

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

Injury No.: 07-108016

Employee: Robert Lemmon
Employer: Copp of St. Louis
Insurer: Regent Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 October 27, 2008.

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 Margaret D. Landolt, issued October 27, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of February 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Robert Lemmon

Injury No.: 07-108016

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Copp of St. Louis

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (Open)

Insurer: Regent Insurance Company

Hearing Date: September 2, 2008

Checked by: MDL

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: October 24, 2007
5. State location where accident occurred or occupational disease contracted: St. Louis, 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
- 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 happened or occupational disease contracted:
Employee used his upper extremities in a repetitive fashion
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: bilateral upper extremities
14. Compensation paid to-date for temporary disability: 0
15. Value necessary medical aid paid to date by employer/insurer? 0
16. Value necessary medical aid not furnished by employer/insurer? Unknown

Employee: Robert Lemmon

17. Employee's average weekly wages: \$615.17
18. Weekly compensation rate: \$410.11/\$389.04

19. Method wages computation: Stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable: 0
Total: 0

Employer shall provide future medical treatment pursuant to Award

This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Lemmon

Injury No.: 07-108016

Dependents: N/A

Before the
**Division of Workers’
Compensation**

Employer: Copp of St. Louis

Department of Labor and Industrial

Additional Party: Second Injury Fund (Open)

Relations of Missouri

Jefferson City, Missouri

Insurer: Regent Insurance Company

Checked by: MDL

PRELIMINARIES

A hearing was held on September 2, 2008 at the Division of Workers’ Compensation in the City of St. Louis, Missouri. Robert Lemmon (“Claimant”) was represented by Mr. Thomas Kendrick. Copp of St. Louis (“Employer”) and its Insurer, Regent Insurance Company, were represented by Mr. Thomas Kuergeleis. Although the Second Injury Fund is a party to this case, due to the temporary nature of the hearing, it did not participate at the hearing. Mr. Kendrick did not request a fee.

The parties stipulated that on or about October 24, 2007, Claimant was an employee of Employer, venue is proper in the City of St. Louis, Employer received proper notice of the injury, and the claim was timely filed. The parties further stipulated to an average weekly wage of \$615.17, resulting in rates of compensation of \$410.11 for Temporary Total Disability (“TTD”) benefits, and \$389.04 for Permanent Partial Disability (“PPD”) benefits.

The issues for determination by hearing are: Whether Claimant sustained an occupational disease arising out of and in

the course of employment on or about October 24, 2007; medical causation; liability of Employer to provide medical treatment; and liability of Employer for future TTD benefits.

SUMMARY OF EVIDENCE

Claimant has been employed by Employer as a dock hand and working dock supervisor for approximately five years. He works eight hours a day, 40 hours per week. Claimant is 5 feet 5 inches and weighs 234 pounds. Before working for Employer, Claimant had no health problems with respect to his upper extremities, and no history of diabetes, thyroid or arthritic condition. Other than this claim, Claimant never made a claim for injuries to his upper extremities. Claimant never had any hobbies which involve using his upper extremities in a repetitive fashion.

Claimant's job duties now are the same as they were in October 2007. Claimant's job duties as dock hand and working dock supervisor involve loading and unloading freight by hand, and with the use of a forklift truck and yard dog, which is a small tractor. Claimant works the day shift from 4:00 A.M. to noon. Claimant does not take breaks, and takes approximately 15 minutes for lunch. The job is fast paced, and he continuously uses his upper extremities in a repetitive fashion throughout his shift.

Claimant operates a forklift up to 50 to 60% of his day. When Claimant arrives at work, he loads or unloads freight from vehicles or containers. The freight varies in weight from under 50 pounds up to 100 pounds. The freight arrives throughout the day in 53 foot trailers. After unloading and separating freight onto pallets, Claimant cuts shrink wrap to wrap the pallets, and stacks them for later pick up by a forklift. He then turns the freight around until it is fully wrapped with the shrink wrap.

After unloading the freight by hand, Claimant operates a forklift or yard dog to unload the freight from trailers and other vehicles. Claimant drives the forklift by steering with his left hand and operating the controls with his right hand. The steering ball, which is operated by his left hand, vibrates continuously. His right hand operates levers that cause the forklift to move from side to side or up and down. Claimant uses both hands to operate the forklift, and it causes vibration in both hands. The vibration of the forklift makes his hands and elbows hurt, and his hands go numb. The controls on the yard dog also cause a vibration in Claimant's hands, but not as pronounced as the forklift.

Claimant sometimes uses a bolt cutter to cut open the seals on the containers. There are usually two seals per container, and it takes a few times cutting the bolt to break the seal.

Approximately a year and a half before October 2007, Claimant began having problems with his hands and elbows. In the beginning, he thought his hands were going to sleep. His symptoms became progressively worse. In approximately July 2007, his hands were going numb, and his elbows were painful. On September 20, 2007, Claimant saw Dr. Ginther, his primary care physician, for a check up. At that time he mentioned his upper extremity symptoms, and Dr. Ginther ordered a nerve conduction study which revealed bilateral carpal tunnel syndrome and left lateral epicondylitis.

