

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

Injury No.: 03-057777

Employee: Herbert Hilderbrand
Employer: Howard Price Turf Equipment
Insurer: AIG National Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: On or about April 1, 2003
Place and County of Accident: St. Louis County

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 May 16, 2006. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued May 16, 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 26th day of December 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Herbert Hilderbrand

Injury No.: 03-057777

Dependents: N/A
Employer: Howard Price Turf Equipment
Additional Party: Second Injury Fund
Insurer: AIG National Insurance Company
Hearing Date: March 13, 2006

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: KOB:tr

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: on or about April 1, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant used air and vibratory tools, performed tedious wiring, and did other tasks requiring ulnar deviation of the wrist, all which caused a disabling left wrist injury
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left wrist.
14. Nature and extent of any permanent disability: 17 ½% of the left wrist.
15. Compensation paid to-date for temporary disability: \$0.
16. Value necessary medical aid paid to date by employer/insurer? Employer/St. Paul Travelers paid \$3,102.00.

Employee: Herbert Hilderbrand Injury No.: 03-057777

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$526.00
19. Weekly compensation rate: \$350.67 / \$340.12
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses (All expenses have been paid – see Award).	\$ 0.00
30.625 weeks of permanent partial disability from Employer:	\$10,416.18

22. Second Injury Fund liability: Open

TOTAL: \$10,416.18

23. 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 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: Tim O'Mara

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Herbert Hilderbrand	Injury No.: 03-057777
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Howard Price Turf Equipment	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	AIG National Insurance Company	Checked by: KOB

PRELIMINARIES

The matter of Herbert Hilderbrand ("Claimant") proceeded to hearing to determine whether Claimant sustained an occupational disease arising out of and in the course of employment. Attorney Tim O'Mara represented Claimant. Attorney Mark Cordes represented Howard Price Turf Equipment ("Employer") and its Insurer, AIG National Insurance Company ("AIG"). Attorney Jay Lory was present to represent the interest of St. Paul Travelers ("Travelers"), a prior workers' compensation carrier of Employer that paid certain expenses for which it was not liable. Assistant Attorney General Kay Osborne appeared briefly to confirm that the Second Injury Fund had entered into an agreement with Claimant to leave the claim against the Second Injury Fund open.

The parties stipulated that on April 1, 2003, Claimant was an employee of Employer, and earned an average weekly wage of \$526.00, corresponding to rates of compensation of \$350.67 for total disability benefits and \$340.12 for permanent partial disability benefits. Employer paid no temporary total disability benefits, but through Travelers, Employer paid medical benefits totaling \$3,102.00.

The issues to be determined^[1] are: 1) did Claimant sustain an occupational disease arising out of and in the course of employment; 2) is Claimant's current medical condition causally related to his job activities; 3) has Claimant established a right to recover temporary total disability benefits; 4) what is the nature and extent of Claimant's permanent partial disability; and 5) is Employer/AIG liable for past medical benefits of \$4,044.44?

SUMMARY OF THE EVIDENCE

Claimant's Testimony.

Claimant is a right-handed man who worked twenty years for Employer as an assembler/foreman. His workweek consisted of four ten-hour days. Claimant stopped working for Employer on or about July 5, 2003 due to a dispute unrelated

to the alleged wrist injury that is the subject of this claim. The foreman position consisted of paper and computer work, but as an assembler, Claimant performed hand intensive work assembling the sub components of the tractors with several different air powered tools. For example, Claimant held a part in his left hand while using an air ratchet with his right hand, which often severely twisted or jerked his left hand when the ratchet reached the end of its rotation. Furthermore, Claimant installed electrical wiring in the dashboard, used pneumatic grinders and other vibrating tools, lifted pumps and motors, and performed other tedious work that required him to hold his left hand in awkward, compromised positions.

Claimant testified that approximately one and one-half years before he actually went to a doctor to have it treated, he started to have pain in his left upper extremity. Eventually, Claimant saw Dr. Vaughn, his family doctor, who ruled out a broken bone and referred Claimant to his workers' compensation carrier, as he felt the injury and pain were work related.

When Claimant reported his wrist as a work related injury, Employer sent Claimant to Unity Corp. Initially, the injury was treated as a sprain, and Claimant went to four or five visits of physical therapy. Then, on July 25, 2003, Claimant saw Dr. Strege, who provided a cortisone shot, casted Claimant's wrist for about a month, and posted restrictions including no lifting more than five pounds. Claimant told Dr. Strege that his wrist hurt when he was performing his lawn care business, operating a commercial walk-behind mower that he bought in May 2003.

Claimant then saw Dr. Brown, who performed an MRI, and diagnosed arthritis and cartilage damage. Dr. Brown told Claimant his condition was not work related and released him.

Claimant currently has pain when he lifts or turns his wrist. He has a catching in his wrist. He cannot pour a carton of milk with his left hand. Claimant takes over the counter pain relievers and wears a brace when he performs any sort of work.

In October or November 2003, Claimant started his lawn care business, working three days and 24 hours a week. He testified that he could never fully operate the lawn care business due to pain in his wrist, and he recently sold the business. In the fall of 2004, Claimant attended taxidermy school and now operates his own taxidermy business, despite that fact that it is hand intensive and often causes him pain. Claimant's hobbies in the past have included archery, hunting, fishing, and gardening, although Claimant has had to cut back on all such activities because of his wrist.

Medical Records.

Dr. Richard Vaughn, Claimant's personal physician, followed Claimant over the years for several chronic conditions, including back pain and heart-related complaints. In 1999 and 2001, the records reflect complaints of left arm tingling, but in the context of heart related concerns. It was not until June 18, 2003 that Dr. Vaughn recorded specific complaints of left wrist *pain* for several months. By mid-July, Dr. Vaughn noted a workers' compensation doctor was following Claimant for his wrist complaints.

From July 25 to September 10, Claimant was under the care of Dr. Strege, who provided partially successful conservative treatment, but eventually suggested surgical treatment. Exhibit C indicates Dr. Strege's office billed Employer's insurance carrier, Traveler's Insurance Co., as Claimant's condition was related to employment. Dr. Strege mentioned the option of surgery in September. Dr. Strege's deposition testimony is summarized below.

On September 23, 2003, Claimant came under the care of Dr. David Brown, who diagnosed osteoarthritis at the radiolunate joint with findings consistent with a capsular leak over the ulnar carpal joint. He provided injections and placed Claimant on work restrictions through October 27, 2003. Claimant's pain, said Dr. Brown, was due to osteoarthritis. He did not specifically address causation, but his office billed Employer/Travelers, and he issued a final rating to Travelers assigning permanent partial disability of 5% of the left wrist.

Expert Opinion.

Dr. David Volarich examined Claimant once on July 28, 2004, generated a report, and testified by deposition. Based on the complaints, history, records, tests and physical findings, Dr. Volarich concluded Claimant suffered a work accident on or about April 1, 2003, that resulted in permanent partial disability of 25% of the left wrist. Claimant's disability is due to the aggravation of degenerative arthritis of the radiocarpal joint and strain of the triangular fibrocartilage complex ("TFCC"). The rating accounts for pain, lost motion, weakness and crepitus. According to Dr. Volarich, the diagnosis is causally related to work. Specifically, the repetitive nature of his work, holding onto parts with his left hand, repetitively lifting, twisting, and performing similar job activities as described in his report, are the substantial contributing factors in causing the above diagnosis. Other than pain control medications, no further treatment is necessary. Suggested restrictions include use of ergonomic positions, limited repetitive actions, and avoidance of impact/vibratory trauma. Dr. Volarich agreed that the operation of a mower requiring ulnar deviation could aggravate or cause symptoms similar to those voiced by Claimant, but the specific activities or hobbies enjoyed by Claimant (i.e. hunting, fishing, archery) would not necessarily aggravate his wrist.

Dr. William Strege was Claimant's treating physician, but Employer/Insurer submitted his deposition testimony. On July 25, 2003, the first of several visits with Claimant, Dr. Strege recorded a history of complaints consistent with the trial

testimony, including Claimant's extensive work with power tools at Employer, as well as his more recent use of a power mower. He testified Claimant had signs and symptoms consistent with possible TFCC injury of the left wrist and probable ulnar impaction syndrome, which diagnosis he later confirmed with diagnostic testing. Treatment consisted of injections and immobilization, and provided some symptom relief. However, by September 10, 2003, Claimant was still in pain, and with an arthrogram showing a triangular fibrocartilage tear, Dr. Strege indicated the only further treatment available was

[2]. With respect to the issue of causation, Dr. Strege felt Claimant's work was the initial cause of his wrist injury, based on the timing of the symptom onset, and the use of the mower aggravated the symptoms by causing the pain to persist.

FINDINGS OF FACT AND RULINGS OF LAW

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

1. Claimant suffers from an occupational disease arising out of and the in course of employment that is causally related to his work for Employer.

Claimant has met his burden of establishing a compensable claim against Employer. "An injury is only compensable if it is clearly work-related." *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo. App. E.D. 1998). "An injury is clearly work related if it was a substantial factor in the cause of the resulting medical condition." § 287.020.2. I find Claimant testified credibly that he had the onset of left wrist pain while he was working for Employer. Any inconsistencies in his testimony are minor and inconsequential. The medical evidence, which is based on Claimant's credible statements regarding the onset of pain, supports a finding that Claimant's work activity is a substantial factor in his wrist injury. The activities he described, using air and vibratory tools, performing tedious wiring, and other tasks requiring ulnar deviation of the wrist, are consistent with causing the left wrist condition. The fact that Claimant's subsequent use of a power mower aggravated his left wrist pain does not negate the fact that Claimant's work for Employer was a substantial factor in the cause of the left wrist condition. Claimant's disease is clearly work related.

2. Claimant did not meet his burden of proof regarding temporary total disability benefits.

Claimant seeks temporary total disability ("TTD") compensation from the day he voluntarily left Employer's employment, to the end of October, when Dr. Brown declared him to be at MMI and he started his own lawn care business. The burden of proving entitlement to temporary, total disability benefits is on Claimant. The purpose of temporary, total disability awards is to cover the employee's healing period, so ...temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 424 (Mo.App. W.D.2000), citing *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App.1997)(both overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003)). The ability to perform some work is not the test for temporary total disability, but rather, the test is whether an employee is able to compete in the open labor market given the employee's present physical condition. *Boyles* at 425.

I find there is insufficient evidence to justify an award of TTD. Neither the medical records nor the testimony show that Claimant was ever unable to compete in the open labor market due to his wrist injury. Despite pain, he continued to work for Employer until he quit in July. Thereafter, Dr. Strege applied an immobilization cast, which may have limited his ability to perform some tasks during August. However, there are no off-work slips, or anything to support a finding Claimant was unemployable. Furthermore, Dr. Brown continued the work restrictions from September 23 to October 27, but did not take Claimant off work. In sum, Claimant has not met his burden of establishing he is entitled to TTD benefits. [3]

3. Claimant has permanent partial disability equal to 17 ½% of wrist.

Claimant seeks an award of permanent partial disability ("PPD") benefits. Workers' compensation awards for PPD are authorized pursuant to § 287.190. The reason for an award of PPD benefits is to compensate an injured party for lost earnings. "Permanent partial disability" is defined in § 287.190.6 as being permanent in nature and partial in degree. The fact finder has discretion as to the amount of the award and how it is to be calculated. It is the duty of the finder of fact to weigh that evidence as well as all the other testimony and reach its *own* conclusion as to the percentage of the disability suffered. *Rana v. Landstar TLC*, 46 S.W.3d 614, 626 (Mo.App. W.D. 2001) (citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003).

Claimant's left wrist injury is undeniably disabling, but there is conflicting evidence as to the degree of disability. Based on Claimant's credible testimony regarding his symptoms and limitations, the medical records, and the expert opinions, I find that Claimant has permanent partial disability equivalent to 17 ½% of his left upper extremity at the level of the wrist.

4. AIG National Insurance Company, as Employer's Insurer, is liable for the reasonable and necessary medical expenses to cure and relieve Claimant's injury.

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury ...of the employee by accident arising out of and in the

course of the employee's employment, and shall be released from all other liability therefore whatsoever.... §287.120.1. The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). In Missouri, an insured employer's liability is secondary and indirect; the insurer is primarily and directly liable." *Smith v. Donco Const.* 182 S.W.3d 693, 698 (Mo.App. S.D. 2006) citing *Mikel v. Pott Indus.*, 896 S.W.2d 624, 625 (Mo. banc 1995); see also §§ 287.300 and 287.035.4.

Claimant incurred medical expenses for reasonable and necessary treatment of his left wrist injury. The evidence presented without objection establishes the charges for such treatment totaled \$4,044.44 (Exhibit C). The parties stipulated that, through Travelers, Employer paid medical benefits totaling \$3,102.00. The parties further stipulated that AIG is the proper insurance carrier on the risk for covering Claimant's claim. Claimant presented no evidence that he was responsible for any portion of the bills, or that there were any outstanding balances. Therefore, I find that the payments by Travelers fully satisfied all charges for treatment associated with treatment of Claimant's work injury.

AIG seeks to avoid all liability for medical expenses by arguing Claimant's injury is not compensable. Having found that Claimant indeed suffers from an injury arising out of and in the course of employment, I further find Employer is liable for the medical expenses incurred. However, because it was fully insured at all times, Employer is only secondarily and indirectly liable for benefits. Rather, AIG, the undisputed insurance carrier on the risk for Claimant's injury, is primarily and directly liable for all compensation due Claimant, including payment of medical expenses.

I find Employer/AIG liable for medical expenses in the amount of \$4,044.44. I also find that the obligation of Employer has previously been met by Travelers' payment of \$3,102.00. The payments mistakenly made by Travelers were benefits derived from Employer's insurer for workers' compensation, albeit the wrong one. Thus, §287.270^[4] does not prohibit consideration of the payments in determining compensation, as it would a collateral source. Therefore, I find the obligation of Employer/AIG to pay Claimant medical expenses has been satisfied. To order AIG to pay Claimant for satisfied charges would constitute an impermissible windfall. See, i.e., *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818, 822 (Mo. 2003) (The claimant was not entitled to reimbursement from her insurer for medical expenses that were written off by the medical providers).

Finding that AIG has no outstanding obligation to pay medical bills under the Workers' Compensation Law in this case does not mean that it is excused from its primary and direct liability for compensation. I find that AIG benefited from Travelers' payments on Employer's behalf for Claimant's medical treatment. Ideally, I would order AIG to pay Travelers \$3,102.00 for medical benefits it paid. However, the Division of Workers' Compensation does not have the jurisdiction or authority to order one company to reimburse another for the payments mistakenly made by the latter to the employee. *Harris v. Pine Cleaners, Inc.*, 296 S.W.2d 27, 30 (Mo. banc 1956). If AIG chooses not to voluntarily reimburse Travelers, Travelers can seek relief in other legal forums as the law may allow.

CONCLUSION

Claimant has a disabling left wrist injury that arose out of and in the course of his employment. His use of tools and other work tasks were the substantial cause of his wrist disability. Accordingly, Employer and AIG, its insurer, are liable to provide compensation under the law, and as specified above.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[1] By a letter filed after the close of the evidence, Claimant withdrew his request for future medical treatment.

[2] Claimant declined further surgery.

[3] Claimant's post-trial brief did not address TTD, suggesting he abandoned the issue.

[4] No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder.... §287.270. RSMo (2000).