

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

Injury No.: 03-114542

Employee: Robert Brandt
Employer: St. Louis County Government
Insurer: Corporate Claims Management
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated November 24, 2008.

The Commission affirms all findings and conclusions of the administrative law judge, but for the calculation of the amount of the Second Injury Fund's liability. The administrative law judge made the following findings: 20% permanent partial disability at the level of the left knee for employee's primary injury; 45% permanent partial disability to the body as a whole for employee's pre-existing disability to the spine; and a 20% load factor for the synergistic effect of the combined injuries. The administrative law judge found the Second Injury Fund's liability to be \$21,378.28, based on 61.6 weeks of permanent partial disability.

The correct calculation of the amount of the Second Injury Fund's liability, based upon the administrative law judge's findings of employee's disability, is as follows:

Primary Injury:	$.20 \times 160 \text{ weeks} = 32 \text{ weeks}$
Pre-existing Injury:	$.45 \times 400 = 180 \text{ weeks}$
Enhancement:	$.20 \times (180 \text{ weeks} + 32 \text{ weeks}) = 42.4 \text{ weeks}$
SIF Liability:	$42.4 \text{ weeks} \times \$347.05 = \$14,714.92$

Based on the above calculation, the Commission ascertains and determines that the correct amount of the Second Injury Fund's liability is \$14,714.92, and we modify the November 24, 2008 award accordingly.

As stated above, all remaining findings of fact and conclusions of law are affirmed.

The award and decision of Administrative Law Judge Mathew D. Vacca issued November 24, 2008, as modified, 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 3rd day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Robert Brandt	Injury No.: 03-114542
Dependents:	N/A	Before the
Employer:	St. Louis County Government	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Corporate Claims Management	Department of Labor and Industrial
Hearing Date:	October 15, 2008	Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDV

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: November 10, 2003
 - State location where accident occurred or occupational disease was 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
- 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: Inspecting sewer drain elevation and fell injuring knee.
- 12. Did accident or occupational disease cause death? No Date of death?
- 13. Part(s) of body injured by accident or occupational disease: Knee
- Nature and extent of any permanent disability: 20% Knee
- 15. Compensation paid to-date for temporary disability: \$0
- 16. Value necessary medical aid paid to date by employer/insurer? \$4,448.19

Employee: Robert Brandt

Injury No.: 03-114542

- 17. Value necessary medical aid not furnished by employer/insurer? \$0

- Employee's average weekly wages: \$1205.92

- 19. Weekly compensation rate: \$662.55/\$347.05

- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

21.	Future Medical	*
	32 weeks of permanent partial disability from Employer	\$11,105.60
22.	Second Injury Fund liability: Yes	
	61.6 weeks of permanent partial disability from Second Injury Fund	\$21,378.28

Total: *\$32,483.88

23. Future requirements awarded: future medical care

Said payments to begin 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 of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert Brandt	Injury No.: 03-114542
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	St. Louis County Government	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Corporate Claims Management	Checked by: MDV:cw

PRELIMINARY MATTERS

Employer/Insurer submitted as Exhibit 1, the deposition of Dr. Nogalski, but the original deposition transcript was mispaginated going from page 11 to page 13, 14, 15 in sequence, and then back to page 12. I left the pages as they were but note the discrepancy for the record. Redacted records were submitted in their current form, not altered by the Court.

ISSUES PRESENTED

The issues presented by resolution by way of this hearing are accident, arising out of and in the course of employment, notice, the statute of limitations, the nature and extent of any permanent partial disability, the liability of the employer for past medical expenses in the amount of \$3,987.00, future medical care and the liability of the Second Injury Fund.

FINDINGS OF FACT

1. Claimant was born on December 31, 1946. Claimant is 6' 2" tall and weights 215 lbs. Claimant served in the Navy from 1960 to 1970 on an aircraft carrier off the coast of Vietnam. Claimant received an honorable discharge and went to work for St. Louis County where he has since worked for the next 34 years for the highway department from 1972 until his retirement in January 2007.
2. Claimant last worked for the highway department as an inspection supervisor at the end of his career. In this capacity Claimant would supervise inspectors of all different grades. Claimant's department would oversee the concrete contracts for the highway department. Claimant retired from St. Louis County when he was no longer physically capable of doing a good job.
3. On November 10, 2003, Claimant was on Buckley Road near a church and school with one of his junior

inspectors, Jeff Bond. Claimant and Jeff Bond were engaged in checking the alignment of the storm line. Claimant was standing on the curb inlet of the storm sewer drain to establish its elevation when Claimant stepped backwards off the storm sewer and into the sump. The sump is the ramp or inlet where water flows into the storm sewer.

4. Claimant then fell forward twisting his knee and striking it just below the kneecap on a concrete lid. Claimant's co-worker Jeff Bond helped him over to the truck. His knee had swollen up to the size of a grapefruit and was extremely painful.

5. Claimant filled out a medical accident form, called his supervisor on the cell phone and was immediately referred to personnel where he was directed to medical care.

6. It took about an hour before Claimant received medical attention, but he received treatment the same day at Unity Health on Gravois Road. Claimant was seen there three times. The first time Claimant received an examination and evaluation and was given some pain prescriptions. Claimant followed up with Dr. Rende in his office and the doctor performed some x-rays, examined the Claimant and released him. Claimant also received an MRI and some physical therapy and was seen at Unity Health on two more occasions.

7. Dr. Rende believes that Claimant has a degenerated osteoarthritic knee that was the result of prior injuries to his knee and that Claimant therefore suffered no permanent injuries as a result of the incident at work.

8. Claimant had a prior a tibia plateau fracture at the age of 24 after which Claimant was in a cast for seven months. Claimant healed extremely well and experienced no problems as a result of the injury.

9. At the age of 34, Claimant had a knee arthrotomy where the medial meniscus was removed in an open procedure.

10. Following these prior injuries to the left knee Claimant did extremely well physically and engaged in very competitive sports. He was a racquetball champion seeded number three in the state. Claimant also engaged in weight lifting. Claimant performed these activities up until the date of this accident.

11. Claimant could not hyperextend his knee following these two prior injuries, but Claimant could straighten it out to 180 degrees. Claimant was able to walk every inch of ten concrete subdivision streets on a near daily basis as he performed his job for the highway department.

12. After Claimant was released by Dr. Rende, Claimant had continuing knee problems. Claimant's pain increased on any activity, he had difficulty performing most of his job at work and co-employees would have to pick up the slack at work.

13. Claimant's knee would constantly give way over the next few years. In 2005, Claimant was mowing at his weekend property near the Lake of the Ozarks when Claimant was going backwards and his knee gave way. Claimant fell with his left foot going under the mower. Also, Claimant severed his great toe and injured the second toe.

14. Claimant's right leg now aches because of his altered gait. It is not clear that the altered gait follow as a result of the injured knee or because of imbalance accruing as a result of the severed toes. Claimant has to pitch to the right to clear the riser when he walks up steps and can no longer push a mower. Claimant now has a riding mower.

15. Exhibit I are the medical bills associated with the toe being severed and reattached. Claimant requests those be paid as being part of the claim.

16. Prior to these injuries Claimant had back problems and underwent a discectomy at L3-4 and following that a second surgery where Claimant underwent a fusion with placement of a bone graft plug and rod. Claimant continues to experience numbness and tingling. His muscles are slower and he has difficulty lifting as a result of the back injury.

17. Dr. Rende believes that Claimant will need a knee replacement sometime in the future, but does not believe the

need for the knee replacement was in any way caused by any injuries that happened at work.

18. Dr. Nogalski also believes that the Claimant will need a total knee replacement, but does not believe the need for the surgery is related to anything that happened on the job.

19. Dr. Rende and Dr. Nogalski believe Claimant sustained a knee strain superimposed on a severely end-stage osteoarthritic knee. They assigned 0% disability for the incident that happened at work.

20. An MRI was performed on December 4, 2003. It demonstrated that Claimant had a lateral meniscus tear which Dr. Rende and Dr. Nogalski believe reflected only generalized degeneration because Claimant had no swelling in the knee after the accident. They found that the ACL ligament was attenuated, that the posterior cruciate ligament was intact and that the collateral ligaments and patellar tendon were also intact. Thus, they concluded that because there was no swelling, Claimant's osteoarthritic condition was not work related and that Claimant had only a knee sprain which returned to baseline with a 0% disability.

21. Dr. Cohen, on the other hand, believes that Claimant sustained a more severe injury to his knee at the time of the accident on November 10, 2003. He believes that Claimant tore the lateral meniscus because, in fact, there was swelling at the time of the injury and during the next several visits leading up to the MRI. Dr. Cohen points to the November 10 and 17 Unity Health records which indicate Claimant had very marked swelling and that it had only slightly decreased by November 17.

22. Records also reveal that Claimant was experiencing popping in the knee which comes from a meniscus lesion or something loose in the knee itself such as floating bodies or pieces of bone. Dr. Cohen believes that due to the recent meniscus tear, the meniscus was now catching and causing Claimant's popping. This he believes is also evidence of new injury.

23. Therefore Dr. Cohen believes that Claimant had an aggravation of a degenerative arthritic knee as well as a meniscus tear. Dr. Cohen believes that Claimant's toe injury was also medically and casually related to the injury in 2003, due to the fact that his knee gave way.

24. Dr. Cohen rates Claimant at 45% permanent partial disability for the two prior disc injuries, surgery and fusions to his spine.

25. Dr. Cohen rates Claimant as having a 35% permanent partial disability measured at the level of the left knee for the prior tibia plateau fracture and meniscus tear.

26. As a result of the work-related injury, Dr. Cohen believes that Claimant had an additional 30% permanent partial disability to the left knee, 20% permanent partial disability to the right knee, as a result of an antalgic gait, and a 30% permanent partial disability to the great toe as a result of the May 2005 lawnmower toe-severing injury.

26. Dr. Cohen emphasizes that Claimant (1) had a fall at work, (2) Claimant experienced immediate pain with marked swelling, (3) that he experienced significant swelling for several weeks, and (4) experienced the type of swelling and popping that one would experience in the situation of an acute meniscal tear.

RULINGS OF LAW

1. Claimant sustained an accident on November 10, 2003, when he stepped off a storm sewer inlet twisting and striking his knee on concrete.

2. The accident arose out of and in the course of Claimant's employment as a highway inspector working for St. Louis County Government.

3. Employer received notice the day of the injury and referred Claimant for medical care.

4. The claim for compensation was filed on March 17, 2004, which is within two years of the date of the injury and, therefore, the claim was timely filed.
5. Employer paid \$4,448.19 in medical care to cure and relieve Claimant of the effects of the work-related injury.
6. The medical benefits reflected in Exhibit I were not reasonable and necessary to cure Claimant of the effects of the knee injury on November 10, 2003. The toe injury is too far removed in time and causality to be attributed to the knee injury on the storm sewer thus, those medical bills are denied.
7. Claimant may need a knee replacement in the future. I do not think it can be fairly said that the meniscus tear is the sole or substantial or primary reason Claimant would need future surgery for a knee replacement. Claimant's former tibia plateau fracture, meniscus tear and attenuated ACL combined with the current meniscus tear are working in concert to produce the need for that surgery in the future. Nevertheless, that is all that is necessary to establish the need for future medical care. Conrad v Jack Cooper Transport, WD 69407, October 21, 2008 (MoApp ED) is directly on point in almost identical medical circumstances.
8. Claimant sustained a 20% permanent partial disability measured at the level of the left knee for the accident which occurred while falling off the curb inlet on November 10, 2003. There has been no surgery to date.
9. Pre-existing the primary injury, Claimant suffered from a 45% permanent partial disability measured at the level of the spine. These two injuries are working in a synergistic fashion best represented by a loading factor of .2.

DISCUSSION

There is insufficient evidence to tie Claimant's altered right gait to either the left knee injury or to the severed toe injury or both. Thus Dr. Cohen's opinion on disability too broad.

Dr. Nogalski and Dr. Rende are too conservative in their judgment that all Claimant's left knee problems were pre-existing. Claimant was able to play racquetball, a sport requiring constant stopping, twisting, bending at the knees, extension, rotation and stress on the knee. He performed this sport at a very high level of competition. Claimant also walked everyday as part of his job over long distances on concrete with no problems.

I think it is highly likely that Claimant did injure the meniscus on the sewer lid. I think all the other injuries to the knee were pre-existing. Thus, the facts and the reality are more consistent with Dr. Cohen's opinions. Claimant was okay until the injury, playing a high level of racquetball and working daily walking. Then the injury to the meniscus caused the knee to worsen and the last straw was now in place to break the camel's metaphorical back.

Nevertheless, I disagree with Dr. Cohen that the lawnmower incident can be attributed to the original injury. The lawnmower incident is too far removed in time to be causally related to the knee injury two years earlier. Knee treatment had long since concluded and the mechanism of the toe injury does not clearly and directly indict the weakened knee. The Claimant was on a slope not using safeguards and the lawnmower blades clearly constituted an intervening superseding event. The Employer does not become the Insurer of all of Claimant's subsequent injuries to a weakened compensable body part.

The later injury is not incidental to and is completely independent of the employment relationship. Thus, there is a different standard for linking future medical to the original incident than there is for tying future events to prior accidents. However, the lawnmower incident is not a natural consequence of a knee injury. Severing the toe is not a direct and natural result of a meniscus tear. These natural consequence concepts contours were recently explored by the Commission in the context of aggravation of an injury by treatment:

In Larson's treatise on workers' compensation law, the author explores the range of compensable consequences that can result after the primary injury occurs.

A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. . . . [W]hen the question is whether compensability should be extended to a

subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of “direct and natural results,” and of claimant’s own conduct as an independent intervening cause.

The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.

The simplest application of this principle is the rule that all the medical consequences and sequelae that flow from the primary injury are compensable. 1. A. Larson, *Larson’s Workers’ Compensation Law*, section 10.01.

In other subsections of this same chapter, the author looks more specifically at various circumstances that are compensable.

[1] – Compensability of Aggravation by Treatment

It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable. Examples include exacerbation of the claimant’s condition, or death, resulting from . . . pain killers, and other medications . . .

When the injury sustained during treatment or examination is not an aggravation of the work-related injury, but injury to another part of the body, courts have also found the injury to be compensable.

[2] – Irrelevance of Fault or Malpractice of Doctor

Fault on the part of physicians . . . , even if it might amount to actionable tortiousness, does not break the chain of causation. . . .

[3] – Irrelevance of Fault of Others Involved in Treatment

Similarly, injuries due to the negligence of persons other than physicians, connected with the process of treatment . . . , are within the compensable range of consequences.

1. A. Larson, *Larson’s Workers’ Compensation Law*, section 10.09.

Cypher v. Independant Plumbing & Interior Electric, L&RC 01-14356 (March 21, 2006).

In the case at hand, I find actions or negligence on employee’s part that acted as an independent intervening cause for the lawnmower incident. Claimant was not cutting sideways on the slope, rather straight up and down. This is not a good safety practice. He also was not wearing steel toe boots or using a safety guard on the mower.

In *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561, 562 (Mo. App. W.D. 1991)(citations omitted), the employee fell off a chair in a whirlpool and injured her right hip and low back while undergoing whirlpool therapy for an ankle injury that occurred during the course of her employment. The law is well settled, that where a claimant sustains injury arising out of and in the course of her employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body is compensable as a direct and natural result of the primary or original injury. *Id.*

The difference in the instant case is that the toe incident did not occur as an accident within the contours of an accident as in *Lahue*. The instant case presents two separate and distinct injuries with only tenuous theoretical connection, but no established direct causal link.

Date: _____

Made by: _____

Matthew D. Vacca

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

*Jeffrey W. Buker
Director
Division of Workers' Compensation*