment and TTD benefits due to issuance of a temporary award

Claimant seeks treatment for his right shoulder injury. Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the workers' injury. I find Employer responsible to provide Claimant with additional medical treatment. I further find Employer is obligated to provide the following treatment: Employer shall select a competent board certified orthopedic shoulder surgeon(s) and authorize any treatment recommended by the physician(s) regarding Claimant's injury including, but not limited to:

- 1) any tests and procedures as directed by the authorized treating physician(s)
- 2) any medications directed by the authorized treating physician(s)
- 3) any splints, slings, braces or similar devices ordered by the authorized treating physician(s)
- 4) any necessary surgical procedures ordered by the authorized treating physician(s), including all doctor, hospital, diagnostic and medical costs
- 5) all post-operative and rehabilitative care as directed by the authorized treating physician(s).

Additionally, Claimant may receive TTD benefits during the course of future medical treatment. TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). Pursuant to this award, Claimant will receive medical intervention for his work related injury. He will also be entitled to receive TTD benefits to cover the healing period associated with such treatment, if the selected physician determines Claimant would be unable to work during that period, or if Employer will not following the physician's restrictions.

CONCLUSION

Claimant sustained an injury to his right shoulder that arose out of, and in the course and scope of his employment with Employer. Claimant is entitled to receive Workers' Compensation benefits associated with his injury as described in this award. This is a temporary award, subject to further order, the proceedings are hereby continued, and the case kept open until a final award can be made.

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation