

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

Injury No.: 04-041234

Employee: Joseph A. Barron
Employer: Johnson Controls Battery Group
Insurer: Johnson Controls Battery Group
c/o Underwriters Safety & Claim
Date of Accident: April 26, 2004

Place and County of Accident: St. Joseph, Buchanan 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 September 22, 2006. The award and decision of Administrative Law Judge Robert B. Miner, issued September 22, 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 February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Joseph A. Barron

Injury No.: 04-041234

Employer: Johnson Controls Battery Group

Additional Party: N/A

Insurer: Johnson Controls Battery Group c/o Underwriters Safety & Claim

Hearing Date: July 19, 2006

Checked by: RBM

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: April 26, 2004.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? 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 occurred or occupational disease contracted: At the time of his accident or occupational disease, Employee worked as a reed stacker where he handled grids. Employee had repetitive upper extremity use, including lifting stacks of grids and stacking them on skids. He also changed molds and used sprayers.
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: Right and left upper extremities.
14. Nature and extent of any permanent disability: 25% of the body as a whole referable to Employee's right and left upper extremities.
15. Compensation paid to-date for temporary disability: \$15,542.59.
16. Value necessary medical aid paid to date by employer/insurer? \$11,504.15.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$593.45.
19. Weekly compensation rate: \$395.63 for temporary disability and \$347.05 for permanent partial disability.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

13 4/7 weeks of temporary total disability from Employer at the rate of \$395.63 per week, or \$5,369.26, and 100 weeks of permanent partial disability from Employer at the rate of \$347.05 per week,

or \$34,705.00, and 6 weeks of disfigurement from Employer at the rate of \$347.05 per week, or \$2,082.30.

TOTAL: \$42,156.56.

22. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Employee 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 Employee: Donald T. Taylor.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joseph A. Barron

Injury No: 04-041234

Employer: Johnson Controls Battery Group

Additional Party: N/A.

Insurer: Johnson Controls Battery Group c/o Underwriters Safety & Claim

STIPULATIONS

At the hearing, the parties stipulated all issues except the payment of temporary total benefits for the periods July 17, 2004 through September 5, 2004, September 8, 2004 through September 21, 2004, and November 1, 2004, through December 8, 2004, and the nature and extent of Employee's permanent partial disability. The parties stipulated that:

1. On or about April 26, 2004, Joseph A. Barron ("Claimant") was an Employee of Johnson Controls Battery Group ("Employer"), and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about April 26, 2004 Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law, and Employer was duly qualified as a self-insured employer.
3. On or about April 26, 2004, Claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment.
4. Claimant's April 26, 2004 injury occurred in St. Joseph, Buchanan County, Missouri.
5. Employer had notice of Claimant's injury.
6. Claimant's claim for compensation was filed within the time allowed by law.
7. Compensation paid to date of hearing for temporary disability was \$15,542.59 that was paid at a temporary total disability rate of \$395.63 per week, representing 39 2/7 weeks for the periods April 28, 2004 through July 16, 2004, September 6, 2004 through September 7, 2004, September 22, 2004 through October 31, 2004, and December 9, 2004 through March 11, 2005.
8. The value of medical aid paid to date of hearing by employer/insurer was \$11,504.15.
9. Claimant did not offer any value of necessary medical aid not provided by employer/insurer.
10. Claimant's average weekly wage was \$593.45.
11. Claimant's weekly compensation rate is \$395.63 for temporary total disability and \$347.05 for permanent partial disability.

PRELIMINARIES

Claimant testified in person. In addition, Claimant offered the following exhibits that were admitted in evidence: Exhibit A, narrative report of P. Brent Koprivica, M. D., and Exhibit B, medical records and rating report of John B. Moore, IV, M. D. Employer offered the following exhibit that was admitted in evidence: Exhibit 1, correspondence between counsel, consisting of Attorney Bates' letters dated September 3, 2004 and October 29, 2004, and Attorney Taylor's reply letter of November 12, 2004.

ISSUES

The parties stipulated that the only two issues in dispute were nature and extent of Employee's permanent partial disability and liability for past temporary total disability benefits for the periods July 17, 2004 through September 5, 2004, September 8, 2004 through September 21, 2004 and November 1, 2004 through December 8, 2004.

CLAIMANT'S TESTIMONY

Joseph Barron (hereafter "Claimant") testified that on April 26, 2004, he was employed by Employer, Johnson Controls. He started work for Employer in 1985. During his employment there, he worked as a formation handler. He did that job for nine-to-ten years. He pushed completed batteries on down a conveyer. He used his upper extremities constantly. He also worked as a grid caster. He operated three machines. His job involved putting fifty-pound cakes of lead into a pot. He did that job about nine-to-ten years. During the last four years of that job a lift was available to lift the pigs from a conveyor. Claimant said he also changed molds weighing between eighty and ninety pounds. He also used scrapes every hour to hour and one-half. He also used a hand brush. He used a hand drill and a spray gun. He said he had progressive problems with numbness and weakness in his upper extremities. He was transferred to be a reed stacker January 2004. He said that was a hard job and he began having complaints in his right elbow. The reed stacker finished the grids. He said the grids were three times as heavy as the ones in casting. He lifted the grids from a pallet onto a rail and into a machine. He first cleaned and lifted the grids before they were put on the rail. He could barely grab the plates. The pain in his hands increased when he started the job, and he began to drop plates. He sprained his ankle and was off work for one week but his arms did not get better. He went back to work and within one hour, his pain increased and he dropped things.

Claimant went to see Dr. Wineinger. He also saw Dr. Sharma for diagnostic studies. Then he saw Dr. Humphreys who recommended surgery. He said the employer then referred him to Dr. Moore the day before Dr. Humphreys was scheduled to do his surgery. Claimant stated that he was between five feet eight inches and five feet nine inches tall, and weighed 205 pounds. Dr. Moore examined him and then scheduled an appointment for him to have surgery to his left hand. Claimant said that the doctor told him he would need a ride home after the surgery. He said his wife had her own business and could not drive him home the day of his scheduled surgery. Claimant said he changed his surgery appointment to two weeks later because he did not have a ride home from surgery. Employer did not offer to provide transportation to Claimant for Dr. Moore's surgery. Temporary total disability benefits were not paid during those two weeks. Claimant said his employer told him he should have been able to get his wife to drive.

Dr. Moore put him on light duty with a five-pound weight restriction after his first surgery.

He was unaware of any light duty work available within those restrictions. He said that Employer did not tell him to report back to work after the first surgery. The first he learned about that was about two weeks later when his attorney contacted him and told him to report to work. He said in November 2004 his employer told him he had abandoned his job.

Claimant met with his employer after the first surgery and discussed Dr. Moore's restrictions. A second surgery was scheduled for December 9, 2004. He had a meeting with Employer one week before the second surgery. He said he requested vacation during the surgery, but Employer refused vacation and told him if he left work he would be fired. He said he was not offered any work until Employer offered him a painting job one week before December 9, 2004. He had his second surgery on December 9, 2004 and was off work for a while. He was terminated on December 26, 2004 pending arbitration.

Dr. Moore released Claimant to return to work on March 11, 2005. He did not go back to work at Johnson Controls due to resolution of his arbitration. He had not had any medical treatment since March 11, 2005.

Claimant testified that his hands and mainly his wrists felt like a sprain. He said that when he has that feeling he cannot function and has no grip in his hands. He said that lasts between twenty-four and seventy-two hours. When that happens he applies cold packs and heat. Activities that cause his hands to flare include lifting logs, pulling brush, and even opening the refrigerator door. He said he could not predict when it would happen. He said his current occupation is lawn and tree service.

Claimant said that both of his arms were the same. He is right-handed. His pain depends on how much he uses his arms. He uses both about the same. He walks behind mowers, which puts a lot of strain on his hands and it is hard to do. He tries to stay with riding lawn mowers. Weed eaters put pressure on his hands. His right hand is a little worse. He has occasional problems dropping things. He did some cement work at his home and dropped fifty-pound bags of cement. The majority of his pain is in his wrists. He has some problems with his fingers. He said his right elbow had recovered pretty well, and he has had no major pain there since his last day at work at Johnson Controls. He got a cortisone shot that pretty much took care of the pain, though it still is a little sore with a lot of use. Pushing, pulling, dragging brush, and pushing mowers cause some problems. He coaches his son and daughter's baseball teams. If he does a lot of throwing, fielding and hitting, he has problems that affect his work. He gave up bowling and softball. He practices with his bow one hour, three times each week, but he cannot do that nearly as much. When his wrists are acting up he cannot do any squeezing and cannot open a bottle of pop. He cannot do weight lifting when his wrists are acting up. Dr. Moore said that his condition would not go away. Dr. Moore gave him a small device with rubber bands that he uses some, but that causes his condition to flare up. His condition has been the same since his December 9, 2004 surgery. He said he worked hard for twenty years at Johnson Controls. He was a group leader and a task leader. He now has to restrict his activities every day.

On cross-examination, Claimant testified that he did not work for Johnson Controls after April 28, 2004. He saw Dr. Moore August 6, 2004, and the first surgery was set for September 8, 2004. The first surgery was done on September 22, 2004, and the second surgery was done December 9, 2004. Dr. Moore released him on March 11, 2005. He later went into the landscaping business but did some gutter installation before going into landscaping. He said that he did not receive a letter from Herm Bauer of Employer in October 2004, and did not receive any phone calls from Mr. Bauer in October 2004. He is now working a full-time job and he uses his arms and hands in his current job. He did not go into work after his first surgery to see if any work was available at Employer until he received a call from his attorney.

I viewed scars on Claimant's wrists and assessed a total of six weeks disfigurement.

MEDICAL EVIDENCE

According to the report of Dr. P. Brent Koprivica dated October 11, 2005, Claimant's Exhibit A, Dr. Wineinger saw Claimant on May 3, 2004 and electrodiagnostic studies were ordered. Dr. Sharma performed electrodiagnostic studies on May 4, 2004. Moderate to severe bilateral carpal tunnel syndrome was present. Dr. Wineinger reevaluated Claimant on May 14, 2004 and noted severe bilateral carpal tunnel syndrome and right lateral epicondylitis. A steroid injection was given that helped only temporarily. Claimant presented to Dr. William Humphreys who recommended open carpal tunnel release on the right on May 28, 2004. The medical records of Dr. Wineinger and Dr. Humphreys regarding Claimant were not offered in evidence.

Claimant was referred to Dr. Moore who first evaluated Claimant on August 6, 2004. Dr. Moore felt Claimant had severe carpal tunnel syndrome bilaterally chronic. Dr. Moore wrote a report dated August 6, 2004 and noted Claimant had worked for Employer for over eighteen years and was constantly gripping and pinching with his hands. He had increasing numbness, pain, and loss of strength in both hands equally for over a year. His hands would often wake him up in the middle of the night, and even with being off work for the past four months, he had a continuation of his symptoms. Nerve conduction studies showed bilateral severe carpal tunnel syndrome. He had failed a prolonged course of conservative treatment with the use of splinting. Dr. Moore recommended bilateral carpal tunnel releases. A left open carpal tunnel release was performed on September 22, 2004. The Operative Note described the procedure as left open carpal tunnel release with radical synovectomy of flexor tendons, internal neurolysis of median nerve, excision of three aberrant muscles, and neurolysis of ulnar nerve and Guyon's canal. Dr. Moore's work status report dated October 5, 2004 stated that Claimant's work status was light duty three weeks, five to ten pound lifting restriction, no repetitive forceful gripping or pinching or repetitive motion of involved hand over six repetitions per minute. Dr. Moore saw Claimant again on November 23, 2004 and noted that he was two months out from left open carpal tunnel release, recovering well, and ready to do the same on the right side, which was equally severe on nerve testing preoperatively. His restrictions then were thirty pound lift times one month, then full duty with no restrictions. Dr. Moore did the same surgery on the right wrist as the left wrist, with the same findings, on December 9, 2004. He provided light duty restrictions on December 10, 2004 that included a statement, "Full Duty with No Restrictions—1-24-05." Dr. Moore's January 18, 2005 restrictions had a thirty-pound lift restriction one month then full duty with no restrictions. The March 1, 2005 work status report noted fully duty with no restrictions.

Dr. Moore released Claimant to full duty with no restrictions on March 11, 2005. His March 11, 2005 note stated that Claimant was at fifty pounds on the right and sixty pounds on the left compared to one hundred pounds for normal grip strength. He noted that they would keep following Claimant every six weeks until he plateaus on grip strength return, and then he can be rated and released at that time. The note stated that he had no restrictions at that time. Dr. Moore's records do not indicate that he treated Claimant between March 11, 2005 and June 20, 2006. Dr. Moore released Claimant without any permanent restrictions on June 20, 2006.

Dr. John B. Moore rated Claimant on June 30, 2006. He noted that Claimant had undergone bilateral open carpal tunnel release with synovectomy on the right hand for treatment of work related carpal tunnel syndrome. He stated claimant had reached maximum medical improvement and had no present need for further medical or surgical treatment as of June 30, 2006. Dr. Moore's June 30, 2006 report noted that subjectively Claimant noticed still some mild dull aching in both of his wrists and occasional numbness following activities, but felt he was much improved over what he was preoperatively. Objectively, Claimant had no measurable impairment of sensation in either hand, a one percent impairment of motion in the right hand, and a three percent impairment of motion in the left hand. Dr. Moore's June 30, 2006 report further stated, "He has no impairment of pinch strength in either hand but does have a 20% impairment of grip strength in both hands with normal symptom magnification tests. His combined whole person rating is, therefore, 23% based on the grip strength loss particularly. This was using the Fourth Edition of the AMA Guides. Using the Fifth Edition, they do not count grip strength loss as being important until a full year has passed following the surgery, and his impairment would be based purely on his mild loss of motion, which is at 3% whole person rating." Dr. Moore's June 30, 2006 rating report was more than one year after the last surgery.

Dr. P. Brent Koprivica evaluated Claimant on October 11, 2005 at the request of Claimant's attorney. Dr. Koprivica's report dated October 11, 2005 was admitted in evidence as Exhibit A. Dr. Koprivica was board certified in emergency medicine in 1984 and recertified in 1994. He had practiced in occupational medicine on a full-time basis since 1983. He is board certified by the American Board of Preventive Medicine in Occupational Medicine. He reviewed the records of Dr. Moore, Dr. Humphreys, Dr. Sharma, and Comprehensive Family Medical Care. Dr. Koprivica noted that Claimant worked at Johnson Controls from September 23, 1985 until April 26, 2004. He noted that Claimant was terminated on December 26, 2004 while off work, and that prior to an arbitration of April 1, 2005, Claimant was offered a buy-out that he took. He noted that Claimant began working on September 1, 2005 at Barron's Expert Guttering for his brother.

Dr. Koprivica's report described Claimant's work for Employer. He noted that during Claimant's work for fifteen years prior to January 20, 2004 as a grid stacker, Claimant had constant upper extremity use. He lifted stacks of fifty grids each weighing about seven pounds, about every thirty seconds. He also lifted and changed molds and used sprayers. Around January 20, 2004 he was switched to reed stacker and handled heavier stacks of fifty finished grids that Claimant estimated weighed double the weight he was lifting before. That was

associated with significant increase in his symptoms.

Dr. Koprivica described the medical treatment Claimant had received for this injury. He noted that Claimant first saw Dr. Wineinger on May 3, 2004 when EMG studies were ordered. Dr. Sharma performed the EMG studies on May 4, 2004 and moderate to severe bilateral carpal tunnel syndrome was present. Dr. Wineinger saw Claimant again on May 14, 2004 and diagnosed right lateral epicondylitis as well as severe bilateral carpal tunnel syndrome. A steroid injection was given that helped only temporarily. Claimant was then referred to Dr. Humphreys who recommended open carpal tunnel release on the right on May 28, 2004. At that point Employer began directing care.

Dr. Koprivica's report also described Claimant's history of present injury and noted that Claimant described progressive difficulty in both upper extremities. Claimant worked for fifteen years prior to January 20, 2004 as a grid stacker when he had constant upper extremity use lifting and changing molds. He noted that Claimant reported having progressive problems with numbness, weakness, nocturnal awakening and eventually dropping things. He also had associated right lateral elbow pain. He was switched to a reed stacker around January 20, 2004 and began handling heavier stacks of fifty finished grids. That was associated with significant increase of his symptoms. Claimant described his subjective complaints. He said his right hand was much worse than his left. He had lost his strength in both hands. He would drop things in his right hand if they were too heavy. His fingers seemed to give out. The numbness was helped by the surgery but strength was an issue. He still had ongoing right lateral epicondyle pain. He reported that he felt it felt like his right wrist was sprained with use.

Dr. Koprivica performed a physical examination of Claimant. He noted that Claimant did not have any exaggerated or inappropriate behaviors. He noted a forty-nine percent loss of grip strength compared to the norm in the right hand and a thirty-six percent loss of grip strength on the left compared to the norm. He noted right lateral epicondyle pain with grip strength testing with the elbow extended.

Dr. Koprivica concluded that Claimant's work activities at Johnson Controls represented upper extremity use activities that were the prevailing factor in the development of severe bilateral carpal tunnel syndromes. In addition there was evidence of synovial hypertrophy of significance along with chronic flexor tenosynovitis that required radical tenosynovectomies bilaterally. Claimant also had release of the ulnar nerves at the wrist level bilaterally. He also noted that the repetitive use activities were the prevailing factor in his development of a chronic bilateral epicondylitis that had been treated non-operatively.

Dr. Koprivica concluded that Claimant was at maximum medical improvement in reference to the repetitive injury claim dated September 2003 through April 26, 2004. He also concluded Claimant was temporarily and totally disabled from April 26 2004 until his release dated March 11, 2005 as a result of the repetitive injury at Johnson Controls. Dr. Koprivica assigned 30% permanent partial disability of the right upper extremity at the level of the elbow (210 week level) and 25% permanent partial disability of the left hand at the level of the wrist (175 week level).

With the bilateral upper extremity involvement, he assigned a 30% permanent partial disability to the body as a whole associated with the claim injury date of September 2003 through April 26, 2004.

DISCUSSION

PERMANENT PARTIAL DISABILITY

The parties stipulated that Claimant sustained an injury by accident or occupational disease arising out of and in the scope and course of his employment for Employer. 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 Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231. The acceptance or rejection of medical evidence is for the Commission. *Smith v. Donco Const.*, 182 S.W.3d 693 (Mo.App. 2006); *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of the Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Reiner*, 837 S.W.2d at 367; *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231. The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229.

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo. App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo. App. 2003);

Elliott v. Kansas City, Mo., School District, 71 S.W.3d 652, 656 (Mo.App. 2002), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett*, 595 S.W.2d at 443; *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted at 505 that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

The evidence demonstrates that Claimant has significant permanent partial disability. Grip strength testing reveals that Claimant has significant loss of grip strength compared to the norm. Work activities cause his upper extremities, mainly his wrists, to flare up and to be painful. During those times he has difficulty gripping. He has limited his hobbies. He treats the condition with Advil, heat, and cold.

Dr. Moore's June 30, 2006 report stated, "He has no impairment of pinch strength in either hand but does have a 20% impairment of grip strength in both hands with normal symptom magnification tests. His combined whole person rating is, therefore, 23% based on the grip strength loss particularly. This was using the Fourth Edition of the AMA Guides. Using the Fifth Edition, they do not count grip strength loss as being important until a full year has passed following the surgery, and his impairment would be based purely on his mild loss of motion, which is at 3% whole person rating." Dr. Moore's June 30, 2006 rating report was more than one year after the last surgery. Dr. Koprivica assigned 30% permanent partial disability of the right upper extremity at the level of the elbow (210 week level) and 25% permanent partial disability of the left hand at the level of the wrist (175 week level). With the bilateral upper extremity involvement, he assigned a 30% permanent partial disability to the body as a whole associated with the claim injury date of September 2003 through April 26, 2004.

Based on the evidence presented, I find Claimant sustained permanent partial disability of 25% body as a whole referable to his right and left upper extremities for which Employer/Insurer is liable.

TEMPORARY TOTAL DISABILITY

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 426 (Mo. App. 2000), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226. Section 287.170, RSMo (2000) provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7 as the "inability to return to any employment and not merely... [the] inability to return to the employment in which the employee was engaged at the time of the accident" Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo. App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991) *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo. App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ the Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a Claimant's employability on the open market includes the anticipated length of time until the Claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the Claimant will return to the Claimant's former employment. *Cooper*, 955 S.W.2d at 576. A significant fact in judging the reasonableness of the inference that a Claimant would not be hired is the anticipated length of time until the Claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a Claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d 575-76.

Claimant requests an award for temporary total disability for three separate periods. The first period is from July 17, 2004 through September 5, 2004. I find that the evidence demonstrates that Claimant was temporarily totally disabled during that period. Claimant did not work during that time. He had significant symptoms of bilateral carpal tunnel, including pain, weakness, and numbness. He had treated with Dr. Humphreys who had recommended carpal tunnel surgery. Employer directed Claimant to see Dr. Moore, and the first appointment was on August 6, 2004. He noted that Claimant had had nerve conduction studies that showed severe bilateral tunnel syndrome. Claimant was noted to have failed a prolonged course of conservative therapy with the use of splinting. Dr. Moore diagnosed the bilateral carpal tunnel condition and recommended surgery. He thought Claimant would require bilateral carpal tunnel releases. Dr. Moore's August 6, 2004 work status report regarding restrictions stated, "as before." It is unclear what that means specifically since the records of Dr. Humphreys and Dr. Wineinger were not offered in evidence, but it is assumed that Dr. Moore intended to keep Claimant off work because of his symptoms and complaints. Claimant was paid temporary total disability benefits

from April 28, 2004 to July 16, 2004.

Dr. Koprivica concluded that Claimant was temporarily totally disabled during that time. The record does not show that Claimant's condition had improved to the point where he could be expected to compete in the open labor market during that period. I therefore award Claimant temporary total disability benefits from July 17, 2004 through September 5, 2004, or 7 2/7 weeks, at the agreed rate of \$395.63 per week.

Claimant also asks for an award of temporary total disability benefits for the period September 8, 2004 through September 21, 2004. Claimant's first surgery was originally scheduled with Dr. Moore on September 8, 2004. Claimant rescheduled the surgery to September 22, 2004 because he had been told by the doctor's office to arrange transportation home due to the surgery. Claimant had left carpal tunnel surgery on September 22, 2004. Claimant's wife was not available to transport Claimant to and from Dr. Moore's office on September 8, 2004. Employer's counsel notified Claimant's counsel by letter dated September 3, 2004 (Exhibit 1) that he had been unable to locate any type of medical transportation service in St. Joseph, that Claimant needed to furnish his own transportation for his treatment as he had to furnish his own transportation to and from work, and as Claimant was only having the left wrist released, he could drive himself to and from the appointment.

I find that Employer/Insurer was responsible to provide transportation to Claimant to and from Dr. Moore's surgery under the circumstances in this case. Employer/Insurer selected the out-of-town doctor to perform the surgery. It knew Claimant was unable to provide the transportation on September 8, 2004, but failed to arrange a cab, or an employee of Employer to drive Claimant to and from Kansas City that day, or other transportation. I do not find Employer/Insurer's argument that Claimant could have driven home a reasonable justification to fail to pay temporary total disability benefits. Claimant was following the doctor's recommendation to get a ride. Failing to do so could have been dangerous to Claimant and others. Further, if Claimant had used both hands to drive home, he could have injured his recently operated wrist. I find that Employer/Insurer is responsible for, and I hereby award Claimant two weeks of temporary total disability for the period September 8, 2004 through September 21, 2004.

Claimant also requests an award of temporary total disability benefits for the period November 1, 2004 through December 8, 2004. Employer/Insurer alleged that it offered light duty work to Claimant during that period. Claimant denied that Employer/Insurer offered light duty work to him during that period until a painting job was offered to him one week before his December 9, 2004 surgery, which would be December 2, 2004. No representative of Employer/Insurer testified at the hearing. I find Claimant's testimony credible, and find further that Claimant was temporarily totally disabled during the period November 1, 2004 through December 1, 2004. I award Claimant 4 2/7 weeks of temporary total disability benefits for the period November 1, 2004 through December 1, 2004.

Claimant's Proposed Award included a provision that costs and fees be awarded to Claimant pursuant to Section 287.203, RSMo (2005). However, Claimant did not request an award for costs and fees pursuant to this statute or present any evidence relating to this issue during the hearing in this case. The only issues raised by the attorneys during the hearing that the Division consider were past temporary total disability and permanent partial disability. Claimant's request for costs and fees pursuant to Section 287.203, RSMo (2005) is denied.

Date: September 22, 2006 Made by: /s/ Robert B. Miner

Robert B. Miner,
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret

Patricia "Pat" Secret, Director
Division of Workers' Compensation