

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

Injury No.: 02-016564

Employee: Scott Curran
Employer: Johnson Controls, Inc.
Insurer: Authorized Self-Insurer

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 Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) 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 the award and decision of the ALJ dated June 23, 2011, as supplemented herein.

Employee alleges, among other things, that the ALJ erred in denying his claim for past temporary total disability (TTD) benefits for the time period of February 4, 2004, to March 25, 2004 (7 2/7 weeks). Based on our review, we conclude that the ALJ did not err in denying employee's claim for the past TTD benefits, but find that the award should be supplemented with additional facts and analysis regarding the same.

Findings of Fact

On February 3, 2004, employee was counseled by the plant superintendent regarding negligence, inefficiency, scrap, and productivity. Shortly after employee's meeting with the plant superintendent, employee complained to his plant manager that his shoulder hurt and that he needed to leave work. The human resources manager had previously told employee that he was not allowed to work at employer's facility while taking his prescribed pain pills (Lortab). Employee testified that on February 3, 2004, his shoulder pain reached the point that he needed to take his pain pills and, therefore, he requested to go home.

Employee was permitted to leave work on February 3, 2004, but was instructed to provide verification from a medical professional for his need to leave work on that date. The next day, February 4, 2004, employee saw Dr. Middleton, who provided him with a set of trigger point injections.² Dr. Middleton's February 4, 2004, note indicates employee's primary complaint as headaches. Dr. Middleton opined that the headaches were related to employee's myofascial pain associated with his right shoulder and neck pain. Employee requested a return to work slip from Dr. Middleton and she provided the same, but with

¹ Statutory references are to the Revised Statutes of Missouri 2001 unless otherwise indicated.

² Employee had previously treated with Dr. Middleton and actually had a regularly scheduled appointment to receive these trigger point injections on February 16, 2004.

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instructions that if he has any change in his headaches such as blurred vision, nausea, or vomiting, he needs to seek immediate medical treatment. Employee provided copies of Dr. Middleton's return to work slip to employer the next day, February 5, 2011.

Despite receiving the return to work slip from Dr. Middleton, employer refused to allow employee to return to work. Employee sought another note from Dr. Middleton. On February 11, 2004, Dr. Middleton provided a second return to work slip indicating that she was treating employee for neck and shoulder pain and that the headaches are related to the neck and shoulder pain. Upon being presented with this second return to work slip, employer still refused to allow employee to return to work.

An employer memo dated March 25, 2004, provides evidence of employer's rationale for refusing to allow employee to return to work. Said memo states, as follows:

[Employee] supplied documentation on 2/5/04 and 2/11/04 and neither one of these documents supported or stated the need to leave work on 2/3/04 for shoulder problems. On 3/22/04, the union presented more documentation. This document indicates that [employee] had an office visit on 2/4/04 and was given a trigger point injection. This document again does not specifically state the need for him to leave work on 2/3/04. Furthermore, this was presented forty eight (48) days after he left work on 2/3/04. [Employee]'s record will reflect a "B" rule suspension from 2/5/04 through 3/25/04 for 'Other actions or offenses detrimental to the welfare of the Company or anyone associated with the Company.'

Employee testified that on March 25, 2004, employer called him and "requested [he] ... sign a piece of paper saying it was [his] fault [he] was off work" for the period of February 4, 2004, to March 25, 2004. Employee refused to sign the paper and was discharged on April 5, 2004, for failing to show up for work or report his absences from March 29, 2004, through April 2, 2004.

Discussion

With respect to TTD benefits, the Court in *Cooper v. Medical Center of Independence*, 95 S.W.2d 570 (Mo. App. 1997) summarized the law, as follows:

Section 287.020.7 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.' '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

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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).

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). This standard is applied to temporary total disability, as well as permanent total disability. Contrary to the findings of the Commission, this does not mean that an employer is forced to either make light duty available to a claimant or pay temporary total disability benefits simply because the claimant remains under active medical care and there is a reasonable expectation that the employee's functional level might improve. An employer is only obligated for said benefits if the employee could not compete on the open market for employment.

Id. at 575.

Employee argues that he was released to return to work by Dr. Middleton on February 4, 2004, and that the only reason he did not return to work was because employer refused to allow him to return to work due to a medical condition related to his work injury.

We find that the competent and substantial evidence supports a finding that employee was not permitted to return to work on account of separate and distinct labor management issues. There is no evidence to support a finding that employee was unable to work or that employer refused to allow him to return to work due to a medical condition. Employee was actively seeking to return to work and the only medical evidence on this issue supports a finding that employee was, in fact, **able** to work during the time in question.

For the foregoing reasons, we agree with the ALJ's conclusion and deny employee's claim for past TTD benefits. Employee failed to prove that he was unable to compete for employment in the open labor market from February 4, 2004, to March 25, 2004.

We affirm the award of the ALJ as supplemented herein.

The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued June 23, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 29th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: **SCOTT CURRAN**

Injury No. **02-016564**

Employer: **JOHNSON CONTROLS, INC.**

Insurer: **AUTHORIZED SELF-INSURER**

Hearing Date: **APRIL 4, 2011**

Checked by: **NGA**

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: **FEBRUARY 4, 2002**
5. State location where accident occurred or occupational disease was contracted:
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: **EMPLOYEE WAS A WELDER AND HAD TO MOVE HEAVY OBJECTS IN A REPETITIVE MANNER.**
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: **BOTH WRISTS AND RIGHT SHOULDER.**

14. Nature and extent of any permanent disability: **10% PERMANENT PARTIAL DISABILITY TO BOTH WRISTS AND 10% MULTIPLICITY FACTOR AND 7-1/2% PERMANENT PARTIAL DISABILITY TO RIGHT SHOULDER AND 3 WEEKS DISFIGUREMENT ALLOWANCE.**

15. Compensation paid to-date for temporary disability: **NONE**

16. Value necessary medical aid paid to date by employer/insurer? **\$11,825.42**

17. Value necessary medical aid not furnished by employer/insurer? **\$7,084.23**

18. Employee's average weekly wages: **\$776.83**

19. Weekly compensation rate: **\$517.89 / \$329.42**

20. Method wages computation: **By Stipulation**

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: **\$ 7,084.23**

Weeks of temporary total disability (or temporary partial disability)
55.9 Weeks of permanent partial disability from Employer X **\$329.42 = \$18,414.58**
3 Weeks of disfigurement from Employer x **329.42 = \$988.26**

22. Second Injury Fund Liability: **N/A**

TOTAL: \$26,487.07

23. Future requirements awarded: **THE EMPLOYER IS ORDERED AND DIRECTED TO PROVIDE CLAIMANT WITH NONSURGICAL TREATMENT BY DR. MIDDLETON FOR UP TO FOUR VISITS PER CALENDAR YEAR.**

Each of said payments to begin **FEBRUARY 5, 2002** and to be payable and 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%** of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: **DAVID W. WHIPPLE.**

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **SCOTT CURRAN** Injury No. **02-016564**
Employer: **JOHNSON CONTROLS, INC.**
Insurer: **AUTHORIZED SELF-INSURER**
Hearing Date: **APRIL 4, 2011** Checked by: **NGA**

ISSUES

Prior to presenting evidence, the parties stipulated the issues to be determined by this hearing are:

1. Whether the claimant's injury was medically caused by claimant's alleged accident or occupational disease;
2. Liability of the employer for additional medical treatment;
3. Liability of the employer for past temporary total disability compensation;
4. Liability of the employer for past medical bills;
5. What is the nature and extent of claimant's disability;
6. Assessment of claimant's disfigurement allowance.

STIPULATIONS

The parties agreed that on February 4, 2002, Scott Curran was an employee of Johnson Controls, Inc. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation law and the employer was an authorized self-insurer.

The parties also agreed that the claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment on February 4, 2002.

The employer admitted that it had proper notice of claimant's injury and a timely Claim for Compensation was filed. The parties agreed that the correct rate of compensation is \$517.89 per week for temporary total disability and \$329.42 per week for permanent partial disability. No compensation has been provided. Medical aid has been furnished in the amount of \$11,825.42. The claimant is asking for past medical expenses in the amount of \$7,084.23.

The parties agreed that the liability of the Second Injury Fund would be determined at a later date.

The claimant testified in person. He is 45 years old. I found him to be a believable witness. He worked at Johnson Controls for over 16 years. He started at Johnson Controls on August 26, 1987 and his employment was terminated on April 5, 2004.

His position was that of a “caster”, which is a welder. He was required to grip and move heavy objects in a repetitive manner. In January, 2002 he started to have pain in both of his wrists and later in his right shoulder.

The claimant went first to his personal physician, Dr. Susan Vega. The employer then sent Mr. Curran to OHS Comp Care on February 5, 2002. He was referred to Dr. John Moore, who performed an open carpal tunnel release on claimant’s right wrist on April 10, 2002 and then on July 24, 2002 performed an endoscopic release in his left wrist.

Dr. Moore noted that the claimant had complaints of right shoulder pain and said it was unrelated to his bilateral carpal tunnel syndrome. He rated the claimant at 2% body as a whole.

The employer had an MRI taken of claimant’s right shoulder. The claimant was sent to Dr. C. Dan Smith. Dr. Smith noted the MRI showed some subtle degenerative change of the A.C. joint but otherwise noted that the study was unimpressive. Dr. Olson gave the claimant an MRI of his neck. The neck MRI was normal. Dr. Smith was unable to offer any surgical treatment.

The employer then released the employee and no further treatment was ordered.

The employer did have the claimant examined by Dr. Charles E. Rhoades, M.D. on March 7, 2011. Dr. Rhoades, when asked if Mr. Curran’s job duties for Johnson Controls were the substantial factor in the creation of claimant’s problems with his right shoulder answered, “It is my opinion to a reasonable degree of medical certainty that the work at Johnson Controls is NOT the prevailing cause for patient’s current condition.”

Dr. Rhoades then provided a rating based on the AMA Guide of 5% of each upper extremity for the carpal tunnel release or 6% of the whole body.

When the claimant was released from medical care on February 5, 2004, he went to Dr. Mary Jo Middleton on his own. A dispute occurred between the claimant and Mr. Herm Baur, the personnel manager. The claimant was suspended and then missed additional time for not contacting the employer. He was terminated on April 5, 2004. The claimant is requesting temporary total disability for this period of time.

The claimant said he was having pain in his right shoulder and severe headaches. He said he went to Dr. Middleton because Dr. Middleton had released the claimant with no further treatment ordered and the employer would not authorize any additional treatment. The claimant said he needed additional medical treatment.

The claimant received three weeks of physical therapy and trigger-point injections from Dr. Middleton in 2004. He continued to treat with Dr. Middleton as he worked elsewhere. He received four trigger-point injections in 2005, four more in 2006, two sets in 2007, three in 2008, and two each in 2009 and 2010, and one on March 14 of this year.

Dr. Middleton diagnosed the claimant as having myofascial pain of the right shoulder girdle and neck covered by his overuse syndrome. This was caused by his repetitive work at Johnson Controls where he was required to turn left to right frequently. She said his shoulder pain caused his migraine headaches. The headaches have diminished in frequency and severity with time.

On September 21, 2005, Dr. Fernando M. Egea found that the claimant had developed bilateral carpal tunnel syndrome and right shoulder overuse syndrome. At that time, he ruled the claimant as having a 20% permanent partial disability of the right shoulder and 10% of the left wrist.

On February 7, 2007, Dr. Fernando M. Egea rated the claimant at 10% of each upper extremity at the 222-week level for his bilateral carpal tunnel syndrome. He also rated the claimant as having a 10% permanent partial disability of the right upper extremity of the 232-week level.

I believe Doctors Egea and Middleton.

I find and believe as a result of claimant's repetitive injury at Johnson Controls, the claimant sustained a 10% permanent partial disability to both of his wrists at the 175 week level plus a 10% loading factor for the bilateral multiplicity. I also find that as a result of claimant's repetitive work, he sustained a 7-1/2% permanent partial disability to his right shoulder at the 232-week level.

For permanent partial disability, I order and direct the employer to pay to the claimant the sum of \$329.42 per week for 55.9 weeks for a total of \$18,414.58.

I also assess three weeks for disfigurement allowance for scars on both of claimant's wrists. I order the employer to pay to the claimant the sum of \$329.42 per week for three weeks for a total of \$988.26.

Mr. Curran seeks reimbursement for medical expenses incurred with Dr. Middleton in the amount of \$7,084.23. The employer terminated medical treatment after receiving Dr. Smith's report. The claimant testified that he was still in pain and needed further medical treatment. He requested the employer furnish him with medical treatment and was refused by the employer.

I find and believe from the evidence that the claimant incurred additional medical treatment that was reasonable and necessary to cure and relieve him from the condition caused by his repetitive injuries at Johnson Controls. I order and direct the employer to pay to the claimant the sum of \$7,084.23 for past medical expenses.

The claimant has been receiving medical treatment from Dr. Middleton for more than six years. The treatment appears to have brought the claimant some relief from this pain. He has a strong doctor patient relationship with Dr. Middleton. He has never been required to see her over four times a year. I believe this treatment to be reasonable and necessary to cure and relieve the claimant from the condition of his repetitive injury.

I order and direct the employer to provide non-surgical medical treatment by Dr. Middleton for up to four visits per calendar year.

The claimant has requested past temporary total disability from February 4, 2004 through April 5, 2004. I find and believe from the evidence that the claimant could have followed the required procedures but elected not to because he was angry at the employer. Claimant's request for past temporary total disability is hereby denied.

Mr. David W. Whipple is hereby assigned a lien in the amount of 25% of this award for necessary legal services rendered claimant.

Made by: /s/ Nelson G. Allen
Nelson G. Allen
Chief Administrative Law Judge
Division of Workers' Compensation

This Award is dated and attested to this 23rd day of June, 2011.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation