

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

Injury No.: 08-090073

Employee: Michael Todd

Employer: Alstom Power, Inc.

Insurer: Ace American Insurance Company

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, 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 section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated January 8, 2010.

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 Chief Administrative Law Judge Nelson G. Allen, issued January 8, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20<sup>th</sup> day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## TEMPORARY OR PARTIAL AWARD

Employee: **Michael Todd**

Injury No. **08-090073**

Employer: **Alstom Power, Inc.**

Insurer: **Ace American Insurance Company**

Hearing Date: **September 11, 2009**

Checked by: **NGA**

### 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: **10/6/2008**
5. State location where accident occurred or occupational disease was contracted: **Platte 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: **Employee was a boilermaker.**
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 thumb.**
14. Compensation paid to date for temporary disability: **None.**

- 15. Value necessary medical aid paid to date by employer/insurer? **\$1,363.70**
- 16. Value necessary medical aid not furnished by employer/insurer? **\$415.60**
- 17. Employee's average weekly wages: **N/A**
- 18. Weekly compensation rate: **\$772.53 / \$404.66**
- 19. Method wages computation: **By Stipulation**

**COMPENSATION PAYABLE**

20. Amount of compensation payable: <b>13 1/7 weeks TTD at \$772.53 =</b>	<b>\$10,153.25</b>
Unpaid medical expenses:	<b>415.60</b>
weeks of temporary total disability (or temporary partial disability)	
	<b>TOTAL: \$10,568.85</b>

Each of said payments to begin **October 7, 2008** and be subject to modification and review as provided by law.

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 **25%** of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: **DANIEL L. SMITH.**

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: **Michael Todd**

Injury No. **08-090073**

Employer: **Alstom Power, Inc.**

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**Prior to presenting evidence, the parties stipulated the following issues were to be determined by this hearing:**

- 1. Did the claimant refuse to take a drug test under Sec. 287.120.6(3) resulting in all benefits being forfeited?**
- 2. Liability of employer for additional medical treatment.**
- 3. Liability of employer for past medical treatment in the amount of \$416.50.**
- 4. Liability of employer for temporary total disability.**
- 5. Is the claimant barred from receiving temporary total disability benefits during the period of time he collected unemployment compensation?**

**The parties agreed that on October 6, 2008, Michael Todd was an employee of Alstom Power, Inc. The employer was operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Ace American Insurance Company.**

**It was further agreed that on October 6, 2008, the claimant sustained an injury by accident arising out of and in the course of his employment. The employer had proper notice of his injury and a timely claim for compensation has been filed.**

**The parties also agreed that the correct rate of compensation for temporary total disability is \$772.53 per week and \$404.66 per week for permanent partial disability. No compensation has been paid. Medical aid has been furnished in the amount of \$1,363.70.**

**The claimant is asking for past temporary total disability from October 11, 2008 through June 3, 2009 except for a period from January 10, 2009 through January 24, 2009. The claimant is asking for additional medical treatment and past medical expenses in the amount of \$415.60.**

**The claimant testified in person. He is 50 years old. He is a boilermaker. He works with steel at high elevations.**

**On October 6, 2008, he was working on the construction of an electric power plant. He was working a 370 foot high tower. He was at least 340 feet off the ground.**

**He had an argument with some engineers about the size of a hammer to use to drive a butt-stay pin of 18 inches by one inch into an I-beam. The engineer said to use a 16-pound sledge hammer. He said this was dangerous and wanted to use a smaller four-pound hammer.**

**The engineer won and another person was brought in to use a 16-pound hammer. The claimant was not involved in the hammering. He was standing several feet away.**

**The pin was struck by a coworker using the 16-pound hammer, the pin broke up, flew in the air, and struck the claimant's right thumb and drove it against a wall. It amputated between a quarter and a half of the distal joint of the right thumb.**

**The claimant was able to walk. He walked to the elevator with the general foreman. There they waited for medical first response team but no one ever came. The elevator was late in arriving.**

**The first response team never arrived.**

**The claimant said he was in intense pain and bleeding profusely. He said he had to urinate and went to a nearby restroom and urinated.**

**The claimant and the foreman rode the elevator to the ground. The first aid station was a long distance from the elevator. He walked by another restroom and stopped and urinated again.**

**When he arrived at the first aid station, he was given a breath test for alcohol. He passed the test. The time as of the breath test was 2:38 p.m. The injury had occurred sometime shortly after 1:00 p.m.**

**The claimant was then given a cup for a urine test. The claimant said that he tried to comply and provide a urine sample. He asked to go to a doctor but was kept there some time to provide a urine sample even though he told them he couldn't and asked for medical treatment. He said he was still bleeding, was in a lot of pain, and was in shock.**

**Mr. Todd said he drank water but was still unable to provide a urine sample. The employer finally drove him to Corporate Care, 40 minutes away, where he received medical treatment.**

**He said he arrived at Corporate Care about 3:15 or 3:30 p.m. He again drank water and after his medical treatment, gave a urine sample.**

**It was near closing time when he gave the sample. The sample was rejected and not tested because over three hours had passed since he was first asked for a urine sample.**

**Mr. Todd said he had passed a drug test when he had had been hired less than two weeks previously. He claimed that he had given a good faith effort to provide a urine sample and had always been willing to provide a blood test.**

**The next day his employment was terminated because of his failure to provide a urine sample. No compensation has been provided and his right to medical treatment was terminated because of his failure to provide a urine sample.**

**Sec. 287.120.6(3) RSMo provides:**

**“... An employee’s refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by Section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer’s policy clearly authorized post-injury testing.”**

**In this case, there was no reason to suspect the claimant had been injured because of his use of alcohol or a nonprescribed controlled substance by the claimant. He had just had a drug test a short time previously and furthermore, the injury was in no way caused by his conduct. The claimant was just unlucky and was in the wrong spot at the wrong time.**

**The employer did have a policy clearly authorizing post injury testing. The claimant testified that he had attempted to comply and provide a urine sample. He said he was dehydrated because of loss of blood. He had just urinated twice. He was in severe pain and was suffering from shock. He claims he did give a urine sample and had complied with the employer.**

**Chris Jimerson testified for the employer. He is employed as the Field Safety Supervisor for the employer. He gave the claimant a ride from the jobsite to and from Corporate Care.**

**He said the claimant had told him he did not provide the urine sample earlier because the claimant had smoked marijuana the previous weekend and was afraid he would test positive. The claimant denied this conversation.**

**There was no medical evidence that the claimant was refusing anything. There was no medical evidence that the claimant, in his medical condition, could have provided a urine sample.**

**The claimant should have been seen by a doctor as soon as possible. This should have been the first priority; not to determine if the claimant could fail a drug screening test and allow the employer to escape liability for medical treatment and compensation.**

**The claimant was correct in demanding medical treatment. Shock is a dangerous medical condition. Even if there was a small possibility that an injured employee might be subject to shock, prompt medical treatment should have been the only option. Human life and health is the greatest priority. Nothing else should be considered until this is addressed.**

**It is the burden of the employer to prove the claimant refused to take a drug test under Section 287.120.6(3) RSMo. His rights to benefits under the Missouri Workers' Compensation Act are not forfeited. The employer has not proven the employee refused to give a urine sample.**

**There was medical evidence and it was obvious from observation, that the claimant required medical treatment from a hand specialist. The employer has refused medical treatment and abandoned its right to direct medical treatment. The employer is directed to provide the claimant with such medical treatment as may cure and relieve the condition caused by his injury of October 6, 2008. This medical treatment is to be provided by a hand specialist located in an area near the claimant's residence.**

**The claimant has received medical treatment at his own expense. He has paid medical expenses in the amount of \$415.60. I order and direct the employer to pay to the claimant the sum of \$415.60 to pay for his past medical expenses.**

**The claimant did not work until his brother got him a job in California as a boilermaker working on the ground. He said he really could not perform this job but held it from June 10, 2009 through June 24, 2009. This gave him time to file for unemployment in California. He drew unemployment until June 3, 2009, when he returned to work.**

**Sec. 287.170.3 provides "an employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation."**

**Since the claimant applied for compensation from January 25, 2009 through June 3, 2009 and had, in fact, been employed from January 10, 2009 through January 24, 2009, the claimant is barred from receiving temporary total disability from January 10, 2009 through June 3, 2009.**

**I find and believe the claimant was temporarily totally disabled from October 7, 2008 through January 9, 2009. I order and direct the employer to pay to the claimant the sum of \$772.53 per week for 13 1/7 weeks for a total of \$10,153.25.**

**Daniel L. Smith is hereby assigned a lien in the amount of 25% of this award for necessary legal services provided claimant.**

Date: January 8, 2010

Made by: /s/ Nelson G. Allen  
Nelson G. Allen,  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

This Award is dated and attested to this 8th day of January, 2010.

/s/ Naomi Pearson

**Naomi Pearson**

Division of Workers' Compensation