

TEMPORARY AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 10-109482

Employee: Lisa Bush
Employer: Westchester House
Insurer: Old Republic Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this temporary award modifying the August 28, 2012, temporary or partial award of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

TTD Benefits

The ALJ awarded employee, among other things, six weeks of temporary total disability benefits as a result of the left wrist carpal tunnel syndrome release surgery performed on November 12, 2010. The ALJ based this award on Dr. Crandall's testimony that a surgery, such as the one performed on employee, generally requires six weeks of recovery.

Section 287.020.6 RSMo defines "total disability" 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." The court in *Cooper v. Medical Center of Independence*, 95 S.W.2d 570 (Mo. App. 1997) summarized the law on temporary total disability benefits, as follows:

'Temporary total disability' is a judicial creation that is defined by case law and not by statute. See *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 820 (Mo. App. 1995). The purpose of temporary disability awards is to cover the employee's healing period. *Id.* Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo. App. 1985). Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. *Vinson v. Curators of Univ. of Missouri*, 822 S.W.2d 504, 508 (Mo. App. 1991). A temporary award is not warranted when further progress is not expected. *Phelps v. Jeff Wolk Const. Co.*, 803 S.W.2d 641, 646 (Mo. App. 1991).

¹ Statutory references are to the Revised Statutes of Missouri 2009, unless otherwise indicated.

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In determining whether an employee is totally disabled, the main issue is 'whether any employer, in the usual course of business, would reasonably be expected to employ the [employee] in [the employee's] present physical condition.' *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo. App. 1996).

Id. at 575.

While testimony was presented at the hardship hearing regarding employee's left wrist carpal tunnel syndrome release surgery, there is no testimony in the record regarding employee's ability to compete in the open labor market or the total amount of time she missed from work due to the November 12, 2010, surgery. Due to this lack of evidence, we find that for purposes of this temporary award, employee has failed to meet her burden of proving her entitlement to the six weeks of temporary total disability benefits awarded by the ALJ. Therefore, we reverse the ALJ's award of six weeks of temporary total disability benefits. In light of the currently limited record, this issue of temporary total disability benefits is more appropriately addressed in the event this case proceeds to a final award. Accordingly, we leave open the issue of employee's entitlement to temporary total disability benefits.

Treatment by Specific Doctor

In addition to the aforementioned, we must also address the ALJ's decision to award treatment with a specific physician. The ALJ ordered "[a] change in provider to Dr. Glogovac ... pursuant to Section 287.140.2 RSMo (2005)."

Section 287.140.2 RSMo provides, as follows:

If it be shown to the [Di]vision or the [C]ommission that the requirements are being furnished in such a manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the [D]ivision or the [C]ommission may order a change in the physician, surgeon, hospital or other requirement.

First of all, employee has not proven that employer waived its right to direct employee's medical treatment. The ALJ did not even make that specific finding in his award. Secondly, employee has failed to prove that her health and recovery has been endangered by the medical treatment provided by employer. Lastly, even if employee met this burden, the only relief provided under § 287.140.2 RSMo is that " the [D]ivision or the [C]ommission may order a **change** in the physician, surgeon, hospital or other requirement." (Emphasis added). Section 287.140.2 RSMo does not authorize the Division or the Commission to **appoint** a specific doctor to provide the employee's medical treatment.

For the foregoing reasons, we find that the ALJ erred in ordering employee's additional medical treatment be provided specifically by Dr. Glogovac.

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Decision

We reverse the ALJ's award of six weeks of temporary total disability benefits, but, as discussed above, we leave the issue open for further determination.

We find that employee has established she is entitled to additional medical treatment to cure and relieve her of the effects of her work-related carpal tunnel syndrome and affirm the ALJ's award ordering employer to provide the same. We find that the ALJ erred in ordering employee's additional medical treatment be provided specifically by Dr. Glogovac. Employer has not waived its right to select the physician to provide said treatment.

We affirm the ALJ's temporary or partial award with respect to all other issues not specifically addressed herein.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued August 28, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this temporary award.

This award is only temporary or partial. It 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 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 13th day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary