

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

Injury No.: 04-059391

Employee: Rosemary Bivens  
Employer: St. Alexis Hospital  
Insurer: American Home Assurance Company c/o SRS  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: May 20, 2004  
Place and County 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 3, 2007. The award and decision of Administrative Law Judge Kathleen M. Hart, issued October 3, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 1st day of April 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

# AWARD

Employee: Rosemary Bivens

Injury No.: 04-059391

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: St. Alexis Hospital

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund (open)

Insurer: American Home Assurance c/o SRS

Hearing Date: July 18, 2007

Checked by: KMH

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
  - 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
  - Date of accident or onset of occupational disease: May 20, 2004
  - State location where accident occurred or occupational disease was contracted: St. Louis
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
  - 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:  
Claimant fell at work injuring her right knee.
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 knee
  - Nature and extent of any permanent disability: 50% of the right knee

15. Compensation paid to-date for temporary disability: \$1,275.21
16. Value necessary medical aid paid to date by employer/insurer? \$10,295.28

Employee: Rosemary Bivens

Injury No.: 04-059391

17. Value necessary medical aid not furnished by employer/insurer? n/a

- Employee's average weekly wages: \$743.70

19. Weekly compensation rate: \$495.92/\$354.05

20. Method wages computation: Stipulation

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

9 4/7 weeks of temporary total disability	\$4,746.66
80 weeks of permanent partial disability from Employer	\$28, 324.00

22. Second Injury Fund liability: Open

Total: \$33,070.66

23. Future requirements awarded: pursuant to Award

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 Sievers

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

Employee: Rosemary Bivens

Injury No.: 04-059391

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: St. Alexis Hospital

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund (open)

Insurer: American Home Assurance c/o SRS

Checked by: KMH

A hearing was held on the above captioned matter July 18, 2007. Rosemary Bivens (Claimant) was represented by attorney Jim Sievers. St. Alexis Hospital (Employer) was represented by attorney Mark Cordes. The Second Injury Fund was left open.

### **STIPULATIONS**

The parties stipulated to the following:

- Claimant was injured on May 20, 2004, during the course and scope of her employment.
- Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
- Employer's liability was fully insured by American Home Assurance.
- Employer had notice of the injury and a claim for compensation was timely filed.
- Claimant's average weekly was \$743.70 yielding TTD and PPD rates of \$495.92 and \$354.05. Claimant has been paid TTD in the amount of \$1,275.21 representing 2 4/7 weeks of compensation from October 14 through October 31, 2004. Claimant has received \$10, 295.28 in medical benefits.

### **ISSUES**

The parties stipulated the issues to be resolved are as follows:

- Whether Claimant's total knee replacement was medically and causally related to her work injury.
- Whether Claimant is entitled to future medical care.
- Whether Claimant is entitled to TTD from February 9, 2006 through April 17, 2006.
- Whether and to what extent Claimant has sustained any PPD.

### **FINDINGS OF FACT**

Based upon the competent and substantial evidence, I find:

- Claimant is a 57 year-old married female who has worked for Employer as a Nurse for 30 years. She continues to work for Employer part-time as a Staff Nurse working eight hour shifts, three times a week.
- Claimant cares for a group of patients on each shift. She administers medications and treatments, and she oversees the patient care technicians and nurses' aids.
- On May 20, 2004, Claimant was going into a patient's room. The floor was wet, and she fell onto her knees hitting her right knee harder than her left. Claimant had no prior injury, medical treatment or pain in her right knee. She reported her injury to the Charge Nurse, but deferred treatment expecting her knees to improve. After a few weeks, her right knee pain increased and she was not able to climb steps.
- Claimant sought treatment through workers' compensation and was sent to Concentra. After a few months of conservative treatment, she had an MRI which revealed a torn meniscus. Employer then sent Claimant to Dr. Ritchie.
- Claimant first saw Dr. Ritchie September 22, 2004. He reviewed her recent x-rays and MRI and noted they showed no appreciable arthritis.
- Dr. Ritchie performed surgery October 14, 2004, to repair Claimant's medial and lateral meniscus tears. He also noted some degenerative findings at the time of surgery, and characterized these as "not horrible". He noted she was not down to "bare bone". Following surgery, he ordered physical therapy and prescribed medications.

- Claimant returned to work November 1, 2004. She worked limited duty sitting at a desk for two weeks and returned to full duty November 20, 2004.
- She continued to have pain, limited movement, and difficulty walking. Due to Claimant's ongoing problems, she had cortisone injections in December 2004. These alleviated her symptoms for a few days. In January 2005, Dr. Ritchie released Claimant from treatment. She testified she still had problems in her knee at this point, but she felt they were improved.
- Over the next few months, Claimant continued to have knee pain and was not able to walk on her treadmill. She had difficulty walking up and down stairs and wore a brace for support.
- By April 2005, Claimant still had stiffness and significant pain with activities. She sought additional treatment and saw Dr. Ritchie April 25, 2005. He thought she could be treated for her degenerative wear which he opined was not work related.
- A few months later, Claimant had cardiac bypass surgery, and walked on her treadmill during rehab. She testified her knee symptoms increased at this time.
- When Claimant returned to work following her bypass, she still had complaints with her knee. She had difficulty getting in and out of her car. She was not able to kneel or squat on the floor to play with her grandchildren. She had spasms and excruciating pain which was worse at night.
- On October 7, 2005, Claimant went to Dr. Markenson since additional care through Employer had been denied. She complained of stiffness, swelling and soreness in her knee. She was starting to have discomfort in her hip and with walking. She told Dr. Markenson she felt she had not done well following her 2004 surgery. Dr. Markenson ordered x-rays which showed she was now down to bone on bone on the medial side of her right knee. He noted the MRI from before her 2004 surgery showed early signs of arthritis. Dr. Markenson treated Claimant with injections, and advised Claimant she was going to need a knee replacement once she was stable from her heart condition.
- By January 2006 Claimant's symptoms persisted, and Dr. Markenson recommended additional surgery. He performed a total knee replacement on February 9, 2006. When Claimant returned to work April 17, 2006, she still had knee complaints, but they were improved. She continued to take Advil, avoided steps and avoided long periods of sitting. Claimant was released from treatment in June 2006.
- Claimant continues to have a locking feeling in her knee when she uses stairs. She can not bend her

knee back completely. She still has pain, but it is bearable. She has difficulty getting up after a fall. She continues to take over-the-counter anti-inflammatories. She continues to work as a nurse, but she needs help with heavy patients and with lifting things off the ground.

- Claimant did not have complaints or difficulties with her knee before her work injury. She had arthroscopic surgery to her left knee in 1995, but has had no recommendation for left total knee replacement.
- In August 2001, Claimant was diagnosed with fibromyalgia. She has continued to treat with Dr. Kirschner for her complaints of muscle weakness and fatigue related to this condition.
- Claimant is credible.

### **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

- Claimant's right total knee replacement was medically and causally related to her work injury.

The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986).

The medical experts disagree as to the causation of Claimant's knee replacement.

Claimant's expert, Dr. Volarich, opined Claimant developed posttraumatic arthritis as a direct result of her work injury, and the need for the knee replacement was due to the posttraumatic arthritis. He based his opinion on the fact Claimant's September 2004 x-rays and MRI showed no significant degenerative changes. Her October 2004 surgery notes indicate she had some chondromalacia, but she was not down to bare bone. By October 2005, her x-rays showed advanced posttraumatic degenerative arthritis and her knee was now down to bone on bone.

Employer's expert, Dr. Ritchie, opined the need for Claimant's knee replacement was related to degenerative changes in her knee and not to her work injury. He found the 2004 surgery and follow-up care did not accelerate her arthritis, and her ongoing complaints following the 2004 surgery were due to degenerative changes. However, Dr. Ritchie did not review Dr. Markenson's surgery notes or records in order to evaluate the progression of Claimant's arthritis. In addition, Claimant credibly testified she had no complaints in her right knee before her work injury, and her complaints did not significantly improve following the surgery.

Dr. Ritchie saw Claimant before her total knee replacement, but he did not give an opinion regarding the progress of her arthritis at that point. The only medical opinion in evidence on the change in Claimant's arthritic condition is Dr. Volarich's. I find Dr. Volarich's opinion to be well reasoned, and I find Claimant's knee replacement was medically and causally related to her work injury.

- Claimant is entitled to future medical care.

Section 287.140.1 "entitles the worker to medical treatment as may reasonably be required to cure and relieve from the effects of the injury." *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824, 828 (Mo.App. E.D. 2005) (citations omitted). It is sufficient to award future medical benefits if the claimant shows by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 437 (Mo.App. E.D. 2001).

Dr. Ritchie and Dr. Volarich testified knee replacements have limited life expectancies. Given Claimant's age, she is likely to need another knee replacement. Claimant has established by reasonable probability she is in need of additional medical treatment, and future medical benefits are awarded to Claimant.

- Claimant is entitled to TTD benefits from February 9, 2006 through April 17, 2006.

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part on other grounds). Claimant testified and the medical records corroborate she was unable to work from February 9, 2006 until she was released to return to work April 17, 2006. She is therefore entitled to 9 4/7 weeks of TTD or \$4,746.66.

Pursuant to this award, Claimant may receive additional medical care. Employer is ordered to provide TTD benefits to cover the healing period associated with such treatment if Claimant is unable to work during that period.

- Claimant has sustained 50% PPD to her right knee and is entitled to \$28,324.00 in compensation.

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App.1991) (overruled in part on other grounds). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770,773 (Mo.App. 1983) (overruled in part on other grounds).

Based on the medical opinions and on Claimant's ongoing symptoms, I find she has sustained 50% PPD to her right knee as a result of her work injury and treatment. She is therefore entitled to \$28,324.00 in compensation.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

KATHLEEN M. HART  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

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Jeffery W. Buker

*Director*

*Division of Workers' Compensation*

Rosemary Bivens Injury No: 04-059391