

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

Injury No. 13-034224

Employee: Ronald Pogue
Employer: Plaza Tire & Auto Service
Insurer: Hartford Fire 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 § 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 October 6, 2014.

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 Carl Strange, issued October 6, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27th day of January 2015.

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 AWARD

Employee: Ronald Pogue

Injury No. 13-034224

Dependents: N/A

Employer: Plaza Tire & Auto Service

Additional Party: Second Injury Fund (OPEN)

Insurer: Hartford Fire Insurance Company

Hearing Date: September 25, 2014

Checked by: CS/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? February 1, 2013.
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: Employee performed repetitive job activities and injured his upper extremities.

12. Did accident or occupational disease cause death? N/A
13. Parts of body injured by accident or occupational disease: Bilateral upper extremities.
14. Compensation paid-to date for temporary total disability: \$0.00.
15. Value necessary medical aid paid to date by employer-insurer? \$0.00.
16. Value necessary medical aid not furnished by employer-insurer? N/A
17. Employee's average weekly wage: \$592.84.
18. Weekly compensation rate: \$395.23.
19. Method wages computation: By agreement.
20. Amount of compensation payable: EE awarded additional medical aid (See Findings).

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.

The compensation awarded to the employee shall be subject to a lien in the amount of costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Mark Moreland

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 September 25, 2014, the employee, Ronald Pogue, appeared in person and by his attorney, Mark Moreland, for a temporary or partial award. The employer-insurer was represented at the hearing by their attorney, Ross Ball. At the time of the hearing, the parties agreed on certain undisputed facts and identified the facts that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. On or about February 1, 2013, Plaza Tire & Auto Service was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Hartford Fire Insurance Company.
2. On or about February 1, 2013, the employee was an employee of Plaza Tire & Auto Service and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage was \$592.84 and his rate for temporary total disability and permanent total disability is \$395.23.
6. The employer has furnished no medical aid to employee.
7. The employer has paid no temporary total disability benefits to employee.

ISSUES:

1. Occupational Disease
2. Medical Causation
3. Additional Medical Aid

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

1. Statement of Employee;
2. Medical Records of St. Anthony's Medical Center; and
3. Deposition of Dr. Bruce Schlafly.

Employer-Insurer's Exhibits

- A. Deposition of Dr. Craig Beyer;
- B. Invoices;
- C. Invoice list of jobs;
- D. Table of jobs;

- E. Job descriptions; and
- F. Wage statement.

APPLICABLE LAW:

- Under Section 287.067.1 RSMo., “the term ‘occupational disease’ is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.”
- Under Section 287.067.2 RSMo., “an injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”
- Under Section 287.067.3 RSMo., “an injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”
- Under Section 287.020.3 (1) RSMo., “ the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment.”
- Under Section 287.190.6 RSMo., “in determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.”
- Under Section 287.800.1 RSMo., “administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.”
- Under Section 287.800.2 RSMo., “administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.”
- Under Section 287.140.1 “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury”.

RULINGS OF LAW:***Issue 1 & Issue 2: Occupational Disease and Medical Causation***

Ronald Pogue (“Employee”) has consistently complained of numbness, tingling and pain in his hands since he reported it to Plaza Tire & Auto Service and Hartford Fire Insurance Company (“Employer-insurer”). After Employee filed a claim, Employer-insurer chose to send Employee to Dr. Craig Beyer in Glen Carbon, Illinois. Employer has the right select the treating physician in accordance with 287.140.1.

In this case, it is clear that the evaluating physician, Dr. Craig Beyer, has a bias in favor of Employer and Employer-insurer and cannot objectively evaluate Employee’s condition. This bias is clearly shown throughout all of his records and deposition. At his initial examination on September 17, 2013, Dr. Beyer relies heavily on an “important article in the Journal of Bone & Joint Surgery by Dr. Szabo” to note a lack of scientific evidence of cumulative trauma disorder/overuse syndrome. Although he noted that “an EMG and a rheumatologic workup would be reasonable scenarios for this particular patient”, he further opined that “even an EMG may detect carpal or cubital tunnel syndrome, which would be an EMG diagnosis and not necessarily correlate with a true clinical scenario”. Finally, Dr. Beyer also noted that “the patient has upper extremity symptoms of unclear etiology”. On April 17, 2014, Dr. Beyer reviewed some additional records, and reinforced his prior stance on the matter by noting “repetitive trauma as a diagnosis is not used routinely in the orthopedic literature. Specific diagnoses are required.” At the time of his deposition, Dr. Beyer testified that “cumulative trauma disorder as an entity is not validated in any literature, and furthermore in the orthopedic literature multiple studies have indicated there is no identifiable relationship between job or at work activities and development of carpal tunnel with very few exceptions in terms of a relationship between extreme activities and carpal tunnel syndrome”. When asked about an air impact gun, Dr. Beyer reiterated “as I said the current literature does not support job relationship or job risk factors in the development of carpal tunnel syndrome.” To further support his position, Dr. Beyer noted that “in fact, the most common person I see is Grandma Jones who plays cards with her girlfriends in terms of carpal tunnel syndrome”. On cross examination, Dr. Beyer noted a guitar player and a colorectal surgeon may be able to get work related carpal tunnel syndrome. Further, he noted that if some falls and breaks their wrist they can get traumatic carpal tunnel syndrome (Employer-Insurer's Exhibit A). Dr. Beyer’s reasoning leads me to clearly doubt his ability to objectively evaluate this Employee. As a result, I find the opinions of Dr. Beyer to be extremely lacking and not credible.

As an alternative, Employee has offered the opinion of Dr. Bruce Schlafly in support of his case. Dr. Schlafly examined Employee and clinically diagnosed him with bilateral carpal tunnel syndrome and bilateral cubital syndrome with no cervical radiculopathy present. Dr. Schlafly further noted that Employee “may have an additional component of mild tendonitis at the left shoulder which may be secondary to prolonged nerve compression in the left upper extremity”. Dr. Schlafly opined that Employee’s “work for months and years as an auto mechanic, with repetitive use of heavy duty tools, both manual and air-powered tools, with repetitive exposure to vibration in the hands and upper extremities, is the prevailing factor in the

cause of the bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, and in the need for additional treatment”. Additionally, Dr. Schlafly opined that Employee should come under the care of a hand surgeon for additional evaluation and treatment of his work related bilateral carpal tunnel syndrome and work related bilateral cubital tunnel syndrome which may require surgery, electrical studies, nonoperative treatment, wrist splints, elbow braces, and rest off work. After the bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome are treated, Employee’s left shoulder complaints should be reevaluated (Employee's Exhibit 3). After careful review of all the evidence, there is no credible evidence in the record to discredit the opinion and testimony of Dr. Schlafly. Therefore, I find Dr. Schlafly’s opinions to be more persuasive than any other opinion including those belonging to Dr. Beyer.

Based on the evidence, I find that Employee has satisfied his burden of proof on the issues of occupational disease and medical causation. I therefore find that Employee has sustained an occupational disease to his bilateral upper extremities arising out of and in the course of his employment and that his employment was the prevailing factor in causing the resulting medical condition, disability, and his current need for additional treatment.

Issue 3: Additional Medical Aid

Employee has requested an award for additional medical aid in accordance with Dr. Schlafly’s opinion and report. The only defenses that Employer-insurer had to deny Employee’s request for additional medical aid were based on the issues set out above. Given my findings under each of the issues above, the Employer-insurer has no other basis for denying the Employee’s request for additional medical aid. The medical evidence supports a finding that the additional treatment and possible surgery being suggested by Dr. Schlafly is both reasonable and necessary to cure and relieve Employee from the effects of his injury.

Based on these findings, Employer-Insurer is directed to furnish additional medical aid in accordance with Section 287.140 RSMo.

ATTORNEY’S FEE:

Mark Moreland, attorney at law, is allowed a fee of costs plus 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:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation