

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

Injury No.: 02-097932

Employee: William Bauman
Employer: United Parcel Service
Insurer: Liberty Mutual Fire Insurance Co.
Date of Accident: August 13, 2002
Place of Accident: St. Louis, 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. We have reviewed the evidence, read the briefs of the parties and considered the entire record. Pursuant to section 286.090 RSMo, the Commission affirms in part and reverses in part the award and decision of the administrative law judge dated September 19, 2006. The award and decision of Administrative Law Judge Cornelius T. Lane, is attached and incorporated to the extent it is not inconsistent with the instant award.

I. Preliminary Matters

The stipulations of the parties, issues in dispute and summary of the evidence were accurately recounted in the September 19, 2006, award issued by Administrative Law Judge Cornelius T. Lane and will not be repeated by the Commission unless special emphasis necessitates.

The administrative law judge awarded employee compensation for his hernia and left hip injuries because he determined that both of those injuries were the direct result of the August 13, 2002, accident. The administrative law judge then concluded that employee was entitled to medical expenses for his left hip replacement, temporary total disability benefits for the time employee was off after hip replacement surgery, and future medical benefits relating to his hip replacement surgery. The administrative law judge also found that employee's left hernia injury resulted in 5% permanent partial disability of the body as a whole for 20 weeks at a rate of \$340.12 per week, and that employee's left hip injury resulted in 40% permanent partial disability of the left leg at the hip for 207 weeks at a rate of \$340.12 per week.

Both employee and employer filed applications for review with the Commission. Employee alleges that the administrative law judge's decision was against the weight of the evidence and that the amount and nature of medical costs awarded is incorrect. Employer alleges that the administrative law judge erred in finding that employer was responsible for employee's left hip injury and therefore that employer was responsible for the medical bills relating to that injury.

The Commission, as discussed below, affirms that part of the administrative law judge's award relating to employee's hernia injury. However, the Commission reverses the administrative law judge's award of compensation to employee for his left hip injury because employee's work accident on August 13, 2002, was not a substantial cause of that injury

II. Medical Causation

Principles of Law

The claimant in a workers' compensation case has the burden to prove all essential elements of his claim, *Cook v. St. Mary's Hosp.*, 939 S.W.2d 934, 940 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Bigboy*

Steel Erection, 121 S.W.3d 220, 226 (Mo. 2003), including “a causal connection between the injury and the job[.]” *Williams v. DePaul Health Ctr.*, 996 S.W.2d 619, 631 (Mo. App. E.D. 1999), *overruled on other grounds by Hampton*, 121 S.W.3d at 226.

“An injury is compensable if it is clearly work related.” Section 287.020.2, RSMo. 2000. “An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.” *Id.* An injury is not compensable merely because work was a triggering or precipitating factor. *Id.*

“Awards for injuries ‘triggered’ or ‘precipitated’ by work are nonetheless proper *if* the employee shows that the work is a ‘substantial factor’ in the cause of the injury.” *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852, 853 (Mo. banc 1999). Thus, in determining whether a given injury is compensable, a “work-related accident can be both a triggering event and a substantial factor.” *Bloss v. Plastic Enters.*, 32 S.W.3d 666, 671 (Mo. App. W.D. 2000), *overruled on other grounds by Hampton*, 121 S.W.3d at 225. “A preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the pre-existing condition to “escalate to the level of disability.” *Higgins v. Quaker Oats Co.*, 183 S.W.3d 264, 271 (Mo. App. W.D. 2005). Ordinary, gradual deterioration or progressive degeneration of the body caused by aging is not compensable, however, except where it follows as an incident of employment. Section 287.020.3(1) RSMo. 2000.

“Determinations with regard to causation and work-relatedness are questions of fact to be ruled upon by the Commission” *Bloss*, 32 S.W.2d at 671. Furthermore, in making such determinations, the Commission is the judge of the credibility of witnesses and has discretion to determine the weight to be given opinions. *Id.* Medical causation not within common knowledge or experience must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221 (Mo. App. 1992).

The ultimate determination of credibility of witnesses rests with the Commission; however, the Commission should take into consideration the credibility determinations made by the administrative law judge. When reviewing an award entered by an administrative law judge the Commission is not bound to yield to his or her findings including those relating to credibility, and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo. App. 2004).

The instant case involves a complex medical condition clearly outside the realm of lay understanding. After reviewing the entire record, which necessarily includes, the testimony of the employee, review of the treating medical records, as well as review of the expert report of Dr. Volarich and expert testimony rendered by both Dr. Wagner and Dr. Lux, the Commission is not persuaded by the evidence presented that the accident occurring August 13, 2002, was a substantial factor in causing employee’s left hip injury and need for hip replacement surgery.

Injury

The Commission notes that employer admits that a work-related accident occurred on August 13, 2002. The parties placed the following issues in dispute: medical causation as to employee’s left hip injury; past medical expenses of employee’s left hip replacement; temporary total disability benefits relating to employee’s left hip; permanent partial disability benefits relating to employee’s left hip; and future medical benefits relating to employee’s left hip injury.

The Commission also notes that due to the fact that we find employee’s left hip injury and need for left hip replacement not to be medically causally related to the work-related accident of August 13, 2002, the remaining issues are moot.

The only expert testimony that could conceivably establish medical causation between the work-related accident and the resultant medical condition was the testimony of Dr. Lux. The Commission is not persuaded by the explanation of Dr. Lux as to how the accident sustained by employee was a substantial factor in causing employee’s resultant left hip condition. We do not believe this finding to be supported by the evidence. The more credible, believable and persuasive evidence shows that employee had degenerative arthritis in his left hip long

before his work-related accident and that the accident was not a substantial cause of employee's need for his left hip replacement.

The more credible and persuasive testimony of Dr. Wagner is that the work-related accident was merely a triggering event, and was not a substantial cause of employee's need to have his left hip replaced. Dr. Wagner believes that the accident may have caused employee's degenerative arthritis to become symptomatic, but that the accident did not aggravate the disease. Accordingly, the Commission concludes that the work-related accident occurring on August 13, 2002, was not a substantial factor in causing employee's left hip injury and need for left hip replacement surgery.

Dr. Wagner examined employee on May 10, 2004. He also took x-rays of employee's hips and reviewed medical records from Dr. Byler, Dr. Cantrell, Dr. Lux, surgery notes from employee's hernia operation and the medical report of Dr. Volarich. Dr. Wagner believed that employee had advanced degenerative disease in his left hip at the time of the injury on August 13, 2002, and that the degenerative disease had been present at that time for at least five to ten years.

Dr. Wagner believes that the work accident was merely a triggering event which caused symptoms to manifest, and that the accident was not a substantial cause of the degenerative disease and that it did not aggravate employee's disease. This is because he does not believe that the falling 70 pound box caused enough force to injure employee's left hip. He testified that each step a person takes places force on that person's hip equal to three times that person's body weight. Employee weighed approximately 180 pounds, which would equate to approximately 540 pounds of force for each step. Clearly, this is far greater a force than that of the falling box. He explained that the external rotation of employee's left leg when the box hit it could cause his arthritis to become symptomatic, but that it did not cause his arthritis. He also testified that the hernia in employee's left side had no relation to employee's hip condition.

Dr. Byler's records also show that employee had hypertrophic degenerative osteoarthritic changes in his left hip shortly after the accident. She referred employee to Dr. Cantrell for his left hip complaints and he determined that employee's hips showed evidence of bilateral degenerative osteoarthritis, the left greater than the right. Dr. Cantrell informed employee that employee's difficulty with internal rotation and flexion of his left hip were in part likely related to those underlying degenerative changes present in his left hip that they were not causally related to his work accident. Further, it was his opinion that, within a reasonable degree of medical certainty, employee's work accident did not cause or aggravate his underlying degenerative joint disease in the left hip.

Both of employer's experts also agreed that employee had degenerative arthritis in his left hip. Dr. Volarich examined claimant for the sole purpose of preparing an independent medical report. He determined that employee had degenerative arthritis in his left hip and referred employee to Dr. Lux for further evaluation and potential hip replacement surgery. Dr. Lux's records show that he diagnosed employee as having severe osteoarthritis in his left hip, bone-on-bone contact and loss of joint space. He agreed that employee's osteoarthritis was not caused by the work accident and that the hypertrophic degenerative spurring in employee's right and left hip were necessarily present prior to his work accident.

V. Conclusion

The Commission determines and concludes that based on the more credible, convincing and persuasive evidence, the work-related accident on August 13, 2002, was not a substantial factor in the cause of employee's left hip injury and need for left hip replacement surgery.

That portion of the administrative law judge's September 19, 2006, award of benefits to employee for his left hip injury and left hip replacement surgery is reversed; the employee is not entitled to any amount of compensation payable for this injury; and employer is not responsible for any amount of compensation payable.

Based on the above finding, all remaining issues on appeal are moot.

The portion of the administrative law judge's September 19, 2006, award of benefits to employee for his hernia injuries is affirmed.

That award is subject to a lien in favor of James S. Haupt, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 7th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: William Bauman

Injury No.: 02-097932

Dependents: N/A

Before the
Division of Workers'

Employer: United Parcel Service

Compensation
Department of Labor and Industrial

Additional Party:

N/A Relations of Missouri
Jefferson City, Missouri

Insurer: Liberty Mutual Fire Insurance Co.

Hearing Date:

July 27, 2006 Checked by: CTL:tr

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: August 13, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
Employee, while working as a customer counter clerk, was removing a package from a cart when he sustained injury to his abdomen (groin) and left hip.
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: Lower abdomen, groin, left hip and leg
14. Nature and extent of any permanent disability: 5% PPD body as a whole as related to abdomen; 40% PPD referable to left leg at hip
15. Compensation paid to-date for temporary disability: \$4,266.96
16. Value necessary medical aid paid to date by employer/insurer? \$7,362.26

Employee: William Bauman

Injury No.:

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17. Value necessary medical aid not furnished by employer/insurer? \$28,254.00

- 18. Employee's average weekly wages: \$
- 19. Weekly compensation rate: \$649.32/\$340.12
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$28,254.00
12 6/7 weeks of temporary total disability (or temporary partial disability)	\$8,348.40
102.80 weeks of permanent partial disability from Employer	\$34,964.33

- 22. Second Injury Fund liability: No

TOTAL: \$71,566.73

- 23. Future requirements awarded: Future medical benefits to be left open for the revision of left hip replacement and to be the responsibility of the Employer/Insurer.

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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

James S. Haupt

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Bauman

Injury No.: 02-097932

Dependents: N/A

Before the
Division of Workers'

Employer: United Parcel Service

Compensation

Department of Labor and Industrial

Additional Party: N/A

Relations of Missouri

Jefferson City, Missouri

Insurer: Liberty Mutual Fire Insurance Co.

Checked by: CTL:tr

PREFACE

On July 27, 2006, there was a hearing in the above-mentioned matter. Claimant, William Bauman was represented by Attorney James S. Haupt and the Employer/Insurer was represented by Attorney Maureen Cary.

STIPULATIONS

The parties stipulated:

1. That on or about 8-13-02, while in the employment of United Parcel Service, claimant sustained an injury by accident arising out of and in the course of employment occurring in the City of St. Louis, MO.
2. The employer and employee were operating under the provisions of the Missouri Workers' Compensation Law.
3. Employer's liability was fully insured by Liberty Mutual Fire Insurance Company.
4. Employer had notice of the injury and a claim for compensation was filed within the time prescribed by law.
5. The claimant's compensation rate was \$649.32 for temporary total disability benefits and \$340.12 for

permanent partial disability benefits.

6. The employer paid medical benefits totaling \$7,362.26.
7. The employer paid temporary total disability benefits in the amount of \$4,266.96 representing 6 4/7 weeks of compensation from 8-14-02 to 9-29-02 at the rate of \$649.32 per week.

ISSUES

1. Medical causation.
2. Past medical expenses in the amount of \$40,277.21
3. Temporary total disability benefits for 12 6/7 weeks from 10-4-04 to 1-2-05 at the rate of \$649.32 a week or a total of \$8,348.40.
4. Permanent partial disability benefits.
5. Future medical benefits.

EXHIBITS

The Claimant offered the following exhibits

which were admitted into evidence without objection:

- Exhibit A Dr. Byler records of 8-13-02 to 11-14-02
- Exhibit B Dr. Bennett records of 8-20-02 to 10-24-02
- Exhibit C Healthsouth Outpatient Surgery Center records (hernia surgeries) 8-27-02
- Exhibit D Dr. Cantrell's records of 11-14-02 to 1-27-03
- Exhibit E Work Center P.T. records of 11-15-02 to 12-26-02.
- Exhibit F Dr. Volarich report of 9-26-03 and CV.
- Exhibit G Letter from employee attorney to employer dated 1-20-04
- Exhibit H Dr. Paul Lux records of 11-18-03 to 1-04-05
- Exhibit I Letter from employee attorney to employer dated 2-19-04,
- Exhibit J Deposition of Dr. Paul Lux dated 2-9-06
- Exhibit K Barnes West County Hospital records (left hip surgery) of 10-4-04
- Exhibit L Medical expenses summarization re: left hip surgery
- Exhibit M Dr. Volarich report of 4-17-06

The Employer/Insurer offered the following

exhibits which were admitted into evidence without objections:

- Exhibit 1 Deposition of Dr. Wagner with attached report and CV
- Exhibit 2. Deposition of Chris Hoffman

FINDINGS OF FACT

1. On August 13, 2002, the Claimant sustained an injury at work when lifting a 70-pound package when it slipped from his hands and struck his left leg and twisting his left hip. Claimant informed his supervisor who took him to see Dr. Byler because Claimant felt immediate pain as a result of the incident. The following day the Claimant went back to see Dr. Byler because he was hurting at work. Dr. Byler told Claimant to stay off work and referred him to see Dr. Bennett who he saw on August 20, 2002 who recommended surgery for a left sided hernia. After the surgery on August 27, 2002, Claimant still had some problems in his abdomen and complaints of pain in the left hip.
2. Claimant, because of his left hip problems, was referred to Dr. Cantrell and the doctor prescribed physical therapy and medication and the Claimant continued under Dr. Cantrell's care until January 27, 2003, at which time he was released.
3. The Claimant was seen by Dr. David Volarich on September 26, 2003 on behalf of Claimant's attorney. Dr. Volarich sent the Claimant to see Dr. Paul Lux, a hip replacement specialist. On November 18, 2003, Dr. Lux recommended a surgery on the Claimant's left hip. The Employer sent Claimant to see Dr. John Wagner on May 10, 2004 who examined the Claimant and said it was his opinion that Claimant had degenerative arthritis in his left hip and his complaints were not work related.
4. On July 9, 2004, Dr. Lux recommended that the Claimant have a left hip replacement and this was done on October 4, 2004 at Barnes Jewish Hospital. As a result of the hip surgery the Claimant was off work 12.67 weeks from October 4, 2004 to January 2, 2005 and did not receive any workers' compensation benefits. Further, Claimant's medical expenses for his left hip surgery amount to \$40,177.21 which was not paid by the workers' compensation carrier, Liberty Mutual Insurance Co.
5. Dr. Lux also testified that as a result of Claimant's left hip surgery he will need left hip revision surgery in 10 to 15 years.
6. Claimant still as a result of the hernia operation as well as the hip surgery has many complaints.
7. Claimant was a very credible witness and testified that prior to the August 13, 2002 incident at work he had never had any medical problems or treatment for the left hip and never had any injuries to the left hip. Claimant stated that prior to August 13, 2002 he was quite active with hiking, walking, and participating in various sporting activities. Claimant did testify that subsequent to the hernia as well as the hip replacement he does still hike, walk, and participate in sports activities but he does feel pain during those activities which he had not had before the incident of August 13, 2002.
8. Dr. Lux, who performed the surgery on Claimant's left hip, testified by deposition and was very credible and testified that Claimant's injury at work was the significant cause of Claimant's hip pain and the need for his hip replacement and thus the substantial contributing factor in causing Claimant's hip condition and the surgery. Dr. Lux further testified that Claimant will need additional surgery in the future in the form of a left hip revision surgery in 10 to 15 years.
9. Dr. Lux further testified that the medical bills of \$40,177.21 were reasonable and necessary for the treatment that Claimant received as a result of his left hip replacement.
10. Dr. Volarich who examined the Claimant at the request of Claimant's attorney felt that Claimant had a 10% permanent partial disability of the body as a whole as result of the hernia that was surgically repaired and 75% permanent partial disability of the left lower extremity at the hip.

11. The Claimant offered Exhibit L which listed the medical bills from Dr. Lux, Barnes Jewish Hospital and Home Health Care totaling \$40,177.21. However, evidence shows that the medical providers have accepted as full and final payment of the medical bills for the left hip replacement in the amount of \$28,254.40.

RULINGS OF LAW

From all the evidence I find the following:

1. Claimant's hernia as well the left hip injury were a direct result of the injuries that the Claimant sustained on August 13, 2002.
2. Claimant's medical treatment for the left hip replacement was reasonable and necessary as a result of his injury of August 13, 2002 and the Employer/Insurer is to pay medical expenses in the amount of \$28,254.40.
3. Employer has paid temporary total disability benefits to the Claimant for the time off after the left hip surgery from October 4, 2004 to January 2, 2005 for a period of 12 and 6/7ths weeks at the rate of \$694.32 per week for a total of \$8,348.40.
4. Claimant sustained an injury to his left hernia and as a result of the work injury of August 13, 2002, Claimant has a resulting 5% permanent partial disability of the body as a whole for a period of 20 weeks at \$340.12 per week for a total of \$6,802.40.
5. Claimant's work injury of August 13, 2002 requiring a left hip replacement results in a permanent partial disability of 40% of the left leg at the hip at the 207 week level for a total of 82.80 weeks x \$340.12 for a total of \$28,161.93.
6. Claimant is entitled to future medical benefits to be paid by the Employer relating to his left hip replacement surgery.

This award is subject to an attorney's fee of 25% in favor of Claimant's attorney James Haupt.

Date: _____

Made by: _____

Cornelius T. Lane

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret

Director

Employee: William Bauman

Injury No.:

02-097932

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

"An injury is compensable if it is clearly work related." Section 287.020.2, RSMo. 2000. "An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability." *Id.* An injury is not compensable merely because work was a triggering or precipitating factor. *Id.*

"Awards for injuries 'triggered' or 'precipitated' by work are nonetheless proper if the employee shows that the work is a 'substantial factor' in the cause of the injury." *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852, 853 (Mo. banc 1999). Thus, in determining whether a given injury is compensable, a "work-related accident can be both a triggering event and a substantial factor." *Bloss v. Plastic Enters.*, 32 S.W.3d 666, 671 (Mo. App. W.D. 2000), *overruled on other grounds by Hampton*, 121 S.W.3d at 225. "Determinations with regard to causation and work-relatedness are questions of fact to be ruled upon by the Commission . . ." *Id.* at 671. Furthermore, in making such determinations, the Commission is the judge of the credibility of witnesses and has discretion to determine the weight to be given opinions. *Id.*

It is undisputed that employee suffered a work-related injury on August 13, 2002. After this accident, and in addition to his hernia injuries, employee began to experience pain in his left hip. Employee credibly testified that he had never had any pain or injuries to his left hip prior to August 13, 2002. Employee sought treatment for this pain. Upon examination by Dr. Cantrell, it was discovered that employee had degenerative arthritis in his left hip. This is undisputed by employee's and employer's doctors.

After reviewing employee's medical records, taking x-rays and personally examining employee, Dr. Lux opined that the work-related accident was the substantial factor in employee's injury to his left hip and employee needs to have that hip replaced.

Dr. Wagner does not believe that the work-related accident was a substantial cause of employee's left hip injury. The certitude of his opinion is undercut by his admission that the work-related accident was a triggering cause of employee's pain. This pain is what caused employee's disability and is what accelerated employee's need to have his left hip replaced.

"A preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the pre-existing condition to "escalate to the level of disability." *Higgins v. Quaker Oats Co.*, 183 S.W.3d 264, 271 (Mo. App. W.D. 2005). Ordinary, gradual deterioration or progressive degeneration of the body caused by aging is not compensable, however, except where it follows as an incident of employment. Section 287.020.3(1) RSMo. 2000.

Employee's credible testimony establishes a chronology suggestive of a medical causal connection between the August 13, 2002, work accident and his need for the left hip replacement. Dr. Lux's expert medical opinion that the accident caused employee's need for left hip replacement surgery was supported by his logical explanation of how employee's accident was asymptomatic prior to the accident, and then, fifteen months later, employee had to have his left hip replaced. Clearly, during that time frame, the work-related accident was the only factor that

caused employee's left hip condition to manifest.

I would affirm award of the administrative law judge. I respectfully dissent from the decision of the majority of the Commission to modify the award to reduce benefits in this case.

John J. Hickey, Member