

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

Injury No.: 03-055097

Employee: James Bubash
Employer: American Airlines
Insurer: American Home Assurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: April 21, 2003
Place and County of Accident: St. Louis City

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 August 23, 2005. The award and decision of Administrative Law Judge Joseph E. Denigan, issued August 23, 2005, 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 25th day of April 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Bubash

Injury No.: 03-055097

Dependents: N/A Before the
Division of Workers'
Employer: American Airlines **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund (Open) Relations of Missouri
Jefferson City, Missouri
Insurer: American Home Assurance Company
Hearing Date: June 14, 2005 Checked by: JED: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: April 21, 2003
5. State location where accident occurred or occupational disease was 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 occurred or occupational disease contracted:
Claimant was jumping off of belt loader when he felt a sharp pain in his 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: Left knee
14. Nature and extent of any permanent disability: 33% permanent partial disability referable to the right knee
15. Compensation paid to-date for temporary disability: \$12,651.60 (19 and 6/7ths weeks)
16. Value necessary medical aid paid to date by employer/insurer? \$10,822.63

Employee: James Bubash Injury No.: 03-055097

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$637.45/\$347.05
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

52.8 weeks of permanent partial disability from Employer \$18,324.24

22. Second Injury Fund liability: Open

TOTAL: \$18,324.24

23. Future requirements awarded: Yes (see narrative 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:

Michael T. Londoff

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Bubash	Injury No.: 03-055097
Dependents:	N/A	Before the
Employer:	American Airlines	Division of Workers'
Additional Party:	Second Injury Fund (Open)	Compensation
Insurer:	American Home Assurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

This case involves a right knee injury resulting to Claimant with the reported accident date of April 21, 2003. Employer admits Claimant was employed on said date and that any liability was fully insured by American Assurance Co. The Second Injury Fund is a party to this claim but remains open for a determination of liability at a future date. Both parties are represented by counsel.

Issues for Trial

1. liability for unpaid temporary total disability;
2. nature and extent of permanent partial disability; and,
3. future medical expenses.

FINDINGS OF FACT

Claimant's Testimony

Claimant worked for Employer for approximately thirty-seven (37) years as a ramp service operator loading and unloading aircraft and guiding aircraft back from the jet way. Claimant worked in this capacity, specifically, for the last thirty-two (32) years. Claimant was injured by jumping off a belt loader and experienced an immediate onset of pain and swelling in his right knee.

Claimant testified that the vast majority of time as a baggage handler and working ramp service required him to go up and down steps, up and down ladders, and crawling in the bellies of planes, all of which he did on a regular routine daily basis. Claimant performed these tasks as on a regular basis for several years.

Claimant testified during his entire tenure in the airline industry of performing his job duties he had never experienced any problem with either his right or left knee. Specifically, he never lost time from work, never sought/received any medical attention, and took no pain medications of any nature related to his knees other than for the subject claim.

Treatment

At the end of Claimant's workday he was sent by his employer to BarnesCare for a medical evaluation. Claimant was instructed to use ice and anti-inflammatory medications. Claimant was placed on restrictions of no climbing of ladders, no kneeling or squatting, and limited walking and standing.

Claimant's right knee symptoms did not improve and soon was incapable of going back to work due to the increased symptoms, swelling and pain in his right knee. BarnesCare provided Claimant with a knee immobilizer. Subsequently, Claimant had an MRI and was diagnosed with a torn medial retinaculum and a fracture of the medial patella. Dr. Chams initial course of treatment was conservative in nature requiring Claimant to continue to use the right knee immobilizer. No surgeries were recommended or performed during the TTD period.

On May 22, 2003 Dr. Chams prescribed a new PTO brace for Claimant which Claimant currently wears. Dr. Chams prescribed physical therapy. Follow-up treatment with Dr. Chams resulted in continuing in physical therapy but Claimant was also given an injection. Dr. Chams then placed Claimant in a work-hardening program for several hours per day. Claimant testified the work-hardening program was of no assistance.

Thereafter, Dr. Chams followed-up with a functional capacity exam which included permanent restrictions to sedentary work only and restrictions of no squatting, kneeling, or lifting over fifty (50) pounds occasionally and twenty (20) pounds frequently. Claimant was unable to work and was paid TTD benefits for almost five months.

Opinion Evidence

Dr. Chams

On several occasions, Dr. Chams discussed future treatment with Claimant after it became apparent that conservative care was not helpful. Dr. Chams suggested a total knee replacement was likely. Dr. Chams stated in his report dated March 28, 2005 (Exhibit A-1G):

My opinion at this point is that Mr. James Bubash will inevitably need a right total knee arthroplasty at some point in his future. With a reasonable degree of medical certainty, his total knee arthroplasty was directly related to his exacerbation of his arthritic condition sustained in a work-related injury on 04/21/03.

Dr. Hulsey

Claimant saw Dr. Richard Hulsey on behalf of the Employer on August the 11, 2003 and for a follow-up seven (7) months later. Dr. Hulsey provided the opinion Claimant could not go back to the work he was performing as a baggage handler on the ramp and made permanent the same restrictions as Dr. Chams of no climbing steps, no squatting or kneeling. On the first occasion of August 11, 2003 Dr. Husley did not place Claimant at maximum medical improvement. Dr. Hulsey testified he did not find Claimant at maximum medical improvement. On the second occasion Dr. Hulsey saw Claimant he also provided the opinion Claimant was in need of future surgical intervention which included but not limited to a total knee replacement and assigned a work related PPD of ten percent with an additional ten percent PPD pre-existing. At deposition, he admitted the reported injury constituted an exacerbation of the underlying degenerative condition that gave rise to Claimant's inability to return to work.

Dr. Cohen

Dr. Raymond Cohen saw Claimant on January 6, 2004. He embraced the restrictions imposed on Claimant by Dr. Chams and Dr. Hulsey and agreed with the projected need for a total knee replacement in the future. Dr. Cohen assigned PPD ratings of five percent pre-existing and thirty-five percent currently.

RULINGS OF LAW

Temporary Total Disability

Claimant seeks additional TTD benefits under a theory that the combined circumstances of being permanently restricted from his prior employment and, per non-treating physicians, was not designated as having attained maximum medical improvement (MMI) creates a duty on Employer to pay TTD benefits. This theory is not tenable for all situations but may apply in Claimant's case. It is axiomatic that an employee may be able to return to less demanding employment and, yet, not be medically found to have attained MMI. MMI is but one factor in the determination of entitlement to TTD benefits. See Cooper v. Medical Center of Independence, 955 S.W.2d 570, 576-577 (Mo.App. 1997).

Inherent in this discussion is the potential to use interchangeably the two phrases *release from treatment* and *MMI*. These are two separate developments in workers' compensation cases. The occurrence of each may or may not coincide. For example, many employees return to full duty work, after release from treatment, with serious symptomatology and with the real expectation that improvement will continue during the course of the next few months or year. Thus, an injured employee may not be found at MMI but may otherwise be returned to work status.

Here, Claimant received extended treatment and observation, including radiological diagnostics. During this period, Claimant was paid substantial TTD benefits. On September 23, 2003 the treating physician released him to return to work. TTD also ended and no further benefits were paid. Thereafter, Dr. Hulsey examined Claimant and did not find Claimant at MMI. Dr. Hulsey said he could not return to his *prior employment* because it exceeded the rather severe restrictions he imposed. He did not proscribe other employment.

Dr. Hulsey also stated that Claimant was not at MMI but did not prescribe a treatment plan and did not place Claimant off work. Taken in context of the whole record, Dr. Hulsey's statement is not particularly persuasive because he contradicts his opinion on MMI by making Claimant's restrictions permanent. Claimant's lack of employment is consistent with his age and decision to retire. He apparently retired earlier than he hoped. The evidence does not include a vocational analysis.

Also, the expert testimony did not address what other employments Claimant was fit to perform. Finally, Claimant offered no contrary evidence; Dr. Cohen did not place Claimant off work for that period. Separately, the record contains no history of hardship petition or requests to change providers. The record is insufficient to impose further TTD liability against Employer.

Future Medical Expense

Section 287.140 Mo.Rev.Stat. (1994) requires that the employer/insurer provide "such medical, surgical,

chiropractic, and hospital treatment...as may reasonably be required...to cure and relieve [the employee] from the effects of the injury.” Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathis v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). While conclusive evidence is not required, evidence which shows only a mere possibility of the need for future treatment will not support an award. Dean v. St. Luke’s Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997). An employee is not entitled to future medical treatment for a possible disability resulting from some other cause. Breyer v. Howard Construction, 736 S.W. 2d 78, 82 (Mo. App. SD 1987).

Here, the treating orthopedist expressed his opinion that an arthroplasty was likely as a result of the reported injury. Dr. Cohen embraced this record. Neither compared the other knee as Dr. Hulsey did. Dr. Hulsey agreed that an arthroplasty was inevitable, bilaterally, but qualified his opinion on causation by suggesting that the acute findings on the post-accident MRI were not circumstances typically giving rise to arthroplasty. Rather, he posited that Claimant’s advanced degenerative findings were the basis of his projection.

Dr. Hulsey’s distinction seems equivocal. His suggestion is inconsistent with his admission that the reported injury advanced Claimant’s degenerative right knee condition. Specifically, the additional trauma and the imposition of severe permanent restrictions on a previously untreated knee belies the suggestion that arthroplasty does not flow from the reported injury. The other expert evidence is nearly unanimous in this regard. While the brief expert testimony herein does not fully address foundation for the opinions, it is, nevertheless, sufficient to form the basis for rulings of law. Dr. Hulsey’s distinctions neither rebut the fact of no treatment based, or activity based, pre-existing PPD nor the opinion of the treating orthopedist. The balance of the evidence requires an award of future medical treatment.

Permanent Partial Disability

Claimant testified that his work-related injury resulted in him retirement five (5) years earlier than anticipated due to the severe limitations in his range of motion and chronic pain. Dr. Hulsey and Dr. Dr. Cohen both imposed permanent restrictions. Prior to the reported injury he worked unrestricted. Claimant had no prior injury, treatment, or diagnosis of his right (or left knee). Claimant testified the problems and pains he has in his right knee not only effected his work life but also his domestic life, including sleeplessness. The record suggests Claimant sustained a PPD loss of approximately one-third of the right lower extremity at the level of the knee.

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Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a thirty-three percent PPD of the right knee. In addition, Employer shall be responsible for future medical care and treatment of Claimant’s right knee symptoms, including but not limited to, prescription drug expenses and surgical interventions.

Date: _____ Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia “Pat” Secret
Director
Division of Workers' Compensation

