

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

Injury No.: 04-034802

Employee: Clarence Counce

Employer: Kansas City Area Transportation Authority

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: April 23, 2004

Place and County of Accident: Jackson 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, 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 March 15, 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 Mark S. Siedlik, issued March 15, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of June 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

TEMPORARY AWARD

Employee: Clarence Counce Injury No. 04-034802

Employer: Kansas City Area Transportation Authority

Insurer: Self-Insured

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: January 31, 2005

Checked by: MSS/abj

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 23, 2004.
5. State location where accident occurred or occupational disease was contracted: Jackson 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: While driving bus, Claimant injured neck and shoulders.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Neck, shoulders.
14. Nature and extent of any permanent disability: Undetermined.
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? To be determined.

18. Employee's average weekly wages: \$784.08
19. Weekly compensation rate: \$522.72
20. Method wages computation: Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: To be determined. Weekly benefits from last day worked until released from treatment.

Unpaid medical expenses: Those submitted in Claimant's Exhibits B and C, as well as future medical expenses as incurred.

22. Second Injury Fund liability: N/A

TOTAL: To be determined.

23. Future requirements awarded: Medical treatment and weekly benefits as ordered, consistent with Dr. Frevert.

Said payments to begin as of date of Award and to be payable and to be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Steven Wickersham.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Clarence Counce Injury No. 04-034802

Employer: Kansas City Area Transportation Authority

Insurer: Self-Insured

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: January 31, 2005

Checked by: MSS/abj

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri, on January 31, 2005. The claimant, Clarence Counce, was represented by his counsel, Mr. Steve Wickersham. The employer and insurer were represented by their counsel, Mr. Charles Brown. The claimant alleges an accident on or about the 23rd of April 2004 when while in the course and scope of his employment in Kansas City, Missouri. The employer and insurer were self-insured for workers' compensation purposes. The employer had notice of the claim, which was timely filed. There have been no benefits paid to date.

The issues to be resolved are:

1. Accident;
2. whether the accident arose out of and within the course and scope of employment;
3. medical causation;
4. past medical expense;
5. future medical care;
6. compensation rate; and
7. the nature and extent of temporary total disability.

The evidence at trial consisted of the testimony of the claimant in person and together with medical records, reports, wage statements, as well as the deposition testimony of Dr. Hall, comprising Claimant's Exhibits A through C and Employer/Insurer's Exhibits 1-4.

The claimant testified he began as a KCATA bus driver in June 1999 and worked as a part-time driver to start but later becoming a full-time driver. The claimant, a large man who testified he is 6 foot, 4 ½ inches tall and weighs approximately 295 pounds, found that every bus he drove for the employer required him to have the driver's seat back as far as possible to accommodate his frame. The claimant also testified he had to tilt the steering wheel downward slightly but had to reach out to drive the buses. The claimant further testified to reach the steering wheel, which was nearly flat, in front of him, he would also have to lean forward to grasp the wheel. The claimant noted most buses do not have power steering so turning corners required concerted effort to pull the wheel. Claimant also has a lever to pull to his right side to open passenger doors.

The claimant first began to experience pain in his neck and shoulders in June 2003 while driving his bus. At first the claimant thought the problem temporary but the pain never went away. The pain continued to worsen and the claimant continued working through the pain. The claimant testified when he took off for his scheduled vacation, he would get his condition checked out. The claimant did go see Dr. Frevert and was diagnosed with bilateral shoulder impingement, brought about by the repetitive motion of driving his bus. Claimant was ordered off work by Dr. Frevert and took this document to his employer and was informed he should file for FMLA medical leave as the condition was not work related.

Claimant testified he dealt with Deb Cheney in personnel, who indicated she would get back to him regarding his work status, and as of the date of the hearing, the claimant testified he has never heard from her again. The claimant was released to sedentary duty by Dr. Frevert but was informed by his employer no sedentary duty was available.

The claimant was scheduled for surgery on July 2, 2004, but had an episode of breathing difficulty and irregular heartbeat, which postponed the surgery. The claimant remains anxious about this condition to the extent he is currently unwilling to have surgery to repair the bilateral shoulder impingement. The claimant testified Dr. Frevert's current treatment plan is to treat him with Cortisone injections, light exercises, and range-of-motion stretching.

The claimant testified he worked generally 50 to 55 hours per week at a base rate of \$19.15 on the larger buses and a rate of 75percent of that salary (\$14.37) for smaller buses.

MEDICAL EVIDENCE

The claimant was examined by Dr. Frevert, a shoulder specialist in the Kansas City area. Dr. Frevert, after examining the claimant and having the claimant go through a period of physical therapy, opined the claimant's

bilateral shoulder impingement would require injections, living with the pain, or surgery as treatment alternatives. Dr. Frevert had in fact scheduled the more problematic left shoulder for surgery, which was canceled based on the claimant's anxiety attack and that procedure has never been rescheduled.

The claimant was also examined by Dr. Hall for the employer and insurer. Dr. Hall examined the claimant, reviewing the history of treatment and complaints, and opined the claimant's complaints and need for treatment are unrelated to work. Dr. Hall felt the claimant has cervical radiculopathy and shoulder impingement syndrome unrelated to work as a bus driver. Dr. Hall felt that the claimant's work was not an aggravation of his condition and was willing to treat the claimant under his private health insurance.

FINDINGS

It is well established in the state that the burden is on the employee to prove all material elements of their claim. Beyer v. Howard Construction Co., 736 S.W.2d 78 (Mo.App. 1987). The quantum of proof is reasonable probability. White v. Henderson Implement Co., 879 S.W.2d 575 (Mo.App. 1994). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326 (Mo. App. 1986). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A. B. Chance Co., 503 S.W.2d 697 (Mo.App. 1974).

Under §287.020.2, an injury is compensable if it is clearly work related, and an injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. §287.020.3(2) declares that "[an] injury shall be deemed to arise out of and in the course and scope of employment only if: (a) it is reasonably apparent, upon consideration of all circumstances, that the employment is a substantial factor in causing the injury; and (b) it can be seen to have followed as a natural incident at work; and (c) it can be fairly traced to the employment as the proximate cause; and (d) it does not come from hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal amount of employment life[.]"

I find from the evidence and testimony presented, the reports of Dr. Frevert, a well-respected upper extremities specialist in the Kansas City area, to be more convincing than Dr. Hall, who testified for the employer and insurer as to the nature of the claimant's condition. While Dr. Frevert looked at the job requirements of the claimant sitting and leaning forward with arms outstretched to push and pull the steering wheel as the cause for the claimant's condition and need for treatment, Dr. Hall, when presented with the same facts, indicated that work was not the cause of the claimant's condition, without real explanation as to what was the cause of the claimant's condition. When Dr. Hall was pressed on cross-examination as to the intricacies of the claimant's work with the repetitive grasping or reaching forward almost to the overhead position as it relates to the body when sitting, Dr. Hall incredulously indicated that this repetitive activity at work was not the cause of the claimant's condition and need for treatment. I find this to be unconvincing and believe as more credible the reports of Dr. Frevert.

I find the claimant's wages during the 13 weeks prior to his accident, based on the evidence and information provided, to be \$10,192.98 for an average weekly wage of \$784.08 and a compensation rate of \$522.72 per week. I find the claimant entitled to weekly benefits at the rate of \$522.72 per week due from the employer and insurer since the date the claimant last worked and to continue until Claimant is released from treatment. I find further the claimant is entitled to be reimbursed for medical bills submitted in Claimant's Exhibits B and C as being reasonable and necessary to cure and relieve the claimant's condition, and find the employer and insurer responsible to pay those bills. I find the claimant entitled to additional medical treatment consistent with the recommendations of Dr. Frevert, and if Dr. Frevert opines the claimant is to continue on an off-work status, that weekly benefits shall continue consistent with the doctor's opinion.

I find Claimant's counsel, Mr. Steve Wickersham, entitled to attorney's fees of 25 percent of sums recovered for his legal services rendered. This award, being temporary in nature, is subject to review and reconsideration upon the completion of treatment and the issuing of final disability opinions.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation