

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 04-081746

Employee: Donald Black
Employer: Aulbach Contracting, Inc.
Insurer: American Home Assurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: July 29, 2004
Place and County of Accident: St. Louis County, 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 reverses the award and decision of the administrative law judge dated May 9, 2006. The award and decision of Administrative Law Judge Matthew D. Vacca is attached hereto solely for reference.

The dispositive issue is whether or not employee's alleged resulting medical condition is medically causally related to an injury by accident arising out of and in the course of employment. Section 287.120.1 RSMo. In other words, was the accident occurring July 29, 2004, a substantial factor in causing employee's alleged resulting medical condition, i.e., a complex perirectal fistula. Section 287.120.2 RSMo. The administrative law judge concluded that the accident occurring July 29, 2004, and injury sustained was a substantial factor in employee's subsequent development of the alleged resulting medical condition. The Commission disagrees with this conclusion and reverses the award.

I. Principles of Law

In reviewing the instant case, the Commission is guided by several legal principles set forth in various Missouri Appellate Court decisions.

In the case of *Royal v. Advantica Restaurant Group, Inc.*, 194 S.W.3d, 371 (Mo. W.D. 2006), the Missouri Court of Appeals, Western District, succinctly stated at page 376, the following:

The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, *Cook v. St. Mary's Hosp.*, 939 S.W.2d 934, 940 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton*, 121 S.W.3d at 226, 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. As correctly noted by the Commission in its decision, this case is governed by section 287.020.2, which provides:

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

"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.* 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).

II. Facts

Preliminary Matters

At the outset, the Commission notes that employer admitted a work-related accident occurred July 29, 2004. The parties placed the following issues in dispute: medical causation; temporary total disability benefits; compensation rate; and future medical benefits.

Testimony of Donald Black, Employee

Employee described an injury due to an accident arising out of and in the course of his employment occurring July 29, 2004. His description of the injury was as follows: he was breaking/busting concrete slabs with a machine; a sliver of concrete, an inch to an inch and a half long, landed in the seat of the machine which employee was occupying; while operating the machine, and sitting on the seat where the sliver of concrete landed, eventually the sliver of concrete cut through his jeans and cut his right buttock; employee believed the event to be minor, and he got up from the seat and brushed the sliver away; employee described the location of the cut as an abrasion to his right buttock between the seam of his jeans and the seam of his right back pocket; and employee admitted the abrasion was not directly on his rectum.

Subsequently, due to symptoms and complaints, employee sought medical care and treatment on August 4, 2004. Employee has been treated for a perirectal abscess since August 4, 2004.

(The Commission notes that due to the fact that we find employee’s medical condition, perirectal abscess/perirectal fistula, to not be medically causally related to the above described accident, it is not necessary to recount medical treatment received and residuals pertaining to this medical condition.)

Testimony of Jerome F. Levy, M.D. (medical expert utilized by employee)

Dr. Levy testified by deposition in behalf of the employee. Dr. Levy received certification from the American Board of Surgery, in 1965, continuous through his date of testimony, April 4, 2006. Dr. Levy admitted that he did not see employee, rather, he conducted a medical records review. On direct testimony, Dr. Levy stated that his review indicated the accident occurred as follows: “. . . On July 29, 2004, he [employee] was sitting on a piece of jagged concrete, and that caused a small cut or laceration in the region of his anus, in the perirectal region, that then became infected.”

Dr. Levy was of the opinion that the laceration as described, by the sliver of concrete, near the anus region, resulted in infection and a subsequent perirectal abscess.

On cross-examination, Dr. Levy admitted that the perirectal area is the area “right around the anus”. Dr. Levy further explained that perirectal actually means near the rectum.

On further cross-examination Dr. Levy was asked whether a laceration to one’s buttock cheek could cause the type of infection employee contracted or would the laceration have to be closer to the anus? The answer given by Dr. Levy was as follows: “That would be very unlikely. The closer to the anus it is, the more likely to cause the problem.”

Conversely, Dr. Levy admitted that the further away from the anus the laceration occurs, the less likely the laceration is to cause a problem. Dr. Levy further admitted that he did not physically examine employee, and Dr. Levy did not know exactly where the laceration occurred.

Testimony of Gregory W. Brabbee, M.D. (medical expert utilized by employer)

Dr. Brabbee testified by deposition in behalf of the employer. Dr. Brabbee received board certification from the American Board of Surgery in 1979 in colon, rectal and general surgery, continuing through the date of his deposition April 13, 2006. Dr. Brabbee testified that he reviewed employee's treating medical records concerning treatment received subsequent to the accident occurring July 29, 2004, and Dr. Brabbee also physically examined employee on or about May 29, 2005.

The diagnosis of Dr. Brabbee was a complex perirectal fistula with an associated communication with a vein.

Dr. Brabbee explained that almost all of these type fistulas, of this magnitude, arise from an infection within the anal canal in what are called the crypts of the anal canal. Dr. Brabbee further testified that the only type of traumatic perirectal fistula that he could conceive of developing would be through a laceration through the anal canal or an impalement type injury. Dr. Brabbee noted that the accident described by Mr. Black was not the sort of injury that would lead to a perirectal fistula like the one Dr. Brabbee diagnosed. As explained by Dr. Brabbee there were no lacerations through the anal canal or an impalement type injury, rather, employee described an abrasion type injury to his right buttock.

Dr. Brabbee further explained that the location of the pathology concerning employee's medical condition was ". . . a little off to the right, but . . . essentially . . . midline posteriorly". (In reference to the rectum).

In further explanation of the diagnosis and resultant condition, Dr. Brabbee stated that a perirectal fistula, such as the one he diagnosed, develops from the inside out as opposed to from the outside in (emphasis added).

Dr. Brabbee further explained that if the perirectal fistula were attributable to a traumatic occurrence, namely, an impalement type injury, there would be a delay of maybe a day or two before medical treatment would have been necessitated. As stated by Dr. Brabbee: ". . . within the first 24 to 48 hours usually a person would seek medical attention if they had an impalement injury of any significance".

Dr. Brabbee was of the medical opinion that the event occurring July 29, 2004, was not a substantial factor in causing the perirectal fistula/abscess that Dr. Brabbee diagnosed when he evaluated the employee. On cross-examination Dr. Brabbee was asked whether or not the treatment employee received subsequent to the described accident of July 29, 2004, was related to the accident. The answer of Dr. Brabbee was as follows:

"I can only attest to what I'm seeing as what he presented to the emergency room with as of this date, which was August the 4th. And the findings at August 4th, I do not believe, were related to his work-related injury. I do believe that he had a perirectal abscess with necrotizing fasciitis, but I do not believe, based on my understanding of the pathogenesis of this disease or this report, that it was related to the incident of the injury at work."

On further cross-examination, Dr. Brabbee reiterated his opinion that employee's superficial abrasion of his buttock, which employee described to him, did not cause employee's resultant medical condition, his perirectal abscess.

On additional cross-examination Dr. Brabbee summed up his medical opinions as follows:

"All I'm aware of, purely and simply, is this gentleman had what he calls a work-related injury where he sat on a cement block of some sort and had an abrasion of his buttock. That's what he told me. The next thing I know, he's presenting to the doctors on the 4th of August with this perirectal fistulous abscess."

Dr. Brabbee then states unequivocally that he does not relate this medical condition to the accident employee

described occurring on July 29, 2004. The medical opinions of Dr. Brabbee were not impeached.

III. Findings of Fact and Conclusions of Law

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, i.e., medical causation of a complex perirectal fistula. 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 testimony rendered by both Dr. Levy and Dr. Brabbee, the Commission is not persuaded by the evidence presented that the accident occurring July 29, 2004, was a substantial factor in causing the development of employee's resultant medical condition, i.e., the perirectal fistula.

The Commission notes that the only expert testimony, which conceivably could establish medical causation between the work-related accident and the resultant medical condition, was the testimony of Dr. Levy. The Commission is not persuaded by the explanation of Dr. Levy as to how the accident sustained by employee was a substantial factor in causing employee's resultant medical condition.

Dr. Levy indicated that his opinion, based on a medical review of the records, was that there was a laceration in the region of employee's anus, in the perirectal region, that then became infected. The initial treating medical records do not support this finding or supposition made by Dr. Levy. The more credible, believable and trustworthy evidence is that employee sustained a superficial abrasion to his right buttock and there was no cut or laceration to the perirectal region. Dr. Levy further admits that a superficial type laceration rarely causes a problem like the problem employee experienced. Dr. Levy further admitted that a laceration to one's buttock cheek is very unlikely to cause a type of infection incurred by the employee. Dr. Levy stated that the further away from the anus the less likely a problem is to occur and Dr. Levy did not know exactly where the laceration occurred.

On the other hand, Dr. Brabbee was unequivocal in his testimony. Dr. Brabbee testified that almost all of these conditions, fistulas, of the magnitude employee experienced, arise from an infection within the crypts of the anal canal and therefore from the inside out rather than from the outside in. Dr. Brabbee noted that the only type of traumatic perirectal fistula that he could conceive of developing would be through a laceration through the anal canal or an impalement type injury, neither of which occurred when employee experienced his accident as described on July 29, 2004.

Dr. Brabbee unequivocally concluded that the accident occurring July 29, 2004, as described to him by the employee, was not a substantial factor in causing the perirectal fistula abscess that Dr. Brabbee subsequently diagnosed.

The Commission finds the testimony of Dr. Brabbee to be the most credible, persuasive and convincing. Accordingly, the Commission concludes that the accident occurring July 29, 2004, was not a substantial factor in causing employee's ultimate medical condition, a perirectal abscess.

IV. Conclusion

The Commission determines and concludes that based on the more credible evidence, the accident occurring July 29, 2004, was not a substantial factor in the cause of the employee's resulting medical condition, i.e., a perirectal fistula.

The award of the administrative law judge issued May 9, 2006, is reversed; the employee is not entitled to any amount of compensation payable; and the employer is not responsible for any amount of compensation payable.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued solely for reference.

May 9, 2006, is attached

Given at Jefferson City, State of Missouri, this 8th day of December 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

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.

"At a hardship hearing for temporary disability and medical aid the claimant need only show a compensable accident arising out of and in the course of employment which results in a temporary disability and need for medical care." *Downing v. Willamette Indus.*, 895 S.W.2d 650, 655 (Mo. App. 1995). "For an award of temporary disability and medical aid, proof of cause of injury is sufficiently made on reasonable probability, while proof of permanency of injury requires reasonable certainty." *Id.* "Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt.'" *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 611, 620 (Mo. App. 2001) (citations omitted).

Employee suffered a laceration on his buttocks near his anal verge on or about July 29, 2004. The relatively painless laceration became increasingly painful between July 29, 2004, and August 4, 2004, such that employee sought medical treatment. Upon examination, a perirectal abscess was discovered. Employee had never before suffered from such an abscess. After reviewing employee's medical records, Dr. Levy formed the opinion that the July 29, 2004, laceration became infected leading to the development of an abscess and resulting in employee's need for medical treatment. Dr. Levy explained that any break in the skin – even a superficial one – carries a possibility of infection.

Dr. Brabbee does not believe that a superficial abrasion such as employee suffered can cause the development of an abscess and fistula. The certitude of his opinion is undercut by his admission that he has never seen findings like the findings revealed by employee's fistulogram and he is perplexed by the etiology of the venogram.

Employee's credible testimony establishes a chronology suggestive of a medical causal connection between the July 29, 2004, incident and his present condition. Dr. Levy offered his expert medical opinion that the incident caused employee's current need for treatment supported by his logical explanation of how the condition originated and developed. Employee has established by a reasonable probability that the work accident resulted in his temporary disability and his need for medical care. *Downing*, supra.

On another matter, I believe the Commission errs in entering a final award. The events preceding the hearing in this matter are all too common. Employee requested medical treatment from employer, which request was denied. Employee filed a request for hardship hearing seeking an award of medical treatment from employer. In

pre-trial stipulations, the parties agreed that the matter was before the administrative law judge on a request for a temporary award of medical treatment. Neither employer/insurer nor employee requested that a final award be entered.

In recent years, Missouri appellate courts have frequently held that the Division and Commission exceed their powers when they address issues not stipulated for hearing by the parties.

The rules of the Department of Labor and Industrial Relations, in particular, 8 CSR 50-2.010(14), provide: "hearings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the state of Missouri shall apply. Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues." Therefore, the ALJ should confine the evidence during the hearing to the stated contested issues. Stipulations are controlling and conclusive, and the courts are bound to enforce them. A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish... [O]ur colleagues in the Southern District [have] concluded that the Commission acted in excess of its powers in making its award on grounds not in issue.

Boyer v. Nat'l Express Co., 49 S.W.3d 700, 705 (Mo. App. 2001). See also, *Aldridge v. S. Mo. Gas Co.*, 131 S.W.3d 876 (Mo. App. 2004), *Bock v. Broadway Ford Truck Sales*, 55 S.W.3d 427, 436 (Mo. App. 2001) (set aside on other grounds). Because the parties were not seeking final disposition of this matter, it is error to enter a final award.

The need for medical attention is often greatest soon after an alleged injury. Consequently, requests for temporary awards are often heard before medical diagnoses are rendered and before discovery is completed.

Temporary or partial awards are not subject to the principles of either claim or issue preclusion. They are not final judgments on the merits but are subject to modification. A temporary or partial compensation award "may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made" Section 287.510 RSMo. This language recognizes that the final award may differ from the temporary or partial award. "The legislature clearly contemplated that the ALJ may render a decision in a final hearing which differed from that of the temporary or partial award."

Dilallo v. City of Md. Heights, 996 S.W.2d 675, 677 (Mo. App. 1999) (citations omitted).

When a hearing is held on a request for temporary award seeking medical treatment, a claimant victory results in a temporary award. Because a temporary award is not res judicata, employer can try again to convince the administrative law judge that the claim is not compensable at a final hearing. Fairness dictates that in those cases where employer prevails after a hearing seeking a temporary award, the award denying compensation should also be temporary so claimant is afforded the opportunity at a final hearing to convince the administrative law judge the claim is compensable. To hold otherwise suggests it was the legislature's intention to grant claimants the right to ask for a temporary determination of needed medical benefits, but only under threat of losing their entire claim. I do not accept the legislature so intended.

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

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Dependents: N/A

Employer: Aulbach Contracting, Inc.

Additional Party: Second Injury Fund (Open)

Insurer: American Home Assurance Co.

Hearing Date: April 20, 2006

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: MDV: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: July 29, 2004
5. State location where accident occurred or occupational disease contracted: St. Louis County
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:
Sat on sliver of concrete.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: Body as a whole
14. Compensation paid to-date for temporary disability: \$21,628.80
15. Value necessary medical aid paid to date by employer/insurer? \$13,842.00
16. Value necessary medical aid not furnished by employer/insurer? -0-

Employee: Donald Black

Injury No.:

04-081746

17. Employee's average weekly wages: \$820.59
18. Weekly compensation rate: \$547.01/\$354.05
19. Method wages computation: See Award

COMPENSATION PAYABLE

20. Amount of compensation payable:

Future medical benefits:

*

Future temporary total disability benefits: **
Credit for TTD overpayment ###

(All use of an asterisk (*) denotes an uncertain contingent benefit)
(# information not provided)

21. Second Injury Fund liability: Open

TOTAL: * ** ###

22. Future requirements awarded: See Award

Each of said payments to begin immediately 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% which is awarded above as costs of recovery of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Mark Haywood

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|-----------------------------|---|
| Employee: | Donald Black | Injury No.: 04-081746 |
| Dependents: | N/A | Before the Division of Workers' Compensation |
| Employer: | Aulbach Contracting, Inc. | Department of Labor and Industrial Relations of Missouri |
| Additional Party: | Second Injury Fund (Open) | Jefferson City, Missouri |
| Insurer: | American Home Assurance Co. | Checked by: MDV:tr |

ISSUES

The issues presented for resolution by way of this hearing are medical causation, entitlement to future temporary total disability benefits, rate, entitlement to future medical benefits and Employer claims a credit for temporary total disability overpayment if the medical causation is found in Claimant's favor. I find in Claimant's favor on causation and award benefits. Employer is entitled to a temporary total disability credit, although the exact amount is not specified, but the proper rate is set out.

FINDINGS OF FACT

1. Claimant is a 62-year-old heavy equipment operator, married, living in Arnold, Missouri, who has worked for the Employer, Aulbach Contracting, for the last nine years. Claimant has worked for the last 40 years or his entire career in the heavy equipment operator field. In this capacity he operates track hoes, backhoes,

concrete breakers and high lifts.

2. On the date of the accident, July 29, 2004, Claimant was working in hot, humid weather breaking concrete with a drop hammer. This is a large "concrete buster" which is attached to a tractor like vehicle. The operator has to stand to see where the chisel is being placed and once the chisel is upon its mark, then the operator sits down on the seat and begins to operate the drop hammer. This up and sit down maneuver occurs constantly.
3. The seat on this particular vehicle was a black seat and Claimant was working in the sun so the seat would become extremely hot. As Claimant was breaking concrete, standing and sitting on the date in question, a jagged concrete sliver flew onto the seat and Claimant sat on the sliver. Unaware of the concrete immediately, he drove to a work location for about three miles on bumpy roads bouncing in the vehicle seat.
4. The sliver had cut through his pants and lodged into his buttocks near the rectum on the right side.
5. It took approximately 20 minutes to drive the vehicle 3 to 4 miles and although he felt something in his backside he ignored it as typical of the bumps, bruises and construction debris that he encountered on a routine daily basis.
6. When Claimant got to the next job site, he recalls brushing the sliver of concrete away. When he got home that evening his wife noticed dried blood and the backside had become more painful and sore. Claimant then knew that he was cut. Over the next few days he thought that the abrasion was healing. The pain, however, kept increasing and got to the point where he could not sit. Claimant's best recollection is that this incident occurred on a Wednesday or a Thursday and he told the owner about the injury on Monday. Claimant would routinely talk with the owner of the company by telephone and receive orders and directions and he told the owner that he didn't think he would be able to work that day because of the injury. The injury site had started swelling.
7. On August 4, 2004 Claimant went to a MedStop in Arnold, Missouri and from there phoned to the Employer and talked with Angie, the Employer's wife, and asked now to get in touch with the workers' compensation carrier.
8. The MedStop sent Claimant straight to the hospital for surgery and he spent the next eight days in the hospital. On August 4, 2004 St. Anthony's records document a "large right buttock peri rectal mass". Dr. Nellore consulted at St. Anthony's and documented on August 6, 2004 a right gluteal focus to the problem. The emergency room report of August 4, 2004 indicates indurated tissue on the right buttocks where Claimant indicated.
9. Ann Peick, M.D. performed surgery that night. Claimant testified that the treatment consisted of excision and draining of an infected abscess. He spent eight days in St. Anthony's Hospital and experienced complications because of fluid build up in his lungs and congestive heart failure. He was transferred to the ICU where two liters of fluid were removed from his lungs.
10. The wound in his backside continued to discharge and produce puss and Claimant had to undergo a second surgery on August 11, 2004 with Dr. Peick.
11. When that wound didn't heal Claimant was sent to Dr. Esser, a specialist. The wound kept draining and bleeding. It was still bleeding when he saw Dr. Esser and was still bleeding as of the date of the hearing.
12. Claimant experiences a cycle where every three to four days the bleeding will slow and then the wound will drain puss and then as the puss builds up the wound becomes infected again. It is a continuous problem and process and Dr. Esser performed a third surgery in order to seal the wound or fistula that had developed on December 11, 2004. Dr. Esser thought Claimant had a postanal abscess that developed into a horseshoe shaped abscess with extension to the right. This would corroborate the external component to the original wound which will become important to causation.
13. That third procedure didn't work and Claimant now needs a fourth procedure.
14. At this point, the workers' compensation carrier sent Claimant to see two infectious disease specialists, Dr. German and Burgmeister. Dr. Burgmeister concluded that it was the concrete sliver that caused the wound and sent Claimant back to Dr. Esser. Dr. German reportedly concurred.
15. The Insurer's case manager thought that Claimant might have Crohn's disease but a test for that was negative. Dr. German says that Claimant needed immediate attention and he was sent to Dr. Brabbe who performed an examination but due to the painful nature of that examination it has to be performed under anesthesia or with a pain reliever. Further examination was deferred.

16. Claimant's medical treatment was terminated at that point and the case came before me for determination of medical causation.
17. Claimant testified that he continues to wear a pad and he experiences increased bleeding upon lifting or bouncing at work. Claimant is currently working.
18. On cross-examination, Claimant admitted that the sliver of concrete had to cut through his denim and that he did not immediately notice symptoms of pain, that he discovered the concrete only twenty minutes later as he brushed it away. He did not have to pull it out or otherwise dislodge it to brush it away. He had noticed the bleeding at the end of the day when he went into the house and his wife noticed it first. This was approximately one hour after the occurrence.
19. Claimant told Steve Aulbach that he cut himself when he was bouncing up and down on the tractor seat and felt that it was similar to a bruise. He told Mr. Aulbach that he would put ice on the affected area and would stay off from work a day or two.
20. Claimant doesn't see his Employer on a daily basis. Often times the Employer calls him and tells him where to go and he just appears there without going to the office and performs his heavy operator equipment work.
21. Dr. Brabbe, on behalf of the Employer, testified that the condition that Claimant suffered from is extremely unusual. In his professional opinion, Claimant's fistula could not have occurred as a result of an abrasion. Dr. Brabbe testified that if he hadn't seen it, he wouldn't believe a venogram such as Claimant's was possible.
22. Dr. Brabbe believes that Claimant sat on a cement block of some sort and had an abrasion of his buttock. (Exhibit 1, pg. 23). Dr. Brabbe testified that the conditions from which Claimant suffered are caused by two things, one, an infection of the anal canal, and two, an impalement type injury. He doesn't believe that Claimant described an impalement type injury; hence he must suffer from an idiopathic infection.
23. Dr. Levy, on behalf of the Claimant, believes that the injury caused all of Claimant's subsequent surgeries and need for medical treatment. He believes that the opinion and the bills were appropriate and necessary and related to Claimant's complex problem. Dr. Levy has performed exactly the type of surgery that Claimant underwent probably one hundred times in his practice over 40 years.
24. Claimant is a soft-spoken, grey haired gentleman who testified in a straightforward manner.

RULINGS OF LAW

1. Claimant was paid \$9,026.56 in the 11 weeks preceding the injury making the rates \$547.01/\$354.05. If further evidence is presented, the rate may be adjusted.
2. The need for the three surgeries and the proposed fourth surgery are medically and causally related to the original concrete shard incident on July 29, 2004.
3. Claimant is entitled to temporary total disability at the specified rate when he is off work treating for the injuries.
4. Employer is entitled to a credit for overpaid temporary total disability. A specific amount is not given, as the weeks of paid temporary total disability are unclear. The Employer's record will show the proper time period.

DISCUSSION

Claimant was credible. The original injury caused a minor buttock wound that became infected, developed an abscess and surgeries to the site healed poorly, aggravated the wound, and caused a fistula to develop. Dr. Levy has a better understanding of the original injury than Dr. Brabbe. Dr. Brabbe thought Claimant scraped the buttock on a cinder block. This is not accurate. Further, Dr. Brabbe saw Claimant after the third surgery and after several invasive procedures including the venogram where a catheter was dislodged by the probe. Any one of these procedures could have tremendously exacerbated the original injury and helped produce the final condition Dr. Brabbe viewed. Dr. Levy didn't examine the Claimant but clearly understands the progression of the injury and its sequelae. Dr. Brabbe leaps from a cinder block scrape to a complex anal fistula while ignoring all the intervening poking, prodding, probing and invasions, any of which could exacerbate the problem. Claimant's live testimony gave tremendous breadth, depth, credibility and meaning to the live testimony and I find him extremely credible. He makes a grandfatherly type witness. The quicker this condition is addressed, the better.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation