

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

Injury No.: 11-068998

Employee: David D. Phillips
Employer: The Doe Run Company
Insurer: American Zurich Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated May 23, 2013.

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 § 287.510 RSMo.

The award and decision of Administrative Law Judge Gary L. Robbins, issued May 23, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: David D. Phillips Injury No. 11-068998
Dependents: N/A
Employer: The Doe Run Company
Insurer: American Zurich Insurance Company
Appearances: Michael P. Corrigan, attorney for the employee.
Michelle M. Symank, attorney for the employer-insurer.
Hearing Date: March 6, 2013 Checked by: GLR/rm

SUMMARY OF FINDINGS

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? August 7, 2011.
5. State location where accident occurred or occupational disease contracted: Jefferson 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 happened or occupational disease contracted: The employee performed repetitive and hand intensive duties while working as a blast furnace operator while using tools such as a jackhammer and a steel bar for striking slag.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Bilateral arms.
14. Compensation paid-to date for temporary total disability: \$0.
15. Value necessary medical aid paid to date by employer-insurer? \$37,372.71.
16. Value necessary medical aid not furnished by employer-insurer? \$0.
17. Employee's average weekly wage: \$885.96.
18. Weekly compensation rate: \$590.64 per week for temporary and total disability. \$425.19 for permanent partial disability.
19. Method wages computation: By agreement.
20. Amount of compensation payable: See Award.

This award is only temporary and 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.

FINDINGS OF FACT AND RULINGS OF LAW

On March 6, 2013, the employee, David D. Phillips, appeared in person and with his attorney, Michael P. Corrigan, for a temporary or partial award. The employer-insurer was represented at the hearing by their attorney, Michelle M. Symank. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. The Doe Run Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by American Zurich Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of The Doe Run Company and was working under the Workers' Compensation Act.
3. The employer had notice of the employee's claim.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage was \$885.96 per week. His rate for temporary total and permanent total disability is \$590.64 per week. His rate for permanent partial disability is \$425.19 per week.
6. The employer-insurer paid \$37,372.71 in medical aid.
7. The employer-insurer paid \$0 in temporary total disability benefits.
8. The employee is not seeking any reimbursement for any previously incurred medical bills.
9. The employee is not seeking any claim for mileage.
10. The employee is not seeking any claim for temporary disability at this time.
11. The employee is not seeking permanent partial or permanent total disability benefits at this time.

ISSUES:

1. Whether the employee sustained an accident or occupational disease arising out of and in the course of his employment?
2. Whether the employee's injury was medically causally related to his accident or occupational disease?
3. Whether the employer-insurer should be required to provide additional medical care?

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Deposition of Bruce Schlafly, M.D.
- B. Report of Bruce Schlafly, M.D.
- C. Deposition of Kenneth Giffin.
- D. Medical records of James T. Doll, D.O.
- E. Medical records from Occupational Medicine Center.

Employer-Insurer's Exhibits

- 1. Deposition of Bill Miller.
- 2. Deposition of David M. Brown, M.D.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee, David D. Phillips and Nick Streisal were the only two witnesses to personally testify at trial. All other evidence was presented in the form of written records, medical records or deposition testimony.

Mr. Phillips

The employee testified that he lives in Leadwood, is thirty-eight years old and has five children. The employee began working for Doe Run in 2005. He started working in feed floor operations, then worked on the trestle. After the first three months, he worked as a blast furnace operator. He worked as a blast furnace operator up until August 7, 2011, when he was injured. Occasionally he would fill in as a crane operator but only did this a total of three weeks.

The employee described the duties as a blast furnace operator. Blast furnace operators work a twelve hour shift, working 48 hours one week and then 36 hours the next week. For two weeks the crew will work night shift and two weeks the crew will work day shift. The position requires one to use a jackhammer, punch tuyeres, burn pipe, and shovel, change pots, clean out the hood, and clean the notch. The jackhammer weighs about 20-25 lbs. It is air powered and vibrates continuously. The jackhammer is used to clean hard materials out of the furnace and specifically it is used to get lead out of the lead track, clean the slag launders, clean out the notch, clean out the hood, and to open the tuyeres. He testified that he also uses both of his arms to push a bar in to the furnace to knock crust off. He indicated that the bar is about four feet long and weighs fifteen pounds. He also indicated that he uses a bar that is about fifteen feet long to clean tap holes. He testified that jack hammering is required in a lot of his duties.

The employee explained that the blast furnace operators are supposed to have three one-hour breaks. However, if the furnace is "running bad," meaning that the lead is not flowing and slag is high, the blast furnace operators may have only two breaks, one break, or may have to forego all

breaks. When the furnace is “running good,” there are three operators who rotate work on the furnace. One person takes a break, while another is in the cool shaft and another is working on the furnace until he finishes a pot. It takes fifteen to thirty minutes on average to finish one pot, then the worker in the cool shaft and the worker on the furnace switch places. When the furnace “runs bad,” more workers are needed to keep the furnace running and so more than one worker will be working on the furnace. When this occurs, the operators must jackhammer more and burn pipe more. The employee testified that until one and half years ago, the furnace “ran bad” about 70-80% of the time. When things are “running bad,” the employee said he would use the jackhammer from three to five hours per twelve hour shift and when the furnace is “running good,” the employee would use the jackhammer about an hour over a twelve hour shift. The employee estimated that he used the jackhammer three to five hours per shift on two shifts each week and about two hours on two shifts per week.

The employee testified that prior to his work at Doe Run, he had never had pain, numbness, or tingling in his upper extremities. He testified his hands started going numb and his elbows first started hurting probably about three years ago. When he used the jackhammer his hands would tingle and go numb. He would have to shake his hands out and try to shift his hold. He did not miss work due to these symptoms prior to the injury of August 7, 2011.

The employee testified that on August 7, 2011, he picked up a heavy piece of steel and as he picked it up, felt pain from his left elbow shooting into his left hand. The next day he told his supervisor, Richard Horton. He was taken off the furnace and placed in the position of feed floor operator. He indicated that after this injury he was switched to the feed floor. Now his job involves pushing buttons to bring material to the furnace for melting.

The employee testified that he has high blood pressure and gout. When he started working for Doe Run he reported that he weighed 215-220 pounds. He now says he weighs 308 pounds and has weighed over 300 pounds for the last one and one-half years. He said his maximum weight was 354 pounds. He reported that since he stopped jack hammering his symptoms have improved slightly. He indicated that he got some care on his own, but stopped when the doctor asked him why surgery was not being done. He wants medical care for his problems.

Nick Streisal

Mr. Streisal testified at the hearing about the duties of a blast furnace operator. He has worked with the employee on the same crew for six and a half years. Mr. Streisal testified that when the furnace is “running bad,” the operators will jackhammer three to five hours per shift and that this occurs probably once or twice per week. He testified that on a good day, the operators will jackhammer about one and a half to two hours per shift. Mr. Streisal testified that when the furnace “runs bad,” they have to jackhammer more because there is more slag and there is less time for cooling off in the clean air booth. Mr. Streisal stated that he has a slight case of carpal tunnel syndrome and filed a workers’ compensation claim that was settled without surgery.

Kenneth Giffin

Mr. Giffin testified by deposition on November 7, 2012. He is a co-worker of the employee who also works as a furnace operator. He testified that he has worked at Doe Run since November of 2005 and worked with the employee on the same crew the whole time he was there. He provided a description of the various jobs that were performed and the amount of time, the motion and the strength that was needed to perform the various jobs. Everything that is done is conditioned on whether the pots are “running good” or “running bad”. He indicated that normally a pot would run about 20 minutes.

He testified that on average, on an average day, he uses a jackhammer for 120 minutes in his shift to clean the slag launderer and to clean the slag from the tuyeres-sometimes less, sometimes more depending on how the pots are running. He testified that a shift is generally twelve hours.

He indicated that Bill Miller is his foreman and would spend about an hour a day at the furnace. He said he was aware of the 2009 ergonomic study but was not working the day it was performed.

Bill Miller

Mr. Miller testified by deposition on November 7, 2012. He is the General Supervisor in the Process Department, which controls the blast furnace at Doe Run. He has held the position for eight years. He has worked in and around blast furnaces for 24 years.

He testified that he personally spends forty-five minutes to an hour per day in the blast furnace. He testified the blast furnace is part of the process of refining lead from concentrate. Without the process, Doe Run would not be able to have refined lead, which is what its customers purchase. The blast furnace runs around the clock. He testified his typical work shift is 7:00 to 3:30, but that it is a 24-hour-a-day job. He carries a company phone at all times.

Mr. Miller testified to a memo he prepared on January 25, 2012. He also testified regarding an ergonomic study prepared in March 2009. This is the most recent study on the blast furnace position. He testified the job has not changed much since 2009. He indicated that the study was done to see if the operator job might have been a source of creating carpal tunnel. It provided the employer with some ideas to correct problems they may have had. Mr. Miller prepared the January 25, 2012 memo to describe the number of hours Mr. Phillips used a jackhammer. He looked at the 12-hour shift, and broke down the job duties by hour. He indicated 10-15 minutes per hour for jack hammering, and 8-10 minutes for bar use. He testified only one person normally jackhammers at a time due to limited space near the furnace. Further, he explained that due to the number of workers on a crew the jack hammering duties were divided between the workers as they rotated to the furnace

Mr. Miller did not fully agree with the job description provided to ProRehab by Mr. Phillips. He agreed there would be occasional lifting of 50 pounds, but could not think of anything that would

weigh 100 pounds. He testified the job description to Dr. Doll was accurate in that they jackhammer daily, bend, reach, twist, stoop and lift. He also agreed the position is heavier than most. He did not think jack hammering five hours per day would normally occur. He testified based on his personal observation that on an average day a blast furnace operator jackhammers 10 to 15 minutes per hour.

Occupational Medicine Center

The Occupational Medicine Center initially saw the employee on August 29, 2011. The records note an accident of August 7, 2011, where the employee injured his left wrist and elbow from lifting a heavy piece of steel. The employee reported a sudden pop and pain. He was diagnosed with synovitis and tenosynovitis, prescribed oral steroid and Vicodin and was placed on light duty. As of September 7, 2011, the Clinic prescribed therapy which the employee received at ProRehab Clinic. As of September 15, 2011, the Center recommended an MRI of the left elbow. The MRI showed lateral epicondylitis of the elbow and arthritis and the employee was referred to a physiatrist.

Dr. Doll

Dr. Doll is a physiatrist who saw the employee on October 10, 2011. The employee reported numbness in both hands and left elbow pain. The employee reported an August 7, 2011 workplace injury whereby he was working as a furnace operator for Doe Run and reached down and picked up a large piece of steel which caused pain in his left elbow. He also reported numbness in his hands that has worsened since the accident; however he reported that the numbness existed prior to August 7, 2011. He also reported pain.

Dr. Doll diagnosed lateral epicondylitis of the left elbow with paresthesias in the left upper extremity. Dr. Doll treated with cortisone injections, ibuprofen, physical therapy and electrical studies of both upper extremities. The EMG studies showed bilateral carpal tunnel syndrome. As of December 5, 2011, Dr. Doll diagnosed persistent left lateral epicondylitis and bilateral carpal tunnel syndrome and recommended that the employee see an orthopedic surgeon. Dr. Doll prescribed Vicodin and recommended light duty.

Dr. Brown

Dr. Brown initially saw the employee on January 17, 2012. He is a plastic surgeon. The employee described numbness and tingling in the hands for two years and described his job duties that included the use of a jackhammer. By history the employee reported some of his job duties:

- He has worked at Doe Run since August 29, 2005.
- He works twelve hours a day, forty-eight hours a week and thirty-six the next week.
- He runs a jackhammer five hours a day. He switches hands.
- He will also do punch tuyers.

- He uses a bar to punch holes in the furnace and uses a bar to tap a cap back on. He uses both hands.
- He burns pipe. He will hold a bar and twist it back and forth. The pipe weighs five to six pounds. He will do this ten to twenty times a day.
- He changes pots of lead that weigh eight to ten pounds. He does this ten to twelve times a day.

The employee reported a two and one-half year gradual onset of pain, numbness and tingling in his hands and arms.

After examination Dr. Brown provided his opinions that:

- Running a jack hammer five hours a day would expose the employee to occupational risk factors of vibration exposure and sustained gripping would be considered a risk factor for the development of carpal tunnel syndrome.
- It would also be a risk factor for lateral epicondylitis.
- Over six years of running a jack hammer five hours a day is the likely prevailing factor in the need for treatment for carpal tunnel syndrome and lateral epicondylitis.
- The fact that the employee has increased body mass would be a non-occupational risk factor which would put him at risk for carpal tunnel syndrome. Dr. Brown reported the employee as being 5'11" tall and weighing 347 pounds.

As of January 25, 2012, the employer sent a letter to Dr. Brown which included an Ergonomic Job Analysis by Nick Zuccarello dated March 24, 2009. The employer indicated that he employee used a jackhammer 8-10 minutes per hour and removed slag with a bar 10-15 minutes and hour.

On February 13, 2012, after reviewing the information, Dr. Brown reported that:

- Based on all available information the employee's work activities at Doe Run since 2005 is the likely prevailing factor in the development of his lateral epicondylitis.
- The employee has symptoms suggestive of a diagnosis of carpal tunnel syndrome.
- A nerve conduction study revealed evidence of bilateral carpal tunnel syndrome.
- The only non occupational risk factor that the employee has for carpal tunnel syndrome is an increased body mass index. He has no medical problems that put him at risk for carpal tunnel syndrome.
- An increased body mass index is thought to increase the interstitial pressure within the carpal tunnel, which can lead to carpal tunnel syndrome.
- According to the letter from the general supervisor, an employee would only use a jackhammer and remove slag with the bar for only a few minutes per hour.
- If the job description is accurate, I do not believe using a jackhammer just a few minutes an hour or doing slag removal a few minutes an hour would be enough exposure to rise to the level of being considered a prevailing causative factor of carpal tunnel syndrome.
- If the job description is accurate, the employee's body mass index is the likely prevailing cause of his carpal tunnel syndrome.

On March 14, 2012, Dr Brown treated the employee with the third cortisone injection of the left lateral epicondyle and a brace. He recommended full duty. As of April 25, 2012, Dr. Brown recommended surgery for the employee's left lateral epicondylitis.

Dr. Brown eventually performed surgery on May 11, 2012. On September 25, 2012, Dr. Brown rated the employee as having a 4% permanent partial disability of the left elbow.

Dr. Schlafly

Dr. Schlafly saw the employee on June 8, 2012, prepared a report of the same date and testified by deposition on November 14, 2012. Dr. Schlafly reviewed the employee's deposition testimony, took a history, reviewed medical records and conducted a physical examination.

As a result of his physical examination and review of the records he opined that:

- The employee has bilateral carpal tunnel syndrome, lateral epicondylitis of the right elbow and lateral epicondylitis of the left elbow treated with surgery.
- The employee's work at Doe Run is the prevailing factor in the cause of the bilateral carpal tunnel syndrome and lateral epicondylitis of the elbows. The repetitive work performed by the employee when jack hammering and using the steel bar to strike slag is the probable cause for the bilateral carpal tunnel syndrome and the right lateral epicondylitis and in the need for treatment of these conditions.
- The work injury of August 8, 2011, is the primary cause of the left lateral epicondylitis.
- The employee needs surgery for bilateral carpal tunnel syndrome and right lateral epicondylitis.

RULINGS OF LAW:

There is no dispute that the employee's treatment for left lateral epicondylitis was related to the employee's work at Doe Run. The employer-insurer spent over \$37,000.00 providing medical treatment for the employee.

There is no dispute that the employee suffers from an occupational disease in that the employee has carpal tunnel in both upper extremities. The medical testimony of Drs. Doll, Brown and Schlafly all establish this diagnosis. However, the employer-insurer is challenging both occupational disease and medical causation as to whether the employee's duties at Doe Run are the prevailing factor in the cause of his carpal tunnel syndrome.

The employee also suffers from right lateral epicondylitis. The employer-insurer is also disputing this issue. The employee testified that he complained of the symptoms in his right elbow to his treating doctors (Drs. Doll and Brown) but that these doctors were focused on his left elbow and ignored such complaints. Dr. Schlafly examined the employee and noted tenderness at the lateral epicondyle of the right elbow. Dr. Schlafly diagnosed right lateral epicondylitis as a result of the history and examination of the employee. The credible testimony of the employee and Dr.

Schlafly establish that the employee suffers from right lateral epicondylitis in addition to carpal tunnel syndrome.

With respect to causation, the Court finds that the employee's work at Doe Run is the prevailing cause of the employee's carpal tunnel syndrome and right lateral epicondylitis. A central factual dispute in this case centers on how long the employee operated a jack hammer as part of his duties. When Dr. Brown saw the employee, the employee by history told him of his job duties. He indicated that based on the information he had, the employee's job at Doe Run was the prevailing factor in the development of carpal tunnel syndrome and right lateral epicondylitis. It was only after he received a report from Doe Run that he changed his position. That report indicated that the employee only ran the jackhammer or removed slag for a few minutes an hour. He then changed his position and indicated that the employee's body mass index was the likely prevailing cause.

The employee's credible testimony, along with the credible testimony of Ken Giffen and Nick Streisal, established the hand intensive duties performed as a blast furnace operator. These hand intensive and repetitive activities include jack hammering from one and a half to five hours during a twelve-hour shift. Obviously jack hammering may be the most frequently occurring activity, but as the evidence indicates there are other hand intensive activities that the employee performs on a repetitive basis as part of a blast furnace operator's duties.

Dr. Schlafly testified that the occupational duties performed by the employee are the type of work that causes carpal tunnel and lateral epicondylitis. He pointed out that the use of jackhammer for more than thirty minutes total per day is a risk factor for carpal tunnel syndrome. Dr. Schlafly testified that the employee's work with his hands and upper extremities in the course and scope of his employment at Doe Run is the prevailing cause for his bilateral carpal tunnel syndrome and lateral epicondylitis. While the employer-insurer argues that the employee's body mass index (a nice way for saying "fat") is the likely cause for the employee's carpal tunnel syndrome, Dr. Schlafly states the "obesity theory for causation of carpal tunnel syndrome is weak at best." Dr. Schlafly further explained there it is very little or no fat in the carpal tunnel and therefore the employee's increased body mass is not likely to cause increased pressure in the carpal tunnel.

The Court finds that the opinion testimony of Dr. Brown's with respect to causation is less credible than that of Dr. Schlafly. The Court finds that the evidence that Dr. Schlafly relied on and the testimony of the employee's co-workers provides sufficient evidence to support the employee's position that his work at Doe Run is the prevailing cause in the development of his carpal tunnel syndrome and bilateral epicondylitis. The testimony of the employee, Mr. Giffen and Mr. Streisal clearly establishes that a blast furnace operator performs many hand intensive activities, including jack hammering from one and a half to five hours per shift. Because Dr. Brown did not have a complete picture with respect to the job duties of a blast furnace operator, Dr. Brown's causation opinion with respect to the employee's carpal tunnel syndrome should be disregarded.

Dr. Brown did opine that the same work activities (gripping for jack hammering, using a pipe, lifting, changing pots of lead) that caused the left lateral epicondylitis can cause the employee to

have symptoms of right lateral epicondylitis. Dr. Brown testified that the employee could develop lateral epicondylitis in the right arm and his job duties would be the prevailing cause of the right lateral epicondylitis.

With regard to future treatment, both Dr. Brown and Dr. Schlafly recommended that the employee needs additional medical care. As the Court has found that the employee's work duties at Doe Run are the prevailing cause of the employee's bilateral carpal tunnel syndrome and right lateral epicondylitis, the employer-insurer is responsible for providing medical care that will cure and relieve the employee from the effects of these injuries.

In summary the Court finds that the employee has met his burden of proof on the issues of Accident/Occupational Disease, Medical Causation and Additional Medical Care. The Court orders that the employer-insurer provide all of the medical care that is necessary to cure and relieve the employee from the effects of his bilateral carpal tunnel syndrome and right lateral epicondylitis.

ATTORNEY'S FEE:

Michael P. Corrigan, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation