

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

Injury No.: 03-147616

Employee: David Trimmer

Employer: Johnson Controls, Inc.

Insurer: Authorized Self-Insurer

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated February 17, 2011.

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 February 17, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: **DAVID TRIMMER** Injury No. **03-147616**

Employer: **JOHNSON CONTROLS, INC.**

Insurer: **AUTHORIZED SELF-INSURER**

Hearing Date: **DECEMBER 20, 2010** 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: **SEPTEMBER 9, 2003**
5. State location where accident occurred or occupational disease was contracted:
BUCHANAN 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 HAD TO LIFT HEAVY BATTERIES FROM A PALLET AND TRANSFER THEM TO AN ASSEMBLY LINE.**
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: **LEFT SHOULDER**
14. Compensation paid to-date for temporary disability: **NONE**

- 15. Value necessary medical aid paid to date by employer/insurer? **\$282.55**
- 16. Value necessary medical aid not furnished by employer/insurer? **\$347.05**
- 17. Employee's average weekly wages:
- 18. Weekly compensation rate: **\$662.55 / \$347.05**
- 19. Method wages computation: **By Stipulation**

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$3,307.95
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Weeks of temporary total disability (or temporary partial disability)

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TOTAL: \$3,307.95

Each of said payments to begin **SEPTEMBER 10, 2003** and to be payable 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.

The Employer is ordered and directed to provide the claimant with such medical treatment, including surgery, that is reasonable and necessary to cure and relieve the conditions caused by his occupational disease to his left shoulder.

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: **DAVID W. WHIPPLE**

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **DAVID TRIMMER** Injury No. **03-147616**
Employer: **JOHNSON CONTROLS, INC.**
Insurer: **AUTHORIZED SELF-INSURER**
Hearing Date: **DECEMBER 20, 2010** Checked by: **NGA**

ISSUES

Prior to presenting evidence, the parties stipulated the issues to be determined by this hearing are:

1. Whether the claimant sustained an injury by occupational disease arising out of and in the course of employment;
2. Whether the condition the claimant is complaining of was medically causally related to his alleged occupational disease;
3. Was the claimant's claim barred by res judicata or collateral estoppel as a result of the decision in Injury No. 03-142166;
4. What is the nature and extent of claimant's disability;
5. Liability of the employer for past medical aid;
6. Liability of the employer for present and future medical treatment;

The parties agreed that on September 9, 2003, David Trimmer was an employee of Johnson Controls Battery Division. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law and was fully self-insured.

The parties further agreed that the Claimant had filed a timely Claim for Compensation. The correct rate of compensation is \$662.55 per week for temporary total disability and \$347.05 for permanent partial disability. No compensation has been paid. Medical aid has been provided in the amount of \$282.55. The claimant is asking for past medical aid in the amount of \$3,307.95.

Exhibits

Claimant offered the following exhibits which were admitted in evidence without objection, provided the depositions were admitted subject to objections contained in the depositions:

- A. OHS Compare
- B. Heartland Health – Dr. Bronson
- C. Dr. Bruce Smith Medical
- D. Health South Medical
- E. Heartland Regional Medical Center Medical
- F. Dr. Egea Rating
- G. Employee’s Statement of Injury
- H. Employer’s Investigation Report
- I. Medical Bill Summary
- J. Final Award Issued 03-142166

Employer/Insurer offered the following exhibits which were admitted into evidence without objection:

- 1 Dr. Egea 11/19/09 Deposition
- 2 Dr. Smith 5/18/09 Deposition
- 3 August 10, 2005 W/C Appeal Transcript in 03-142166

All objections contained in the admitted depositions are overruled unless otherwise noted.

Findings of Fact – Summary of the Evidence

The Claimant testified in person. He is 59 years old. He has been employed at Johnson Controls for 36 years.

The claimant works on an assembly line and must lift automotive batteries from a forklift pallet to the assembly line and then return the batteries to the skid. This is called “stacking on” and “stacking off”.

He said he spent 75% of his time in the stacking off battery process. This is manually picking up batteries and placing them on a skid three-to-four layers high. He would put one layer of batteries on the skid, then two sheets of wafer board between this and the next layer of batteries up to four layers high. There would be 54 to 66 batteries on a skid. Each battery weighed on average 80 pounds. He averaged 4,000 batteries a day. The total would fluctuate between the 3,600 to 4,500 batteries per day.

On August 10, 2009 in Injury Number 03-142166, Mr. Trimmer had a hearing with Johnson Controls, Inc., concerning the same parties, the same body part, the same date of

occurrence, the same proposed medical treatment, and much of the same medical evidence. In Injury Number 03-142166, the claimant attempted to establish an injury to his left shoulder that was caused by an accident (a fall) at work.

The claimant argues that the employer should be barred from raising the issue of res judicata because it did not raise the issue in its answer as an affirmative defense. The claimant is correct that res judicata is an affirmative defense, however, it was raised as an issue at the hearing and was litigated. See *Snow vs. Hick's Brothers Chevrolet, Inc.*, 480 SW2d 97 (Mo.App. 1972) Pleading an affirmative defense of a workers' compensation case by way of an answer is not the exclusive manner in which a defense may be raised. It was enough of a defense to be litigated whether pled or not to preserve the issue. The claimant's attorney had to be aware of the issues of res judicata and collateral estoppels when he first investigated the case and it was not a surprise to him and he was not prejudiced by the failure to raise it in an answer.

In order for res judicata to apply the following four elements must be satisfied:

(1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the parties to the action; and (4) the identity of the quality of the person for or against whom the claim is made.

The Employer argues that included within the doctrine of res judicata is the principle that the earlier judgment is conclusive not only as to matters actually determined in the prior action, but also as to other matters which could have been properly raised and determined therein. *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter-day Saints*, 821 S.W. 2d 495, 501 (Mo. en banc 1991). However a crucial component of the doctrine of res judicata in this regard is that the two actions must be on the same cause of action. *Terre Du Lac Assoc., Inc. v. Terre Du Lac, Inc.*, 737 S.W. 2d 206, 212 (Mo. App. 1987); *Curnutt v. Scott Melvin Transport, Inc.*, 903 S.W. 2d 184, 191 (Mo. App. 1995).

It is this component of res judicata that is the reason as to why res judicata is not applicable. While the parties are the same and the dates of injury are the same, the two claims are not the same. They are distinct and separate claims for which different evidence is required to establish them. Mr. Trimmer's first claim tried before this Court was presented as an accidental injury pursuant to R.S. Mo. §287.120. In this claim presently before the Court, Mr. Trimmer has alleged an occupational disease which is a distinct and separate claim pursuant to R.S. Mo. §287.063 and §287.067. *Holaus v. William J. Zickell Company*, 958 S.W. 2d 72, 77 (Mo. App. 1997). Because they are not the same cause of action, Mr. Trimmer was not required to raise his current claim with his original claim.

The case of *Holaus v. William J. Zickell Company*, supra, has some factual similarities to this case. In *Holaus*, the claimant initially filed a claim alleging that he had suffered a torn rotator cuff in his shoulder as a result of an altercation at work which caused his shoulder to hit a wall and thereby be injured. Almost four and a half years later, the claimant filed a second amended claim in which he then alleged an occupational disease due to repeated heavy lifting and carrying with an accident/incident date which was the same date as the altercation. The claimant's amended claim still contained the allegations of the altercation and resulting injury.

In response the employer/insurer raised the defense of the statute of limitations. Following a hearing the ALJ found that:

[A]lthough employee did show that he suffered an injury on that date, he did not prove that the particular blow he suffered on that date caused the torn rotator cuff with any reasonable degree of medical probability.

Id. at 77.

The ALJ did not address whether the employee suffered from an occupational disease as he found the claim was barred by the statute of limitations. The claimant argued that the second amended claim related back to the original claim because he was simply amplifying the original claim and was not pleading a new cause of action. The ALJ disagreed, specifically finding that the new allegation of occupational disease represented a distinct and separate claim covered specifically under separate sections of the Missouri Workers' Compensation Law from that of an accidental injury. He further found the two claims involved recovery on two different sets of facts and two different theories of recovery. Id. at 77. The Labor and Industrial Relations Commission affirmed.

On appeal, the Missouri Court of Appeals upheld the Commission's award that the claimant failed to establish that an accidental injury on August 21, 1991 was the cause of the claimant's torn right rotator cuff. The Court of Appeals found that the treating doctor's testimony established that it did not take a major trauma to cause the claimant's torn rotator cuff, that the claimant did not inform the doctor about any altercation or falling against the wall on August 21, 1991 and that he believed that it was more likely that the rotator cuff tear did not occur from any one specific incident but rather was an over use type of phenomenon attributable to his work. Id. at 78.

Regarding the Commission's award that the occupational disease claim was barred by the applicable statute of limitations, the Court of Appeals upheld the award that the claimant's second amended claim did not relate back to the original claim. The Court of Appeals agreed that the second amended claim asserted a claim that did not arise out of the conduct alleged to have caused claimant's injuries in his original claim for compensation. Id. at 80. The Court of Appeals indicated that whether an amendment of a petition or claim amounts to a commencement of a new action or proceeding with respect of the running of the statute of limitations, the general rule is that if the only effect of the amendment made after the running of the limitation period is to perfect or amplify the claim set up in the original pleading, then the amendment relates back to the time of the commencement of the original action so as to be saved from the bar of the statute.

[B]ut that if the amendment so made sets up a entirely new and distinct claim or cause of action from that embraced in the original petition or complaint, the running of the statute in that event is not arrested but instead may be imposed in bar of the new claim or case of action.

Id. at 80.

The Court of Appeals went on to hold that the claimant's second amended claim created a new and distinct claim in that it required different proof than that of the pleading before the amendment. *Id.* at 80. Thus, the Court of Appeals found that the claimant's second amended claim did not arise from the incident alleged in employee's original claim and as a result, the claimant's second amended claim established a new claim and did not perfect or amplify his original claim. Therefore, the claimant's appeal on this point was denied.

While *Holaus* did not involve principles of *res judicata* or collateral estoppel, the rationale behind the Missouri Court of Appeal's finding that the claimant's second amended claim for compensation was barred by the statute of limitations is exactly the same in determining whether or not principles of *res judicata* or collateral estoppel bar Mr. Trimmer's second claim herein. *Holaus* makes clear that a claim for occupational disease is separate and distinct from a claim for accidental injury. *Id.* at 80. The Court specifically notes that it is a distinct claim in that "it requires different proof than that of the pleading before the amendment". *Id.* at 80. Consequently Mr. Trimmer's current claim for injury due to occupational disease is a separate and distinct claim from his original claim and therefore the second element of *res judicata*- identity the cause of action- does not exist. Thus *res judicata* does not apply to bar Mr. Trimmer's current claim.

Similarly, both *Curnett v. Scott Melvin Transport, Inc. supra* and *Terre Du Lac Assoc., Inc. v. Terre Du Lac, Inc., supra* found that the causes of action presented in both cases were not the same of cause of action and that identity of the cause of action did not exist and therefore principles of *res judicata*/collateral estoppel did not apply. See also *Oats v. Safeco Insurance Company of America*, 583 S.W. 2d 713, 719 (Mo. banc 1979).

For these same reasons, collateral estoppel also does not apply to bar Mr. Trimmer's present claim. Collateral estoppel bars relitigation of the same issue in a later case if each of the following elements are satisfied:

(1) The issue decided in the earlier adjudication was identical to the issue presented in the present action; (2) The earlier adjudication resulted in judgment on the merits; (3) The party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) The party against whom collateral estoppel is asserted had an opportunity to litigate the issue in the prior adjudication.

Reidelberger v. Hussman Refrigerator Co., 135 S.W. 3d 431, 433 (Mo. App. 2004); *Tatum v. St. Louis Metro Delivery, Inc.*, 887 S.W. 2d 679, 682 (Mo. App. 1994).

For the same reasons that *res judicata* does not apply, collateral estoppel does not apply. Since Mr. Trimmer's original claim was for an accidental injury, and Mr. Trimmer's current claim is for an occupational disease, there does not exist identity of the issue, which is the first element of collateral estoppel. The issue in the original claim is whether Mr. Trimmer suffered an injury by accident, while the issue in the current claim is whether or not Mr. Trimmer suffered an injury by occupational disease. As the Court of Appeals noted in *Holaus*, these are separate and distinct claims with different facts and theories of recovery. Clearly neither collateral estoppel nor *res judicata* is applicable to bar Mr. Trimmer's present claim.

Dr. Fernando Egea expressed his opinion that the claimant sustained progressive and cumulative injuries to his left shoulder caused by the type of activity he performed in his work at Johnson Controls. Dr. Fretz had noted that the claimant did heavy work and the pain in claimant's shoulder came on gradually.

Dr. Bruce Smith found that the claimant was in need of surgery to repair the rotator cuff in his left shoulder. This could have been either caused by an accident or by repetitive use.

While Mr. Trimmer continues to state he suffered a fall at work on September 9, 2003 and that is when his complaints of pain in his shoulder commenced. This testimony does not, in and of itself, defend his claim for an occupational disease. Mr. Trimmer is not a medical expert and it is up to the previous doctors to determine the course of his shoulder complaints. All Mr. Trimmer knows with any certainty is that he suffers from a torn rotator cuff in his left shoulder and that the doctors indicate that his shoulder needs to be repaired by surgery.

I find and believe from the evidence that the claimant has sustained an occupational disease to his left shoulder by his repetitive lifting and moving the heavy batteries. I order and direct the employer to provide the claimant with such medical treatment, including surgery, that is reasonable and necessary to cure and relieve the condition caused by his occupational disease to his left shoulder.

The claimant is asking that he be given a final award for permanent partial disability. However, it would be impossible to assess any permanent partial disability until the claimant has reached his maximum medical improvement. Hopefully, the additional medical treatment will improve the claimant's medical condition and substantially reduce the claimant's disability. It is impossible to speculate what the claimant's permanent partial disability would be after shoulder surgery was performed.

The claimant has introduced medical evidence that he has incurred medical expenses in the amount of \$3,307.95 for treatment to his left shoulder (Claimant's Exhibit I). These are supported by medical records of the medical provider, which indicates this treatment was incurred by claimant's injury to his left shoulder. See *Martin v. Mid-America Farms, Inc.*, 769 SW2d 605 111 (Mo.banc. 1989). I find these bills were reasonable and necessary to treat the claimant for the injury to his left shoulder. I order and direct the employer to pay to the claimant the sum of \$3,307.95 for past medical expenses.

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

David W. Whipple is hereby assigned a lien in the amount of 25% of this award for necessary legal services provided to the claimant.

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 9th day of March, 2011.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation