

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

Injury No.: 05-140664

Employee: James T. Johnson

Employer: Hertz Corporation

Insurer: Insurance Company of the State of Pennsylvania

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

Date of Accident: All days worked through November 29, 2005 and thereafter

Place and County of Accident: Kansas City, Platte County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 September 19, 2006.

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 R. Carl Mueller, issued September 19, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## TEMPORARY AWARD

Employee: James T. Johnson Injury No: 05-140664  
Dependents: N/A  
Employer: Hertz Corp.  
Additional Party: State Treasurer as Custodian of the Second Injury Fund  
Insurers: Insurance Company of the State of Pennsylvania  
Hearing Date: August 3, 2006  
Briefs Filed: August 18, 2006 Checked by: RCM/rcm

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injuries or occupational diseases 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: all days worked through November 29, 2005 and thereafter.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte 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 drove a shuttle bus for Hertz and repetitively opened and closed doors and handled baggage for many of the passengers who entered and exited his shuttle bus.
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 upper extremities
14. Nature and extent of any permanent disability: Not addressed at this temporary hearing.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.

17. Value necessary medical aid not furnished by employer/insurer? Not determined at this hearing.
18. Employee's average weekly wages: \$460.00.
19. Weekly compensation rate: \$306.67.
20. Method wages computation: By stipulation
21. Amount of Compensation Payable:

Temporary Disability

Twenty-five weeks (1/18/2006-4/9/2006; 5/1/2006-8/3/2006)..... \$7,666.75

22. Second Injury Fund liability: Not at issue at this time.
23. Future requirements awarded: Medical care and TTD as appropriate.

Said payments to begin as of date of this award 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 twenty-four percent (24%) lien totaling \$1,916.69 in favor of Edelman and Thompson, Attorneys, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

### **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	James T. Johnson	Injury No: 05-140664
Dependents:	N/A	
Employer:	Hertz Corp.	
Additional Party:	State Treasurer as Custodian of the Second Injury Fund	
Insurers:	Insurance Company of the State of Pennsylvania	
Hearing Date:	August 3, 2006	
Briefs Filed:	August 18, 2006	Checked by: RCM/rcm

On August 3, 2006, the employee and employer appeared for a temporary hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, James T. Johnson, appeared in person and with his attorney, Michael Downing of Edelman and Thompson. The employer, Hertz Corp., appeared through its attorney, D'Ambra Howard. Although the Second Injury Fund is a party, it did not appear for this temporary hearing. The primary issue presented by the parties is whether the employee's alleged repetitive traumas caused the need for treatment and temporary disability the employee claims. After considering the evidence, and for the reasons set forth below, I find that the employee's work was the prevailing factor in causing his bilateral upper extremity complaints and award him both additional medical care and twenty-five (25) weeks of temporary disability benefits for compensation totaling \$7,666.75. I return this case to the open docket for further consideration at the request of the parties.

## STIPULATIONS

The parties stipulated that:

1. On or about November 29, 2005 (“the injury date”), Hertz Corp. (“Hertz”), was an employer working subject to Missouri’s Workers’ Compensation law with its liability fully insured by Insurance Company of the State of Pennsylvania;
2. Mr. James T. Johnson was its employee working for employer subject to the law in Kansas City, Platte County, Missouri;
3. Mr. Johnson filed his claim within the time allowed by law;
4. The nature and extent of disability will not be addressed at this time;
5. Claimant’s average weekly wage is \$460.00 resulting in a weekly compensation rate of \$306.67 for temporary total disability compensation; and,
6. Hertz did not provide Mr. Johnson either with any temporary total disability compensation or medical care (other than a March 23, 2006 appointment with Neal Moore, D.O. at Landmark Medical Center).

## ISSUES

The parties requested the Division to determine:

1. Whether Mr. Johnson sustained a series of repetitive traumas arising out of and in the course of employment?
2. Whether Mr. Johnson notified Hertz Corp. of the repetitive traumas as required by law?
3. Whether Mr. Johnson is entitled to temporary total disability benefits from January 18, 2006 through April 9, 2006 and again from May 1, 2006 through August 3, 2006 and into the future?
4. Whether Hertz Corp. must provide the employee with medical care?
5. Whether the alleged repetitive traumas caused the need for treatment and temporary disability the employee claims?

## FINDINGS

Mr. Johnson testified on his own behalf and presented Exhibit A (medical records) which was admitted into evidence.

Although the employer did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1 – Medical reports
- Exhibit 2 – Short Term Disability Records

### *Exhibit 3 - Absentee Calendar*

Based on the above exhibits and the testimony of Mr. Johnson, I make the following findings: Mr. Johnson is a 60-year old male residing in Kansas City, Missouri. He commenced his employment with Hertz on August 21, 2003 as a driver of a shuttle bus at the Kansas City International Airport in Platte County, Missouri. His work duties consisted of driving the shuttle as well as the loading and unloading of baggage on a full time basis. This required him to grip and turn the steering wheel on a repetitive basis as well as load and unload baggage for passengers throughout each workday.

In the summer of 2005, Mr. Johnson testified that he developed symptoms in both upper extremities including swelling in his wrists as well as pain and numbness. He did not immediately seek medical attention as he associated these symptoms with arthritis. He was taken off work in October of 2005 for three weeks for an unrelated medical condition, Chronic Obstructive Pulmonary Disease (“COPD”), and then returned to work on October 30, 2005. He worked the entire month of November 2005 with the exception of November 30, 2005 at his normal job performing his normal duties. He testified that his upper extremities continued to bother him during this period, and in fact became worse. He was again taken off work effective November 30, 2005 by his personal physician, Dr. Paul Joslin, as a result of his COPD/bronchitis and edema in his legs. While he was off work consulting with his personal physician, he informed Dr. Joslin of his hand symptoms at an appointment on December 9, 2005. *See*, Claimant’s Exhibit A at 53. In a report dated December 19, 2005 Dr. Joslin noted Mr. Johnson’s left hand was numb with pain radiating almost to the elbow. *See*, Claimant’s Exhibit A at 48. Dr. Joslin ordered EMG tests that were completed on December 20, 2005 and revealed “a very severe hypoesthetic condition” in the left upper extremity, and a moderate hypoesthetic condition in the right upper extremity. *Id.* at 28. At an appointment on January 18, 2006 Dr. Joslin indicated a follow up was needed for carpal tunnel syndrome. *Id.* at 45. Dr. Joslin released Mr. Johnson to return to work on January 18, 2006 with reference to his COPD/bronchitis/edema in his legs. *See*, Claimant’s Exhibit A at 1. However, Dr. Joslin continued him off work on that day as a result of his carpal tunnel. *Id.*

Dr. Joslin then referred Mr. Johnson to Gary Baker, M.D. Dr. Baker is a Fellow of the American College of Surgeons who specializes in cosmetic, reconstructive, breast and hand surgery. *See*, Claimant’s Exhibit A at 2. Mr. Johnson consulted with Dr. Baker on January 25, 2006. In a letter dated January 25, 2006 to Dr. Joslin, Dr. Baker noted that as a driver of a shuttle bus Mr. Johnson performed a good deal of repetitive activity including opening and closing the door of the bus, driving the bus, and handling the baggage. This resulted in exposure to vibration from gripping the steering wheel and constantly turning the vehicle, and that he also repetitively loaded and unloaded the baggage compartment of the shuttle van, which required a good deal of pinch and grip activity in each hand in association with repetitive wrist extension and flexion. Dr. Baker concluded that Mr. Johnson’s present bilateral upper extremity symptoms and physical signs were “the direct result of work related repetitive activities performed with each hand and wrist while employed by Hertz Corporation in North Kansas City, Missouri.” *See*, Employer’s Exhibit 1 at 2. With reference to a treatment plan, Dr. Baker stated that surgical intervention would not be scheduled or attempted until Mr. Johnson received permission from his employer. This is consistent with Mr. Johnson’s testimony that Dr. Baker did not schedule surgery because it was a work related condition, which his health insurance carrier would not cover.

Upon receiving Dr. Baker’s opinions on January 25, 2006, Mr. Johnson immediately reported to “Andrea” in Hertz’s Human Resources department that his carpal tunnel syndrome was work related. Mr. Johnson requested Andrea for Hertz to provide him with medical treatment. Although this is the first time Mr. Johnson learned and reported to Hertz that his condition was work-related, he previously - in the summer of 2005 -had mentioned his upper extremity complaints to two of his managers - “James” and David White. While he believed his complaints were related to arthritis, Hertz did not do anything to investigate whether - as later was shown to be true - his condition was work-related. Hertz neither filed a report of injury nor offered medical treatment at that time. However, following his January 25, 2006 report to Andrea, the employer finally scheduled Mr. Johnson to see Dr. Moore at Landmark Medical Center on March 23, 2006, some two months later. At that time, Dr. Moore indicated the condition was work related and recommended surgery. Dr. Moore restricted Mr. Johnson from lifting over ten (10) pounds or from performing “repetitive use of hands” bilaterally. *See*, Employer’s Exhibit 1 at 11.

Mr. Johnson testified he tried to return to his regular shuttle bus position on or about April 9, 2006. However, after just two or three hours of work he developed such significant additional pain that he could not perform the driving duties. Hertz then placed him on light duty in an administrative position. After three weeks the employer informed him that Dr. Moore had determined that his carpal tunnel was not work related and placed him on short-term disability. Mr. Johnson was only eligible for light duty under company policy if his condition was work related. Mr. Johnson has been off work since May 1, 2006.

As previously stated, Mr. Johnson was ultimately referred by the employer to Neil O. Moore, D.O. on March 23, 2006. In a report signed by Dr. Moore on March 30, 2006, he opined that Mr. Johnson's carpal tunnel diagnosis was "causally related to his employment at Hertz" due to his "lifting/driving". *See*, Claimant's Exhibit A at 5. Dr. Moore also authored a letter on March 30, 2006 stating that Mr. Johnson's job of driving and lifting luggage can aggravate carpal tunnel symptoms and noted that in some cases carpal tunnel does progress despite appropriate splinting and rest. He went on to state that "there certainly could be a causal relationship to his employment at Hertz" and that he had no explanation as to why the symptoms would have worsened other than the natural progression of the carpal tunnel syndrome. *Id.* at 7. Not being satisfied with those conclusions, the insurance carrier apparently sought clarification from Dr. Moore. Dr. Moore then authored a letter dated April 14, 2006 stating that he could not say that Mr. Johnson's carpal tunnel disease was directly related to this employment. *See*, Employer's Exhibit 1 at 7.

## RULINGS

Regarding the issue of whether or not Mr. Johnson sustained a series of repetitive traumas arising out of and in the course of his employment, I find that Mr. Johnson's carpal tunnel syndrome is compensable work related occupational disease. Dr. Baker conclusively opined that Mr. Johnson's carpal tunnel was work related. Indeed, Dr. Baker stated that the carpal tunnel was the "direct result" of Mr. Johnson's work-related activities. Dr. Baker declined to perform surgery because of concerns that the health insurance carrier would not cover the condition since it was work related.

Even Hertz's hired doctor who saw Mr. Johnson only once originally stated that the condition was work related and sought authorization for surgery following the March 23, 2006 appointment. Of course, as noted, Dr. Moore eventually backed off from that opinion. I note that Dr. Moore is a doctor of osteopathy certified by the American Osteopathic Board of General Practice and works at an industrial clinic in St. Joseph. *See*, Employer's Exhibit 1 at 6. Thus, while he may possess sufficient expertise in assessing the impact that a work-related condition has upon a worker, he may not have the qualifications necessary to make conclusive causation opinions in diagnosing occupational diseases. Conversely, Dr. Baker is a medical doctor and is a Fellow of the American College of Surgeons who specializes in cosmetic, reconstructive, breast and hand surgery. *See*, Claimant's Exhibit A at 2. I find he possesses the expertise to make credible diagnoses in a carpal tunnel case such as this. In addition, I find Dr. Baker to be far more qualified than Dr. Moore in making such diagnoses and I adopt Dr. Baker's opinions as fact. Mr. Johnson was referred to Dr. Baker by his family doctor and, thus, is more similar to an independent neutral examiner than the "hired gun" rating doctors that both parties so often turn to.

As this case occurred after Missouri changed provisions of the law relevant to Mr. Johnson's case, further clarification of my opinion is warranted. Missouri's workers' compensation law states, in relevant part, that:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

I find that since Mr. Johnson's carpal tunnel syndrome was the "direct result" of his work, his work necessarily was "the prevailing factor" in causing his resulting medical condition. In addition, I find that Mr. Johnson's carpal tunnel syndrome was the prevailing factor in causing his disability; regardless of whether an employee misses work, if the injury is shown to have harmed the employee's earning capacity, it is enough to constitute a disability under the workers' compensation statutes. *Rupard v. Kiesendahl*, 114 S.W.3d 389 at 394 (Mo.App. W.D. 2003). In Mr. Johnson's case, his earning capacity not only was harmed, it was precluded as his carpal tunnel condition actually did cause him to miss work, as is more fully discussed below.

I find that Mr. Johnson notified Hertz of the possible work relatedness of his carpal tunnel on January 25, 2006, which was the first day that he knew that his condition resulted from his Hertz job duties. Specifically, upon being told by Dr. Baker that his condition was work related on January 25, 2006, Mr. Johnson immediately notified Andrea in the Human Resources department at Hertz of Dr. Baker's opinion.

Regarding his claim for temporary total disability ("TTD") compensation, I note that he admitted missing a significant amount of work in 2005 for his chronic COPD, which obviously is unrelated to his job duties. And, Mr. Johnson candidly admitted at his August 3, 2006 hearing that his COPD had progressed "in the last month" to the point that he would not now be able to work because of his COPD alone. He specifically stated that - at the time of the hearing - was "incapacitated" because of COPD alone. 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). Mr. Johnson's testimony at hearing leads me to conclude - by his own admission - that he was not capable of competing in the open labor market at the time of the hearing due to his COPD alone. His forthright testimony is the only evidence on this point. Previously, Dr. Joslin had taken Mr. Johnson off work on January 18, 2006 due to his carpal tunnel restrictions. Mr. Johnson did not work again until April 9, 2006 through May 1, 2006. I award Mr. Johnson TTD benefits from January 18, 2006 through April 9, 2006 and again from May 1, 2006 through the August 3, 2006 hearing date. This is a period of twenty-five (25) weeks for compensation totaling \$7,666.75.

Regarding Mr. Johnson's medical condition, I find - consistent with Dr. Baker's opinion - that the employee's repetitive work traumas caused the need for treatment he now requires and I award him such treatment at Hertz's expense. Missouri's workers' compensation law gives employers the right to select physicians for their injured employees. MO.REV.STAT. §287.140.10. But, as articulated by Supreme Court Judge Mary Rhodes Russell (then Chief Judge of the Eastern District Court of Appeals), "Employers, however, may waive this right by refusing to provide necessary medical care for employees, and thus be liable for medical expenses the employees incur on their own. *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 821-22 (Mo.App.1995)." *Schneider v. Feeder's Grain and Supply, Inc.*, 24 S.W.3d 739 (Mo.App. E.D. 2000). Mr. Johnson requested treatment from Hertz, which it refused to provide. Therefore, Hertz waived its control of medical care in this case. I direct the Employer and Insurer to provide Mr. Johnson with all medical care that providers he selects deem reasonable and necessary to cure and relieve him from the effects of his work-caused carpal tunnel syndrome. Should the treating physicians opine that Mr. Johnson is unable to work during the course of his carpal tunnel treatment because of such treatment, Mr. Johnson would be entitled to receive TTD benefits at that time.

Mr. Johnson's attorney requested a fee equal to twenty-four percent (24%) of any TTD awarded. I find that such request is fair and reasonable and order a lien attach to this award for \$1,916.69 until paid in full. I return this case to the open docket for further consideration at the request of the parties.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Carl Mueller

*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_

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