As soon as he learned the result of the testing he told his supervisor, and Employer referred Claimant to Concentra, where, after hearing Claimant's complaints, physicians diagnosed carpal tunnel syndrome and lateral epicondylitis, and returned him to work. Claimant was then referred to Dr. David Brown on January 29, 2008. Dr. Brown obtained a detailed description of Claimant's job duties. During the examination, Dr. Brown noted calluses on Claimant's hands. After an examination, Dr. Brown diagnosed bilateral carpal tunnel syndrome, for which he recommended surgery. He also diagnosed bilateral lateral epicondylitis, worse on the left, for which he recommended conservative treatment. Dr. Brown considered Claimant's work a significant factor in the development of these conditions.

Following Dr. Brown's Independent Medical Examination, Employer provided Dr. Brown with a videotape of Claimant at work, and a Physical Demands Analysis, a report which classifies Claimant's job in the medium demand level. Dr. Brown stated that based upon what he saw on the videotape, there appeared to be little exposure to risk factors for carpal tunnel syndrome. Dr. Brown stated the work activities as depicted in the videotape, and as described in the Physical Demands Analysis, potentially could be a minor contributing factor for carpal tunnel syndrome. Dr. Brown indicated Claimant had risk factors of increased body mass index and the fact that he is in his mid forties.

Dr. Brown testified on behalf of Employer. Dr. Brown testified if he were to base his opinion solely on the videotape provided, and the physical demands analysis, and disregard the information he obtained from Claimant regarding his job duties, he does not think Claimant's work would be a substantial cause of Claimant's conditions. Dr. Brown testified if he were to consider Claimant's job activities as they were described to him by Claimant, his job activities were a cause or a substantial factor in the

diagnosis of bilateral carpal tunnel syndrome and bilateral lateral epicondylitis. He testified Claimant described a much more hand and arm intensive job than what he saw on the videotape. Dr. Brown testified he was presented two job descriptions, and his opinion on whether Claimant's work caused his condition, is different depending upon which job description he uses.

Claimant testified the videotape was made at approximately 8:30 A.M., when the bulk of the freight had already been unloaded. In addition, the dock was wet, so they were unable to operate at their ordinary speed. The videotape does not accurately depict Claimant's job duties. The videotape does not reflect Claimant's normal work speed. In addition, Claimant testified the Physical Demands Analysis report is not accurate. Claimant sometimes has to lift 100 pounds by himself, and he does not operate the forklift 75% of the day.

Dr. Schlafly testified on behalf of Claimant. Claimant saw Dr. Schlafly on May 7, 2008. Dr. Schlafly secured a history from Claimant, conducted an examination, and reviewed the medical records, videotape, and Physical Demands Analysis. Dr. Schlafly diagnosed bilateral carpal tunnel syndrome and recommended surgery. Dr. Schlafly recommended Claimant obtain a further evaluation to determine how to treat his epicondylitis. Dr. Schlafly testified Claimant's work at Employer was the prevailing factor in the cause of his bilateral upper extremity pain and associated symptoms.

Claimant currently has complaints of pain and numbness in his upper extremities, and seeks additional medical treatment.

Claimant was a credible witness.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant sustained an occupational disease arising out of and in the course of employment. There is no dispute Claimant suffers from carpal tunnel syndrome, and is in need of surgery. There is also no question Claimant suffers from bilateral lateral epicondylitis, and is in need of treatment. The only dispute in this case is whether Claimant's work activities are the cause of his medical condition.

Two equally qualified medical experts weighed in on the matter. Dr. Schlafly testified Claimant's work is the cause of his condition. Dr. Brown, however, gave alternate opinions on medical causation. His opinion varies depending upon whether he believes Claimant's description of his job activities, or he believes the videotape and Physical Demands Analysis provided by Employer.

I am persuaded by the opinion of Dr. Schlafly. I find Claimant testified credibly with regard to his work duties. Based upon Claimant's credible description of his job activities, the videotape does not accurately depict Claimant's actual job duties. The evidence was uncontroverted that the videotape was obtained at 8:30 A.M., after the bulk of the freight that had to be unloaded by hand had been completed. Furthermore, it had rained that day, and the dock was wet, which slowed the movement of the forklift. Claimant also disputed the Physical Demands Analysis. The Physical Demands Analysis did not reflect the fact that Claimant had to lift up to 100 pounds by himself. Dr. Brown testified if he were to consider Claimant's job description as described by Claimant, he would consider Claimant's work to be the cause of his medical condition.

CONCLUSION

Claimant sustained an occupational disease arising out of and in the course of employment. Claimant is entitled to medical treatment to cure and relieve him from the effects of his injury. Employer shall provide Claimant with medical treatment for his bilateral carpal tunnel syndrome and bilateral lateral epicondylitis. Such treatment shall include surgery, and any other conservative measure as directed by a qualified physician. Employer shall also provide temporary total disability benefits for time Claimant is unable to work as a result of his treatment.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation