

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

Injury No. 07-123247

Employee: William Scott Johnston
Employer: Saladino Mechanical
Insurer: Cincinnati Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 30, 2014. The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued September 30, 2014, 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 28th day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: William Scott Johnston

Injury No. 07-123247

Dependents: N/A

Employer: Saladino Mechanical

Insurer: Cincinnati Insurance Company

Additional Parties: Missouri Treasurer as Custodian of the Second Injury Fund
Saint Luke's Health Systems

Hearing Date: July 25, 2014

Checked by: PAM/drl

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: December 20, 2007
5. State location where accident occurred or occupational disease was contracted:
Harrisonville, Cass 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: Johnston injured his back when pulling carpet.
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: Back, body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: \$188,369.40
16. Value necessary medical aid paid to date by employer/insurer? \$197,193.96
17. Value necessary medical aid not furnished by employer/insurer? See Findings and Rulings
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$742.72 / \$389.04
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Permanent total disability benefits beginning October 31, 2012 at \$742.72 per week for life.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: See Findings and Rulings

Said payments to begin as of the date of the 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 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: John B. Boyd

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Scott Johnston

Injury No. 07-123247

Dependents: N/A

Employer: Saladino Mechanical

Insurer: Cincinnati Insurance Company

Additional Parties: Missouri Treasurer as Custodian of the Second Injury Fund
Saint Luke's Health Systems

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FINDINGS OF FACT AND RULINGS OF LAW

On July 25, 2014, the parties appeared for final hearing. The Division had jurisdiction to hear this case pursuant to Mo. Rev. Stat. §287.110. The Employee William Scott Johnston appeared in person and with counsel, John B. Boyd. The Employer and Insurer appeared through attorney Ryan Wertz. The Second Injury Fund appeared through Assistant Attorney General Kim Fournier, and Saint Luke's Health Systems appeared through attorney Alan Gallas.

STIPULATIONS

The parties stipulated to the following:

- 1) That on or about December 20, 2007, Saladino Mechanical was an employer operating under and subject to the provisions of the Missouri workers' compensation law;
- 2) That Johnston was its employee working subject to the law in Missouri;
- 3) That Johnston notified his employer of his injury and filed his claim in the time allowed by law;
- 4) That Johnston's weekly compensation rate is \$742.72/\$389.04; and
- 5) That on or about December 20, 2007, Johnston sustained an accident arising out of and in the course of his employment which resulted in injury to his back.

ISSUES

The issue to be determined by this hearing is as follows:

- 1) Whether Johnston is permanently and totally disabled;
- 2) What is the nature and extent of Johnston's disability;

- 3) Whether the cardio/pulmonary condition suffered by Johnston is medically/causally related to his injury;
- 4) Liability of the Second Injury Fund;
- 5) Liability for past medical care, including application for direct payment;
- 6) Liability for future medical care.

FINDINGS AND RULINGS

Johnston is a 49-year-old former journeyman plumber. Johnston graduated high school and spent four years in trade school. His entire vocational history consists of plumbing jobs with the most recent as a “working foreman.”

Johnston was severely injured December 20, 2007 while trying to pull carpet. He felt a pop in his back with immediate onset of pain. He was provided medical care by his employer.

Johnston’s back injury was treated by Dr. Hess. On May 21, 2008, Dr. Hess performed a lumbar fusion at Heartland Spine and Specialty Hospital. Medical records from Heartland reflect that with the immediate post-operative period Johnston had a rapid heartbeat and fast and irregular pulse. Johnston also was noted to have complaints of headaches.

Johnston, while home recuperating, developed problems with his left testicle. Johnston was treated for left testes epididymitis which was authorized and paid for by his employer.

Johnston continued during this time to have significant complaints of pain in his back. He also complained of headaches, rapid heart rate and dizziness. Due to his cardio/pulmonary symptoms and complaints, Johnston was referred to a cardiology group Cardiovascular Consultants in August 2008. Johnston was treated with medications. In December 2008 Johnston was diagnosed with atrial fibrillation.

Johnston was also seen in consultation with Dr. Wheeler for pain management and Dr. Ciccarelli, an orthopedist, to see if additional back treatment was warranted. Dr. Ciccarelli did not offer further care.

Johnston was seen by Dr. Giocondo of Cardiovascular Consultants due to his expertise in subspecialty of cardiac arrhythmias, including atrial fibrillation. Dr. Giocondo notes that Johnston developed shortness of breath and irregular heartbeat following his back surgery. Dr. Giocondo testified that the symptoms Johnston complained of can be related to surgery. He testified that Johnston’s rhythm disturbance was caused by his back surgery due to temporal relativity. Because Johnston still had significant cardiac symptoms despite medications, Dr. Giocondo performed surgical ablation. This surgery damages heart tissue with heat to assist

with improvement of symptoms of arrhythmias. Unfortunately, Johnston had severe and significant complications from the ablation surgery including a periprocedural stroke and stenosis of the veins. Dr. Giocondo recommended Johnston be sent for further care to Mayo Clinic.

Treatment for Johnston up to this point had been under the direction of the workers' compensation carrier. Nancy Rafferty, the nurse case manager assigned to Johnston coordinated his care on the insurance carrier's behalf. Once the Mayo Clinic recommendation was made, the insurance carrier declined further coverage. They also requested a report from "Best Doctor's" to assess whether Johnston's medical condition was related to his back injury.

Johnston did obtain the recommended treatment on his own. Dr. Brian Powell surgically corrected Johnston's complication from the ablation procedure with the placement of stents. Johnston also treated with a neurologist, Dr. Bettinger, for symptoms associated with the stroke. Dr. Brian Powell, electrophysiologist or "heart rhythm specialist," treated Johnston while at Mayo Clinic. Dr. Powell explained that atrial fibrillation is an irregular rhythm in the upper chambers of the heart which causes rapid heartbeats triggering symptoms of shortness of breath and rapid heartbeat sensations. Dr. Powell testified that undergoing surgery is a common trigger for atrial fibrillation. Dr. Powell testified that Johnston's immediate postoperative medical records contain evidence of abnormal heart rhythm, specifically a heart rate of 180+ with irregular pulse. These entries are markers of an arrhythmia and atrial fibrillation which Dr. Powell testified occurred with Johnston. Dr. Powell testified that even without rhythm strips commonly used to diagnose atrial fibrillation, he believed that Johnston suffered postoperative atrial fibrillation.

Johnston has numerous symptoms and complaints associated with his back and cardio/pulmonary conditions. The stroke affected his vision restricting his right peripheral vision. He has memory issues associated, including the ability to remember words. Johnston is still under Dr. Giocondo's care for medications. He continues to have fatigue, dizziness, and shortness of breath. Johnston also has significant complaints regarding his back. Johnston takes prescription medications for pain. He has difficulty sleeping. He is unable to crawl, climb, kneel, squat, or bend. He is limited in his ability to sit, stand, and walk.

Johnston had several injuries which predate his December 20, 2007, injury. Some of these injuries included a left ankle fracture with surgery and internal fixation; left thumb surgery, facial injury with internal fixation and prior back injuries. Johnston testified that he had periodic problems with all of the prior injuries. He would occasionally delegate tasks or ask for assistance from coworkers due to his prior injuries. Johnston denies prior cardiovascular problems, high blood pressure, rapid pulse, or atrial fibrillation.

Dr. Koprivica evaluated Johnston and opined that Johnston was permanently and totally disabled. Dr. Koprivica's tests find Johnston suffered from failed back surgery. Dr. Koprivica believes Johnston permanently and totally disabled from his failed back surgery alone and in isolation without consideration of the cardio/pulmonary issues. Dr. Koprivica imposed significant physical restrictions, which include the ability to bend, lift, squat, crawl, kneel, or climb. He restricted Johnston's ability to sit, stand, walk, and change positions as needed.

Dr. Powell notes that Johnston had no prior history of high blood pressure, congestive heart failure, diabetes, or in an age group commonly associated with atrial fibrillation. Dr. Powell notes obesity alcoholism, emotional stress and trauma can be triggers of atrial fibrillation. While not common, Dr. Powell does believe that the very abnormal heart rate and rapid pulse in the postoperative notes indicate atrial fibrillation in Johnston. Once Johnston sustained the postoperative atrial fibrillation, subsequent atrial fibrillation was a natural consequence.

Dr. Michael Farrar, a cardiologist with expertise in atrial fibrillation, testified that he examined Johnston's medical records and could find no causal relationship between the atrial fibrillation and Johnston's low back surgery. He testified that he could not identify the cause of Johnston's atrial fibrillation, but it was likely due to obesity. Dr. Farrar opined that Johnston likely suffered from a lone or idiopathic atrial fibrillation that was not caused by the back surgery.

Dr. Bailey, an orthopedic surgeon, evaluated Johnston for his significant ongoing complaints. Dr. Bailey does describe Johnston's ongoing complaints regarding pain, low sitting tolerance, and muscle spasm. Dr. Bailey believes Johnston capable of returning to work in a medium work classification. He does not believe that Johnston's back fusion failed, but could not definitively state that without a CT scan which was not performed. Dr. Bailey assessed Johnston's permanent partial disability at 10 percent body as a whole.

Nancy Rafferty, occupational therapist and nurse case manager assigned to Johnston, testified live. Rafferty was responsible for coordinating medical care, acting as a liaison with the insurance company, and authorizing medical treatment for Johnston.

Rafferty coordinated and authorized Johnston's care and treatment with Dr. Hess. She was aware of Johnston's cardio issues while in Heartland, but she did not remember Dr. Hess being concerned or that it was related to the back surgery.

Rafferty coordinated and authorized the care and treatment as it related to Johnston's infected testicle. It was through these early July appointments that ultimately lead to a referral to a cardiologist. Rafferty coordinated and provided authorization to St. Luke's Hospital and

Dr. Giocondo for Johnston. Once Johnston was being referred to the Mayo Clinic, the insurance company obtained a "Best Doctors" report regarding Johnston's condition. The insurance company then terminated the relationship between Rafferty and Johnston. Rafferty specifically acknowledged that the care and treatment through St. Luke's Hospital through November 2009 was authorized.

Sheila Johnston, Johnston's wife, testified that her husband had no history of cardiac problems. She said prior to the last injury Johnston would tend cattle, do heavy farm work, hike and fish and was very active. Since the injury, they had to sell the farm, and Johnston performs limited household tasks. She has to remind Johnston to take his daily medications.

Medical Causation

The primary dispute in this claim is whether the cardiac/pulmonary issues Johnston sustained was medically caused by Johnston's compensable back injury. This issue is complex and can only be resolved by demonstrating medical evidence of the relationship between the condition complained of and the asserted cause. Bond v. Site Line Surveying, 322 S.W.3d 165, 170 (Mo. App. W.D. 2010).

Once the insurance company received the "Best Doctors" report dated December 4, 2009, all care and treatment for Johnston's cardio/pulmonary care was terminated. This termination was based on the report conclusion that work was not the prevailing factor in causing the atrial fibrillation. The report in part bases the conclusion on evidence of pre-existing paroxysmal atrial fibrillation via Holter monitoring. The report notes it is unlikely the surgery intensified or worsened his pre-existing condition. The fundamental conclusion of the report is based on Johnston having a Holter monitor in 2006 demonstrating an arrhythmia. Unfortunately, the medical records examined and opined on were the wrong person. In fact, Johnston never saw a cardiologist, wore a Holter monitor, or complained of cardio/pulmonary symptoms until after the back surgery performed by Dr. Hess.

Both Drs. Powell and Giocondo attribute Johnston's atrial fibrillation and subsequent complications to the back surgery. Both doctors testified that the medical records from the surgery noting extremely high heart beat and rapid pulse are markers of an atrial fibrillation. Johnston's specific complaints of shortness of breath, rapid heartbeat and fainting in the time following the surgery further corroborate the diagnosis. These doctors are extremely well-qualified and the testimony supporting the connection between Johnston's back surgery and incidence of atrial fibrillation is highly persuasive.

The proximity of Johnston's complaints to the surgery, lack of any prior cardio/pulmonary problems which predate the back surgery, and the credible testimony of

Johnston regarding his symptoms further support the correlation between the back fusion surgery performed by Dr. Hess and the subsequent diagnosis of atrial fibrillation with subsequent significant complications.

Based on the medical records and reports, persuasive testimony of Dr. Powell and Dr. Giocondo, I find that Johnston's cardio/pulmonary condition specifically atrial fibrillation with subsequent complications associated with its treatment are medically causally related to his December 20, 2007, compensable injury.

Application for Direct Pay

St. Luke's Hospital filed a direct pay medical fee dispute that was presented at the hearing. Health Care Provider exhibit list contains the bills collection notices, medical records, and account records for Medical Fee dispute 07-01378. Nancy Rafferty, nurse case manager for Cincinnati Insurance Company, testified that all services provided in this particular application for direct pay were authorized by the employer. No contrary testimony was offered. Saladino Mechanical with Cincinnati Insurance are directed to pay \$122,832.50 as reflected on the application for direct pay filed September 29, 2011.

Past Medical Expenses

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMO 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D.1995).

Nurse Case Manager Rafferty was already in the process of obtaining necessary arrangements to transfer Johnston's care and treatment to the Mayo Clinic. The employer/insurer specifically denied this case which Johnston subsequently obtained on his own. I, therefore, find Johnston entitled to past medical expenses including, but not limited to, those incurred at the

Mayo Clinic and consistent with the medical bill summary pages 1590 to 1755 as contained in Dr. Koprivica's deposition.

Future Medical Care

Pursuant to Section 287.140.1, an employer is required to provide care 'as may be reasonably required to cure and relieve from the effects of the injury.'" This includes allowance for the cost of future medical treatment. Pennewell v. Hannibal Regional Hospital, 390 S.W.3D 919, 926 (Mo.App. E.D. 2013) citing Poole v. City of St. Louis, 328 S.W.3d 277, 290-91 (Mo.App. E.D.2010). An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related injury.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App. 2001). The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App. 2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care "flow[s] from the accident." Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App. 2001) (quoting Landers v. Chrysler Corp. 963, S.W.2d 275, 283 (Mo.App. 1997).

The evidence clearly demonstrates that Johnston will need ongoing medical care. Johnston is still under active care of Dr. Giocondo. Johnston continues to take numerous prescription medications. The employer/insurer is directed to provide future medical care as necessary, including care related to Johnston's cardio/pulmonary condition.

Permanent Total Disability

Johnston claims he is permanently and totally disabled as a result of his December 20, 2007, injury.

Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in his present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418

(Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d570 (Mo. App. W.D. 570); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996).

There is substantial evidence to support Johnston's claim of permanent total disability. Johnston has numerous and significant complaints related to his back injury and cardio/pulmonary condition. Dr. Koprivica found Johnston to be permanently and totally disabled as a result of the back injury alone without consideration of his cardio/pulmonary condition. He places numerous physical restrictions which preclude Johnston's return to work.

Terry Cordray, vocational expert, testified that when considering Johnston's vocational history, permanent restrictions, and current physical presentation, he is realistically unemployable in the open labor market. Cordray believes Johnston to be permanently and totally disabled .

Based on substantial and persuasive evidence, including the testimony of Dr. Koprivica, Terry Cordray, and the Claimant, I find Johnston to be permanently and totally disabled. I further find Johnston to be so disabled as a result of the injury of December 20, 2007, alone and in isolation. I make this finding based on the testimony of Johnston, his wife, expert testimony of Dr. Koprivica and vocational expert Terry Cordray.

The parties stipulated at the hearing that temporary total disability benefits were paid commencing December 21, 2007 through October 30, 2012. Accordingly, the employer/insurer shall commence permanent total disability benefits at the rate of \$742.72 per week beginning October 31, 2012 and continue as long as Johnston remains so disabled.

Second Injury Fund

Having found Johnston permanently and totally disabled as a result of his December 20, 2007, injury alone and in isolation, the Second Injury Fund has no liability in this claim.

The compensation awarded to Johnston shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of John B. Boyd for necessary legal services.

Made by: _____
Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation