

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

Injury No.: 01-160865

Employee: Raymond Nelson
Employer: ABB Power T & D Company
Insurer: Self-Insured
c/o Pacific Employers Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: November 30, 2001
Place and County of Accident: ABB, Jefferson City, Cole County, Missouri

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 April 4, 2005. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued April 4, 2005, 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 27th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Raymond Nelson

Injury No. 01-160865

Dependents:

Employer: ABB Power T and D

Additional Party: Second Injury Fund

Insurer: Self-insured/Pacific Employers Ins. Co.

Hearing Date: January 27, 2005

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: HDF/cs

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?
4. Date of accident or onset of occupational disease: November 30, 2001.
5. State location where accident occurred or occupational disease was contracted: ABB, Jefferson City, MO.
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:
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: Right arm/shoulder.
14. Nature and extent of any permanent disability: 50% ppd of the right shoulder.
15. Compensation paid to-date for temporary disability: \$2,930.32.
16. Value necessary medical aid paid to date by employer/insurer?
17. Value necessary medical aid not furnished by employer/insurer? \$30,057.65
18. Employee's average weekly wages:
19. Weekly compensation rate: \$445.92 ttd and ptd/\$329.42 ppd.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

\$30,057.65

Mileage: \$ 678.96
27.4 weeks of temporary total disability (or temporary partial disability) through 5/5/03 \$12,294.65
116 weeks of permanent partial disability from Employer 38,212.72

22. Second Injury Fund liability: Yes

weeks of permanent partial disability from Second Injury Fund

Permanent total disability benefits from Second Injury Fund:
payable by SIF for indet. weeks, and including 5/6/03, through 8/20/05 – 116 wks = \$13,514.00.
Thereafter, Second Injury Fund owes \$445.92 per week for claimant's lifetime.
and, thereafter, for Claimant's lifetime

TOTAL:

23. Future requirements awarded:

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, except medical, past and future, hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

R. L. Veit.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Raymond Nelson Injury No: 01-160865

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: ABB Power T and D

Additional Party Second Injury Fund

Insurer: Self-insured/Pacific Employers Ins. Co.

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on January 27, 2005. Memoranda were due by March 28, 2005.

The parties stipulated that on or about the 30th day of November, 2001, the claimant was in the

employment of ABB Power T and D; the claimant sustained an injury by accident; the accident arose out of and in the course of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was self-insured and had additional insurance provided by Pacific Employers Insurance Company; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; the rate of compensation on the date of accident was \$445.92 per week for permanent total disability and temporary total disability benefits, \$329.42 per week for permanent partial disability benefits; temporary disability benefits have been paid to the claimant to date in the amount of \$2,930.32, those payments representing payments made through July 15, 2002, six and four-sevenths weeks; medical aid has been provided in the amount of \$16,313.78.

The issues to be resolved by hearing include 1) the liability of the employer/insurer for an occupational disease affecting the claimant's right shoulder, 2) the liability of the employer/insurer for past temporary total disability benefits from October 22, 2002, through May 5, 2003, a period of 27 and four-sevenths weeks, 3) the liability of the employer/insurer for past medical expenses related to the occupational disease claim, 4) the liability of the employer/insurer for unpaid mileage for 968 miles traveled in conjunction with the occupational disease claim, 5) the nature and extent of permanent disability, 6) the liability of the Second Injury Fund, 7) the liability of the employer/insurer for future medical treatment and 8) the liability of the employer/insurer for attorney's fees.

FINDINGS OF FACT

The claimant, Raymond Nelson, began his employment with ABB Power T and D Company (ABB) in 1978. Mr. Nelson completed high school. Mr. Nelson's work history with ABB includes working on several different "lines," putting machinery together. Mr. Nelson's work involved using his hands and arms to operate air guns and air wrenches and also involved lifting heavy baskets weighing approximately 100 pounds.

Mr. Nelson sustained a right knee injury on October 5 of 1999 (See award in Injury No. 99-167059 which is incorporated herein.)

On November 30, 2001, Mr. Nelson was working on the three-phase internal line wiring transformers when a torque gun jerked injuring his right shoulder. Mr. Nelson had already experienced some right shoulder discomfort while working for ABB.

Mr. Nelson received medical treatment through ABB's workers' compensation insurance from Dr. William Quinn who performed arthroscopic surgery on his shoulder on May 30, 2002.

When Dr. Quinn recommended a replacement of the right shoulder, Mr. Nelson was sent to Dr. Haupt for a second opinion. Thereafter, workers' compensation benefits were terminated.

On October 23, 2002, Dr. Quinn performed a right shoulder replacement on Mr. Nelson. This surgery was paid for through Mr. Nelson's health insurance provided by ABB. The surgery was performed at the University of Missouri Health Care Systems. The resulting charge was \$24,570.99. Mr. Nelson stated that he paid for physical therapy following his shoulder replacement in the amount of \$690.00; however, records reflect a total bill in the amount of \$661.26.

Mr. Nelson testified to the 1968 miles traveled for his additional medical treatment with Dr. Quinn, stating that he made 12 trips and each trip was 164 miles round-trip.

Currently, Mr. Nelson has limitations in lifting his right arm to the side or the front. Approximately 70 degrees of movement from his side is the extent of Mr. Nelson's ability to lift. Mr. Nelson cannot raise his right arm sufficiently to cross the right arm to the left armpit. Mr. Nelson uses his left arm to drive his tractor. Mr. Nelson cannot hook any attachments to his tractor as the result of the limitations of his right shoulder. Mr. Nelson can no longer mend fences or sit and write or work at a computer because of his right arm injury.

Mr. Nelson is currently taking Celebrex for his right shoulder injury.

Mr. Nelson also described his limitations in kneeling and walking as the result of his 1999 right knee injury.

Wilber Swearingin, certified rehabilitation counselor, testified that he believed Mr. Nelson is permanently and totally disabled as the result of his right shoulder injury. Mr. Swearingin found Mr. Nelson's inability to reach out with his right arm as the result of the right shoulder injury to be a significant impediment to activities involving Mr. Nelson's right arm.

Dr. Glen Cooper, osteopathic physician, testified that he initially saw Mr. Nelson on April 1, 2002. although the date of onset in Dr. Cooper's records is December of 2001 or January of 2002, Dr. Cooper noted that Mr. Nelson "experienced a sharp pain" while using a torque gun. Dr. Cooper's records for Mr. Nelson's first visit on April 1, 2002, also include the statement that [Mr. Nelson] states that he has noted problems for quite some time." Dr. Cooper referred Mr. Nelson to Dr. Quinn for surgery to the right shoulder, noting that Mr. Nelson had sustained a work-related right shoulder injury. Dr. Cooper stated that the arthroscopic surgery performed by Dr. Quinn was for an impingement while the right shoulder replacement was for degenerative arthritis.

Dr. Quinn's medical records for the months of May through July of 2002 reflect degenerative arthritis as the cause of his right shoulder pain.

Dr. William Quinn, orthopaedic surgeon, testified by deposition that with regard to Mr. Nelson's right shoulder, it was primarily the years of his work at ABB that caused his shoulder injury rather than a specific incident in November of 2001 or non-work-related deterioration associated with aging. Dr. Quinn treated the right shoulder injury as one injury, describing the arthroscopic surgery on the right shoulder as the initial attempt to provide relief to Mr. Nelson followed by the hemiarthroplasty of the shoulder when the arthroscopic procedure proved unsuccessful. Dr. Quinn referred Mr. Nelson to Maries Manor for physical therapy on his shoulder after surgery.

With regard to additional medical care, Dr. Quinn opined that Mr. Nelson would require additional care. Particularly worrisome to Dr. Quinn was Mr. Nelson's "pain along the bicipital tendon" and the possibility that the prosthesis was rubbing and irritating the tendon. Dr. Quinn mentioned having Dr. Satterlee, another orthopaedic surgeon evaluate Mr. Nelson with regard to the possibility of further treatment.

Dr. Quinn testified to the reasonableness of his \$4,825.40 bill for the right shoulder surgery.

Dr. Raymond Cohen, neurologist, testified that he examined Mr. Nelson on November 25, 2003. Dr. Cohen found Mr. Nelson's right shoulder disability to be 75 percent of the shoulder and found Mr. Nelson to be permanently totally disabled as the result of the combination of his right shoulder, right knee and left wrist injuries.

Dr. Herbert Haupt, specialist in surgical treatment of musculoskeletal injuries, testified by deposition on June 11, 2004, that he saw Mr. Nelson twice, the first time being September 24, 2002. Dr. Haupt found Mr. Nelson to have "significant and chronic degenerative arthritis, right shoulder, and in my opinion, significantly pre-existed the work related injury, only triggered by the work activities of November 30, 2001." Dr. Haupt found a 35-percent permanent partial disability of Mr. Nelson's right shoulder with 5 percent related to the November 2001 injury.

Dr. Haupt again saw Mr. Nelson on December 10, 2003. At that time, on x-rays, Dr. Haupt noted "a very high riding hemi prosthesis in the . . . proximal humerus." Dr. Haupt felt that Mr. Nelson's problems following his right shoulder replacement were the result of poor placement of the proximal humeral prosthesis.

Dr. Haupt stated that the injury of November 30, 2001, did not aggravate Mr. Nelson's arthritis, it merely made it more apparent. Dr. Haupt could not state whether, in the absence of the November 30, 2001 injury, Mr. Nelson would have required the right shoulder replacement.

Dr. Haupt stated repeatedly that he did not evaluate Mr. Nelson's work for ABB and its relationship to his right shoulder injury but that he focused only on the November 30, 2001 events as to whether they caused Mr. Nelson's right shoulder injury.

When Dr. Haupt was re-deposed on January 21, 2005, he had been provided a 10-minute video depicting work Mr. Nelson performed at ABB. Dr. Haupt testified at that time that "having reviewed the videotape, I would not consider the work activities as demonstrated on that videotape to be the type of activities that I would consider likely to result in a significant end stage degenerative arthritic condition as suffered by Mr. Nelson's right shoulder." Dr. Haupt did, however, state that it is "certainly possible" that the activities Mr. Nelson performed with his right arm sped up his degenerative disease to his shoulder.

Dr. Haupt did not find Mr. Nelson to be at maximum medical improvement. Dr. Haupt opined that a revision of the shoulder replacement surgery should be considered for Mr. Nelson.

Debbie Kilfoyle, the adjuster employed by Gallagher Bassett Services on Mr. Nelson's 2001

workers' compensation claim, testified by deposition. Ms. Kilfoyle testified that at the time Mr. Nelson's original right shoulder replacement was canceled, it was canceled in order that Dr. Haupt could examine Mr. Nelson and opine with regard to whether the need for Mr. Nelson's right shoulder replacement arose out of his work injury. Ms. Kilfoyle stated that the question posed to Dr. Haupt was whether a specific incident on November 30, 2001, caused the need for Mr. Nelson's right shoulder replacement and that, upon receiving Dr. Haupt's negative response, the right shoulder replacement was not offered to Mr. Nelson. Dr. Haupt was not asked whether Mr. Nelson's right shoulder complaints could have resulted from his repetitive work activity at ABB.

Gary Weimholt, a vocational rehabilitation consultant, testified that his evaluation of Mr. Nelson's employability was gleaned from a review of medical records rather than a personal evaluation. Mr. Weimholt found Mr. Nelson to be unemployable as the result of the right knee injury coupled with the right shoulder injury. But for Mr. Nelson's right knee and the attendant difficulties in walking, Mr. Nelson could still be employable in light work.

APPLICABLE LAW

Section 287.140.1, RSMo. provides, in part:

"In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." It is sufficient to show that the need for additional medical treatment of a compensable accident is a "reasonable probability." Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt. The fact that a claimant may have a "possible" need for future medical care does not constitute substantial evidence to support such an award. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996).

Section 287.220.1 provides as follows:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the

"Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

Section 287.560 provides as follows:

The division, any administrative law judge thereof or the commission, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. Any party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, and at his own cost to take and use depositions in like manner as in civil cases in the circuit court, except that depositions may be recorded by electronic means. The party electing to record a deposition by electronic means shall be responsible for the preparation and proper certification of the transcript and for maintaining a copy of the tape or other medium on which the deposition was recorded for the use of the division or any party upon request. Copies of the transcript shall be provided to all parties at a cost approved by the division. Subpoena shall extend to all parts of the state, and may be served as in civil actions in the circuit court, but the costs of the service shall be as in other civil actions. Each witness shall receive the fees and mileage prescribed by law in civil cases, but the same shall not be allowed as costs to the party in whose behalf the witness was summoned unless the persons before whom the hearing is had shall certify that the testimony of the witness was necessary. All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. The division or the commission may permit a claimant to prosecute a claim as a poor person as provided by law in civil cases.

AWARD

The claimant, Raymond Nelson, has sustained his burden of proof that he sustained an occupational disease as the result of his years of work involving heavy use of his right upper extremity. Dr. Quinn's testimony regarding the effect of Mr. Nelson's work at ABB on his shoulder was most convincing. Dr. Quinn did not waiver from his position that it was neither the November 30, 2001 injury or degeneration due to age that caused Mr. Nelson to need a right shoulder replacement, but that it was the heavy work at ABB that caused the extreme deterioration he found in the right shoulder. Dr. Haupt opined only that it was not the November 30, 2001 incident that caused the need for Mr. Nelson's right shoulder surgery, a position with which Dr. Quinn does not disagree.

The employer/insurer is liable for temporary total disability benefits from October 22, 2002, through May 5, 2003, the period of time during which Dr. Quinn actively treated Mr. Nelson's right shoulder. In his office note of May 5, 2003, Dr. Quinn's notation that Mr. Nelson has "plateaued" and that he is ready for "release" indicates maximum medical improvement for the right shoulder.

The employer/insurer is liable for past medical expenses for Mr. Nelson's right shoulder injury as follows:

University of Missouri Health Care	\$24,570.99
Dr. Quinn	4,825.40
Maries Manor Physical Therapy	661.26

The employer/insurer is likewise liable for mileage expenses incurred in conjunction with medical treatment, a distance of 1968 miles to be compensated at 34.5 cents per mile.

The employer/insurer is liable for permanent partial disability of 50 percent of the right

shoulder. Mr. Nelson described his limitations in his right arm, as did Dr. Quinn, Dr. Cohen and Dr. Haupt. It is the significant restrictions on right upper extremity movement described by the claimant as well as the treating and examining physicians upon which my assessment of permanent partial disability is based.

The Second Injury Fund is liable for permanent total disability benefits. Mr. Weimholt found Mr. Nelson's restrictions attributable to the right knee and the right shoulder to combine to create his permanent and total disability. Mr. Swearingin did not disagree with Mr. Weimholt's conclusion as to Mr. Nelson's lack of employability, differing only with regard to whether the right shoulder injury alone is sufficient to cause his permanent and total disability. In this case, given the modifications Mr. Nelson had to make to accommodate his right knee injury and the employments which Mr. Nelson could have pursued had he sustained only the right shoulder injury, I find Mr. Weimholt's opinion to be more persuasive than that of Mr. Swearingin.

The claimant, Raymond Nelson, has sustained his burden of proof that he is entitled to future medical treatment for his right shoulder injury. Mr. Nelson himself testified to his ongoing need for Celebrex as the result of the right shoulder injury. Dr. Quinn's medical records document Mr. Nelson's ongoing complaints in his right shoulder and Dr. Quinn and Dr. Haupt both opined positively regarding a potential revision of the right shoulder replacement.

The claimant has failed to sustain his burden of proof that he is entitled to costs and attorney's fees where there are significant questions about the assignment of liability. Dr. Quinn's medical records refer to degenerative arthritis as the cause of Mr. Nelson's need for the right shoulder replacement and it is only in Dr. Quinn's deposition that he elaborates on the degenerative arthritis as being far beyond what is to be expected in a man Mr. Nelson's age and his opinion that the extent of degeneration is attributable to Mr. Nelson's work at ABB. Moreover, the claimant's own vocational expert testified that Mr. Nelson is permanently and totally disabled as the result of the right shoulder injury alone while the employer/insurer presented the testimony of the vocational expert who opined to permanent and total disability as the result of the prior right knee injury combined with the right shoulder injury. It is the opinion of the latter vocational expert which is adopted by this administrative law judge. It cannot, thus, be contended that an unreasonable defense, sufficient to call for the imposition of costs and attorney's fees, was mounted.

Date: April 4, 2005

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secrest
Patricia "Pat" Secrest, *Director*
Division of Workers' Compensation