

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

Injury No.: 03-140789

Employee: Henrietta Brown
Employer: Bi-State Development Agency
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: December 29, 2003
Place and County of Accident: St. Louis City, 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, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated December 3, 2004.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued December 3, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22nd day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: John J. Hickey, Member

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Henrietta Brown Injury No.: 03-140789
Dependents: N/A Before the
Employer: Bi-State Development Agency **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Self-Insured
Hearing Date: September 28, 2004 Checked by: KOB: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: December 29, 2003
5. State location where accident occurred or occupational disease contracted: St. Louis City
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: Claimant operated a bus equipped with multiple foot pedals, thereby contracting an occupational disease.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: Bilateral knees.
14. Compensation paid to-date for temporary disability: \$0.
15. Value necessary medical aid paid to date by employer/insurer? \$0.
16. Value necessary medical aid not furnished by employer/insurer? \$17,673.75

Employee: Henrietta Brown Injury No.: 03-140789

- 17. Employee's average weekly wages: \$754.98
- 18. Weekly compensation rate: \$503.32 / \$347.05
- 19. Method wages computation: By agreement.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$17,673.75
10 6/7 weeks of temporary total disability benefits:	\$ 3,767.97

21. Second Injury Fund liability: N/A

TOTAL:	\$ 21,441.72
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22. Future requirements awarded: Medical treatment and associated benefits as specified in 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 n/a 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 Floyd (the issue of attorney's fees is deferred).

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Henrietta Brown	Injury No.: 03-140789
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Bi-State Development Agency	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Self-Insured	

PRELIMINARIES

The matter of Henrietta Brown (“Claimant”) proceeded to hearing to determine whether she sustained an occupational disease arising out of and in the course of her employment with Bi-State Development Agency (“Employer”). Attorney Mark Floyd represented Claimant. Attorney John Johnson represented Employer, which is self-insured. The Second Injury Fund did not participate in the hearing as Claimant is seeking a temporary award.

The parties stipulated that up to and including December 29, 2003, Claimant was an employee of Employer earning an average weekly wage of \$754.98, which corresponds to compensation rates of \$503.32 for total disability benefits and \$347.05 for partial disability benefits^[1]. Venue, notice, and timeliness of the claim were not at issue. Employer paid no temporary total disability or medical benefits.

The issues to be determined are:

1. Is the condition of Claimant’s knees an occupational disease arising out of and in the course of her employment;
2. Is Claimant’s bilateral knee condition causally related to the conditions of her employment;
3. Is Employer responsible for providing medical benefits in the past and in the future; and
4. Is Claimant entitled to temporary total disability benefits from the period beginning May 22, 2003, through August 6, 2003, and from January 1, 2004, to the present, or any portion thereof?

SUMMARY OF THE EVIDENCE

Claimant is a 60-year-old widow who lives in Illinois. Upon graduation from high school, Claimant became a homemaker. In 1971, she entered the workforce as a nurse’s aide. In 1977, Claimant began work as a bus operator for Employer, and remained employed until December 29, 2003, when she retired.

During her career, Claimant regularly operated 40 to 45 foot long buses that weighed 30,000 to 40,000 pounds. She worked 8 to 12 hours a day. At times, she worked up to 50 hours a week but never worked less than 40. More recently, Claimant has worked regular 40-hour weeks driving the same bus.

Claimant explained how operating a bus varies from operating the typical passenger automobile. A bus has five foot-operated pedals. Beginning on the left side there are pedals for the left signal, the right signal, and the speaker system. The right foot operates the brake and the gas pedal. Claimant indicated that she operated these pedals nearly all of the time during her typical shift. She would have to depress and hold the signal buttons every time she was preparing to and making a turn. She testified the pressure needed to depress the signal buttons as being approximately 30% of the strength of her leg. She would hold the signal buttons down anywhere from one to three minutes at a time. Claimant testified that at the end of shift in her later years (the last eight or so) she often felt fatigue in her left leg. With respect to the right leg, Claimant indicated that the air brake pedal took a great deal of effort to hold down, especially with a large load: approximately 60% of the strength of her leg. Claimant often found herself having to hold down the brake pedal for up to three minutes at a time during the boarding and the alighting process. She estimated she pressed the brake pedal up to a 1,000 times per day. The gas pedal was the easiest to press of all the pedals. Claimant testified that operating a bus was very different than driving a car or performing other regular activities.

Claimant testified that throughout her career, her legs felt fatigued at the end of a shift. However, she began to experience pain in her legs beginning in 2001, starting with the left leg. She went to her own doctor, Dr. Murphy, who drained fluid, injected her knee and provided prescription medication. Her right leg began to bother her the following year. Dr. Murphy referred her to an orthopedic surgeon, Dr. Tessier, who provided steroid injections, medications, and aspirated her knee. Claimant indicated that she had the symptoms while at work, but when she was away from work the symptoms subsided.

In February 2003, Claimant fell on her knees while at work. Within a month after the fall, Claimant requested

that Employer provide her with medical treatment for her knees. Claimant said that Employer denied treatment for a “preexisting condition”. Thereafter, Claimant sought treatment on her own, which included surgery on May 22, 2003, by Dr. Tessier. Claimant was off work on account of the surgery through August 6, 2003.

Following surgery, she still had problems with the knee even though it improved. After Claimant returned to work in August 2003, the symptoms came back. Claimant decided that she could not go on driving a bus and retired at the end of 2003. She understood that her only other option was a knee replacement. She wants to work and wants the knee replacement surgery to allow her to work. She testified that her knee keeps her from working.

Medical records document conservative treatment to Claimant’s right and left knees from mid-2001 at St. John’s Mercy Medical Center. Dr. Tessier’s records indicate he aspirated Claimant’s knee and tried one Visco gel injection before proceeding with a right knee arthroscopic synovectomy, chondroplasty and meniscectomy on May 22, 2003. He kept Claimant off work through August 6, 2003. In follow up visits, Claimant has ongoing complaints of varying degrees, but Dr. Tessier indicated “[w]e would both like to avoid knee replacement surgery” for the advanced osteoarthritic changes. The charges associated with Dr. Tessier’s treatment after April 2003^[2] are \$17,673.75 (Exhibit A, deposition exhibit D). Charges from Creve Coeur Surgery for a May 22 procedure total \$12,370.^[3]

Dr. Kyu Cho is a board-certified orthopedic surgeon who reviewed Claimant’s medical treatment records and related charges, examined her on May 5, 2004, issued a report, and testified by deposition on her behalf.^[4] He testified that the treatment was necessary and the charges were the usual and customary. Dr. Cho was provided a description of the physical demands of Claimant’s job that was consistent with the evidence at hearing. Dr. Cho concluded that Claimant suffered from advanced, bilateral degenerative joint disease of the knees for which consecutive knee replacement surgeries were immediately necessary. On the issue of causation, Dr. Cho testified that Claimant’s long-time position as a bus driver aggravated and accelerated the degenerative arthritis in her knees, and is a substantial factor in necessitating the recommended total knee joint replacements. He further explained that Claimant’s 26 year employment as a bus driver “made the degenerative arthritis much quicker and easier” than anyone else, and that reaching for the pedals all the time is “a substantial factor [in the] cause [of] the degenerative arthritis.” He felt Claimant’s bowlegs were not congenital, but developed as a result of her degenerative arthritis and the corresponding collapse of the joint “cushion” which he explained well by referencing Claimant’s x-rays.

Dr. Richard Lehman examined Claimant on August 3, 2004, and issued a report that Employer submitted as Exhibit 1 in lieu of a deposition. He indicated he reviewed medical records and her job description, but it is unclear whether the job description was consistent with the evidence presented at hearing, as it is not in evidence.^[5] Dr. Lehman is of the opinion that Claimant has bilateral endstage degenerative arthritis and varus of the knees. She is a candidate for future knee replacements, but because she seemed to be “getting by,” conservative treatment would suffice and there was no immediate need for surgery. On the issue of causation, Dr. Lehman felt that Claimant’s bowleggedness, a condition she was born with, is the cause of the degenerative changes, and her job has nothing to do with it.

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FINDINGS OF FACT

Based on the substantial and competent evidence of record, including Claimant’s testimony, which I observed and found to be credible, the expert opinion I find most convincing, and the medical records, I find the following facts:

Claimant is a 60 year old woman who has operated buses for Employer more than two decades. She worked 8-12 hours a day, 40 to 50 hours a week. Driving a bus requires constant depression of pedals with one or both feet, and pedals operate signals, speakers, brakes and acceleration functions on the bus. The repetitive actions and physical exertions performed by Claimant were a substantial factor in the aggravation and acceleration of her degenerative joint disease of the bilateral knees. The treatment provided by Dr. Tessier, including the operative procedure of May 22, 2003, was reasonable and necessary to cure and relieve Claimant’s degenerative joint disease, and the charges therefore were usual and customary. Claimant is in current and immediate need of additional treatment in the form of bilateral total knee replacements.

RULINGS OF LAW

Claimant is seeking a temporary award, primarily for medical treatment and temporary disability. An injured employee seeking a temporary award must establish he was injured as a result of an accident arising out of and in the course of his employment which resulted in temporary disability and need for medical care. *Minnick v. South Metro Fire Protection Dist.*, 926 S.W.2d 906, 909 (Mo.App. W.D.1996). For an award of temporary disability and medical aid, proof of cause of injury is sufficiently made on reasonable probability. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. W.D.1973); *Winsor v. Lee Johnson Const. Co.* 950 S.W.2d 504, 509 (Mo.App. W.D.1997). I find that Claimant has met her burden.

I. The condition of Claimant's knees is an occupational disease arising out of and in the course of employment that is causally related to her job as a bus driver.

Claimant seeks workers' compensation benefits for her degenerative joint disease, claiming it is an occupational disease. A thorough legal analysis of degenerative joint disease as occupational diseases in Missouri can be found in *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43 (Mo.App. E.D.1999), from which the following legal propositions are extracted.

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App.1991). The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. E.D.1995); *Dawson v. Associated Electric*, 885 S.W.2d 712, 716 (Mo.App. W.D.1994); *Hayes*, 818 S.W.2d at 300; *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App.1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo.App.1987).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson*, 885 S.W.2d at 716; *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 223 (Mo.App. W.D.1992); *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App.1991). Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App.1992); *Sellers*, 752 S.W.2d at 416; *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App.1978). However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. *Hayes*, 818 S.W.2d at 299; *Sheehan v. Springfield Seed & Floral*, 733 S.W.2d 795, 797-8 (Mo.App.1987). A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. *Dawson*, 885 S.W.2d at 716; *Sellers*, 776 S.W.2d at 504; *Sheehan*, 733 S.W.2d at 797. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App.1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo.App. E.D.1993); *Webber*, 826 S.W.2d at 54; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo.App.1986).

As a general rule, disability sustained by the aggravation of a preexisting nondisabling condition or disease caused by a work-related accident is compensable even though the accident would not have produced the injury in a person not having the condition. *Gennari v. Norwood Hills Corporation*, 322 S.W.2d 718, 722-723 (Mo.1959); *Weinbauer v. Grey Eagle Distributors*, 661 S.W.2d 652, 654 (Mo.App.1983); *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 891 (Mo.App.1975); *Mashburn v. Chevrolet--Kansas City Div., G.M. Corp.*, 397 S.W.2d 23, 29 (Mo.App.1965); *Garrison v. Campbell '66' Express, Inc.*, 297 S.W.2d 22, 29 (Mo.App.1956). The Supreme Court's definition of "accident" under *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781, 785 (Mo. banc 1983) has been interpreted to include repetitive trauma. *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781, 785 (Mo. banc 1983); *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 123 (Mo.App. E.D.1994); *Sansone v. Joseph Sansone Const. Co.*, 764 S.W.2d 751, 752 (Mo.App.1989).

Aggravation of a preexisting disease or infirmity caused by *nonaccidental conditions* of employment is

compensable as either an accident or as an occupational disease. *Smith v. Climate Engineering*, 939 S.W.2d 429, 436 (Mo.App. E.D.1996). Aggravation of a preexisting disease or infirmity caused by *repetitive trauma* is compensable as either an accident or as an occupational disease. *See Id.* at 433-35.

Claimant has met her burden with the testimony of Dr. Cho. I find that Dr. Cho's opinion is much more credible, consistent with, and well founded in the evidence, as compared to Dr. Lehman's. Dr. Cho testified that Claimant's exposure to the disease is was greater than and different from that which affects the public generally, and describes the link between the disease and the requirement of depressing pedals in Claimant's job, as well as all bus driver's jobs. He explains how the repetitive motion of driving a bus causes and aggravates degenerative joint condition of the knees. He also explains how the bowleggedness, which Dr. Lehman assumes is congenital, is actually caused by the degenerative process that has been accelerated by Claimant's work. Dr. Cho's testimony supports a finding that Claimant suffers from an occupational disease.

II. Employer responsible for providing medical benefits in the past and future.

The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). It is not necessary that the claimant seeking future medical benefits produce conclusive evidence to support that claim. *Id.* The legal standard for compensability requires that work must be "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." §287.020.2 *RSMo.* 2000. Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the employee may make his own selection and have the cost assessed against the employer. *Hammett v. Nooter Corporation*, 264 S.W.2d 915, 919 (Mo. App. 1954).

Claimant obtained treatment of her work related condition as early as 2001, but did not request treatment until May 2003, at which time Employer refused to provide necessary medical care. Treatment obtained on her own, prior to the demand for treatment from Employer, is at Claimant's own expense. I find that Employer is liable for the costs of Dr. Tessier's treatment beginning in May 2003. From the evidence presented at hearing, I find that amount to be \$17,673.75. Charges associated with Dr. Cho's evaluation and the Creve Coeur Surgery bill are denied for the reasons stated above.

I further find that Claimant is in need of bilateral knee replacements as recommended by Dr. Cho. Employer shall make immediate arrangements for a qualified physical to perform the surgery and provide or direct all supportive and follow up care as may be required.

III. Claimant is entitled to temporary total disability benefits.

Benefits for temporary total disability are paid during the "healing period." *See, e.g., Vinson v. Curators of Univ. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. E.D.1991); *Phelps v. Jeff Wolk Constr. Co.*, 803 S.W.2d 641, 645 (Mo.App. E.D.1991). Temporary total disability compensation is paid until the employee can return to work, his condition stabilizes, or he has reached a point where further progress is not expected. *Minnick v. South Metro Fire Protection Dist.*, 926 S.W.2d 906, 909 (Mo.App. W.D.1996); *Vinson*, 822 S.W.2d at 508.

Dr. Tessier had Claimant off work from the date of surgery, May 22, 2003, until her returned her to work on August 6, 2003. I find that Claimant is entitled to recover 10 6/7 weeks of temporary total disability benefits. She shall also recover any and all temporary total disability benefits that may be associated with the medical treatment ordered above.

There is insufficient evidence in this record to determine whether Claimant is entitled to receive temporary total disability benefits after she retired at the end of 2003. Claimant's request for TTD benefits from December 2003 to the present is denied at this time.

CONCLUSION

Claimant has met her burden of establishing with reasonable probability that she suffers from an occupational disease of the bilateral knees as opposed to merely an ordinary disease of life. She shall receive workers' compensation benefits as described in this award.

The benefits provided herein shall 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 issue of attorney's fees is deferred.

Date: _____
Boresi

Made by: _____

Karla Ogrodnik

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Gary Estenson
*Acting Director
Division of Workers' Compensation*

[1] Although Employer's attorney did not stipulate to the average weekly wage initially, at the close of the evidence and in his post-hearing brief, Mr. Johnson agreed to these rates.

[2] Claimant did not make a demand for treatment until May 2003, and thus is not seeking reimbursement for charges before May.

[3] It is unclear from the record what these charges represent, or whether they are duplicative of Dr. Tessier's charges.

[4] Dr. Cho provided an evaluation only, not treatment, and therefore his charges (\$571.75) may not be recovered.

[5] Claimant testified that Dr. Lehman did not ask her any details about her job.