

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

Injury No.: 02-031665

Employee: David Busch  
Employer: Fred Weber, Inc.  
Insurer: St. Paul Fire & Marine Insurance Company

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

Date of Accident: January 18, 2002

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. 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 April 6, 2006. The award and decision of Administrative Law Judge Matthew D. Vacca, issued April 6, 2006, 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 22<sup>nd</sup> day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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Alice A. Bartlett, Member

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

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: David Busch

Injury No.: 02-031665

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Fred Weber, Inc.

Additional Party:Second Injury Fund (Open)

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

Insurer: St. Paul Fire & Marine Insurance Co.

Hearing Date: February 23, 2006

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: January 18, 2002
5. 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
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:  
Injured knee when closing shop.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right knee
14. Nature and extent of any permanent disability: 45% permanent partial disability of right knee
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$12,780.00

Employee: David Busch

Injury No.:

02-031665

17. Value necessary medical aid not furnished by employer/insurer? \$5,393.49
18. Employee's average weekly wages: \$988.00
19. Weekly compensation rate: \$628.90/\$329.42
20. Method wages computation: Agreed

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	\$5,393.49
28 3/7 weeks of temporary total disability (stipulated dollar amount is actually 28 4/7 weeks of benefits)	\$17,968.57
72 weeks of permanent partial disability from Employer	\$23,718.24

Future medical care

\*

(\* denotes an uncertain future benefit)

22. Second Injury Fund liability: Open

TOTAL: \$47,080.30 \*

23. Future requirements awarded:

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:

Andrew Weigley

### FINDINGS OF FACT and RULINGS OF LAW:

Employee:	David Busch	Injury No.: 02-031665
Dependents:	N/A	Before the
Employer:	Fred Weber, Inc.	<b>Division of Workers'</b>
		<b>Compensation</b>
Additional Party:	Second Injury Fund (Open)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	St. Paul Fire & Marine Insurance Co.	Checked by: MDV:tr

### PRELIMINARY MATTERS

Both parties submitted excellent proposed awards.

### ISSUES PRESENTED

The issues in this case revolve around a knee replacement surgery that Claimant had in 2003. The parties agree that Claimant injured that knee at work on January 18, 2002, while working in the course and scope of his employment with Fred Weber, Inc. Prior to the January 18, 2002 work injury, Claimant had undergone two prior arthroscopic surgeries in 1991 and 1992. Those occurred while working for Fred Weber, Inc. Following the January 18, 2002 injury, Claimant underwent a third knee surgery. In 2003, as a result of continuing knee problems, Claimant underwent an additional fourth procedure following which a Staph infection set in and a fifth and sixth surgery were undertaken. It is these last three surgeries over which the parties have disagreement. The Employer contends that the need for the fourth, fifth and sixth surgeries in 2003 were not medically and causally related to the original injury. Claimant contends that the time he was off work from July 11, 2003 to January 25, 2004 (28 and 3/7ths weeks of benefits (\$17,878.72)) are also due him if the fourth, fifth and sixth knee surgeries are found to medically and causally related to the original injury. Claimant also requests \$5,393.49 in out of pocket medical expenses related to the knee surgeries in 2003. He also requests future medical care and permanent partial disability.

## FINDINGS OF FACT

1. Claimant was 61 years old on the date of the injury. He will have worked for Fred Weber, Inc., the Employer herein, for 24 years as of June of 2006. At the time of the hearing Claimant was working as an equipment inspector/light mechanic. In this capacity he would inspect up to 900 pieces of equipment and determine what repairs were necessary. He had been working in this capacity since February or March of 2004. From January 2004 to February 2004 he was working light duty updating records on the equipment. From July 11, 2003 to January 2004 he was off work undergoing knee surgeries. Prior to that, Claimant had been working as a shop mechanic for one and one-half years, which involved working on any of the equipment that came into the Fred Weber shop and performing maintenance and repairs.
2. At the time of the injury Claimant was working as a maintenance supervisor and had worked as a maintenance supervisor for 12 years. In this capacity he would supervise 24 mechanics and 4 laborers. He would make all of the repair decisions and assign others to perform the work. He would be up on his feet and up and down in a chair at his desk and perform quite a bit of fieldwork.
3. On the date of the accident, January 18, 2002, it was approximately 4:00 p.m. and Claimant was engaged in closing the shop. He was halfway down from the end of the shop when he stepped on a hose, twisting his knee and fell to the floor. The right knee popped, but as it was late Friday afternoon, no one else was at work to whom to report the injury, so he went home.
4. Claimant spent a difficult weekend with the knee hurting and swelling. Claimant retrieved a pair of crutches in his garage, which had been last used by his mother and used those to ambulate. On the following Monday he immediately reported the injury to the Head of Safety, Lynn Schwartz.
5. Claimant was sent for care at SSM on January 22, 2002 and an MRI was performed on January 23, 2002.
6. On February 6, 2002 Claimant was examined by a surgeon, Dr. Markenson, and surgery was performed by him on Friday, February 7, 2002.
7. Claimant returned to work immediately on the following Monday, not missing any work. Claimant returned to light duty, performed physical therapy over the next few months, and was released in May of 2002. The knee still hurt but Claimant did his job nevertheless.
8. In the summer of 2002 there was a change in management and Claimant was reassigned back to regular mechanic duties when a new supervisor was named. Claimant went from maintenance supervisor to line mechanic. This was heavy work involving a lot of standing to perform undercarriage manipulation.
9. Dr. Markenson testified on behalf of the Employer/Insurer by way of deposition. Dr. Markenson treated Claimant following the January 18, 2002 knee injury. Claimant had told Dr. Markenson about his previous knee surgeries.
10. Dr. Markenson examined the Claimant, reviewed the MRI, performed arthroscopic surgery on February 7, 2002 with a diagnosis of a tear of the lateral meniscus with the patient having previously undergone a near complete previous medial meniscectomy. Dr. Markenson described the knee having the inside cartilage basically gone. There was only a little thin rim left when Dr. Markenson performed his surgery. He saw no new tears of the remaining meniscus but noted there was not much left to tear. He also discovered chondromalacia which means a significant amount of damage and change and wear over the smooth joint surfaces. Instead of a nice white smooth surface, parts of it were worn down to the bone. The other parts that were not worn down to the bone were extremely worn, irregular and lumpy. Chondromalacia was underneath the patella on both sides of the joint.
11. Dr. Markenson thought that the chondromalacia preexisted the January 2002 injury. He removed the torn piece of lateral meniscus, smoothed what was left of it down as best he could and performed a chondroplasty, which is a smoothing down of the rough areas.
12. Following this, Dr. Markenson also injected Claimant's knee with cortisone and Hyalgan. Hyalgan is a purified cartilage substance believed to help lubricate the joint and spur cartilage growth. Dr. Markenson doesn't believe that either of these treatments gave Claimant any major significant relief.
13. When Dr. Markenson last saw Claimant he told him his knee was arthritic and the next step was going to be a knee replacement to get relief from the symptoms. Dr. Markenson discharged Claimant from treatment on May 10, 2002 at maximum medical improvement. Dr. Markenson also rated Claimant at 5% permanent partial knee disability as a result of the work related injury.

14. Claimant returned to see Dr. Markenson on July 15, 2002 still complaining of soreness and discomfort in his knee. Dr. Markenson suggested that Claimant obtain a position where he didn't have to do a lot of squatting, kneeling, bending and utilizing of the knee. Claimant told Dr. Markenson he had switched to a different job but that the one that he switched to was more physical and actually required more flexing of the knee. Claimant wanted more injections and Dr. Markenson told him he had to wait six months in between injections.
15. Claimant sought treatment thereafter on his own.
16. Dr. Markenson saw Claimant again June 2, 2005. Dr. Markenson prepared a report on that date and discovered that Claimant had had an interim total knee replacement and other treatment related to the total knee replacement because of complications.
17. Claimant had gone to see Dr. Shively in May of 2003. His knee had been getting worse and swelling every night after work and he was unable to deal with the pain. Surgery was scheduled for July of 2003 at BJC. A knee replacement was undertaken and Claimant spent five days in the hospital. Initially the repair was good but Claimant contracted a Staph infection after about eight days and a fifth surgery was performed July 25, 2003. Claimant underwent intravenous antibiotic treatment followed by six weeks of prescription antibiotic pills. He was off work during this entire time.
18. Claimant went to physical therapy from August 13 to September 19, 2003. Claimant was not progressing in physical therapy and his leg was stuck unable to bend at a 45-degree angle. Claimant describes it as being 17 degrees off of the ability to bend at a 45-degree angle.
19. A sixth procedure was performed. The doctor cut through scar tissue and replaced the hardware. Claimant underwent physical therapy again and returned to work in January of 2004 to light duty. In this light duty Claimant would perform paperwork and update repair documents.
20. In March of 2004 Claimant was given the job of Inspector and has continued in that capacity up until the date of the hearing. This is lighter work than Line Mechanic.
21. Claimant experienced two prior surgeries to the right knee. On June 25, 1991 Claimant was working for Fred Weber as a mechanic when he jumped out of a truck and hit a rock at an unusual angle and underwent knee surgery on July 25, 1991 with Dr. Piontek. Claimant was released by that physician in December of 1991.
22. In May of 1991 Claimant began having further knee trouble and treated and was ultimately released by Dr. Lehman after surgery. A compromise lump sum settlement was entered into in 1993 for 25% permanent partial disability measured at the level of the right knee.
23. From 1993 until 2002, the date of the injury herein, Claimant had experienced good luck with his knee and only experienced minor swelling.
24. Claimant treated over the course of the years with a chiropractor by the name of Dr. Van Horenbeeck who treated him for neck complaints he had as a result of the awkward position he held his neck while welding.
25. Claimant testified that Dr. Van Horenbeeck would pop "it". The testimony was unclear as to whether he popped Claimant's knee when he popped his neck.
26. Claimant now complains of swelling in the leg at the end of the day. He had prescription pain medications but they did not work so he pretty much gave up taking prescription medication.
27. The knee was swollen at the time of the hearing.
28. Claimant admits that in January of 1999 when he saw Dr. Van Horenbeeck he complained of his knees locking up and producing a grinding sensation.
29. Claimant also admits that in November of 2001 Dr. Holzini or Holzem took a history of no relief with Celebrex from bilateral knee pain. Claimant testified he had no real knee treatment between 1992 and 2002. Claimant testified that he only complained to Dr. Holzini during regular office visits as part of his overall health picture.
30. Claimant also injured his left knee in 1985 when he fell off a paver.
31. Claimant believes he is now favoring his right knee and his left knee is beginning to hurt.
32. Claimant would describe the pain in his right knee in between 1993 and 2002 as a level of 2 to 3 out of a

scale of 10. Now he describes that pain as a 7 to 8 on a scale of 10.

33. Claimant also testified that he lost no time from work in 1993 to 2002 following his original right knee injuries while working at Fred Weber, Inc.
34. Dr. Markenson didn't believe that Claimant's original January 18, 2002 work related lateral meniscus tear and the subsequent partial lateral meniscectomy were the cause for the need of the total knee replacement.
35. Dr. Markenson had not seen Dr. Shively's records. Dr. Markenson admitted that Claimant was not doing well following the injury at Fred Weber and following the procedure that Dr. Markenson performed. He did admit that Claimant appeared from his history and medical records to have been doing well between 1993 and 2002.
36. Dr. Musich testified on behalf of Claimant. He examined Claimant in January of 2003. Dr. Musich also reviewed medical records. Dr. Musich believes that the work trauma of January 18, 2002 is a substantial factor in the development of acute right knee pathology that required surgical intervention and intra-articular injections of synvisc (hyalgan) post-operatively.
37. Dr. Musich believes that the work trauma of January 18, 2002 is a substantial factor in the patient's right knee pathology which resulted in a torn lateral meniscus of the right knee along with symptomatic chondromalacia of the medial and lateral tibial plateaus and the medial and lateral femoral condyles. He believes that Claimant's employment for Fred Weber is a substantial factor in the development of symptomatic degenerative arthritis in the right knee. He felt that Claimant would require knee replacement surgery in the future. He also believes that the January 18, 2002 injury was a substantial factor in the development of severe additional symptoms which resulted in a permanent partial disability of 50% of the right knee over and above the disabilities he suffered from prior to the January 2002 injury.
38. Dr. Musich believes that Claimant suffers from a 25% permanent partial disability of the left knee which occurred before the January 18, 2002 right knee injury. He believes that the two injuries are working in a synergistic fashion significantly greater than their simple sum total and which will continue to produce a hindrance to his routine activities of daily living. Dr. Musich believes that the January 18, 2002 injury at Fred Weber was a substantial factor referable to Claimant's need for joint replacement surgery.
39. Dr. Musich examined Claimant again in February of 2005 and reviewed further medical records from Dr. Shively and Barnes Jewish West County Hospital and believes that the injuries of January 18, 2002 and the surgery performed by Dr. Markenson caused Claimant to develop pyarthrosis as a result of the surgical intervention and believes that Claimant now suffered from a 75% permanent partial disability at the level of the knee over and above the prior injuries.
40. Dr. Musich believes that Claimant's work activities at Fred Weber required a lot of physical maneuvering, climbing, kneeling, squatting and those work duties caused degenerative arthritis in the right knee and further that the subsequent treatment from January 18, 2002 forward was because of the work related trauma that occurred on January 18. Dr. Musich has no doubt that all the treatments following Dr. Markenson's arthroscopic procedure were absolutely related to the January 18, 2002 trauma and generally to the work duties at Fred Weber which caused the arthritic condition.
41. Dr. Musich believes that the original injuries and surgeries in 1991 and 1992 as well as degeneration between 1992 and 2003 as well as the injuries on January 18, 2002 and the surgery which followed with Dr. Markenson all were contributing factors in the need for additional surgical treatment following Dr. Markenson's surgery.
42. The MRI on January 23, 2002 indicated that there was a strain or partial tear of the anterior cruciate ligament but that a portion of it remained intact. Dr. Markenson found the ligament intact when he performed the arthroscopic surgery.
43. Claimant was a very credible witness.

#### **RULINGS OF LAW**

1. Claimant's need for knee replacement surgery with Dr. Shively and the two follow up surgeries related to the Staph infection and replacement of the hardware are medically and causally related to the original injury occurring on January 18, 2002. The work was a substantial and the prevailing factor in causing the need for the knee replacement surgery and the subsequent procedures.
2. Claimant is entitled to \$17,968.57 in temporary total disability benefits from July 11, 2003 to January 25, 2004 for 28 and 3/7ths weeks of temporary total disability. Claimant was temporarily and totally disabled as a result of the need for the knee replacement surgery and the subsequent complications.

3. The knee replacement surgery and two follow up surgeries were reasonable and necessary and Claimant's out of pocket expenses are \$5,393.49 which was rendered for reasonable and necessary medical care for which Claimant should be reimbursed.
4. Claimant may require future medical care to cure and relieve him of the effects of this injury. This may include analgesic medications and whatever future medical care he may need as a result of his right knee condition which is medically and causally related to the original injury on January 18, 2002.
5. As a direct result of the accident and injuries occurring on January 18, 2002, the damage caused by the subsequent medical treatments and following a reasonable period of rehabilitation, Claimant is left with a 45% permanent partial disability measured at the level of the right knee.

### **DISCUSSION**

The original injury of January 18, 2002 was the substantial factor in the need for all of the subsequent right knee care. Dr. Markenson's care was really not adequate to treat the condition. Claimant requested further medical care in July of 2002, but the Hyalgan treatment was not available for several more months and Claimant needed some relief, especially since his job had gotten more physical. It is unrealistic to believe that the minimal smoothing Dr. Markenson performed on Claimant's knee would resolve the problems caused by the January 18, 2002 injury.

While Claimant was not entirely asymptomatic prior to the January 18, 2002 injury, he had no real treatment other than an unsuccessful trial of Celebrex and lost no time from work on account of the bilateral knee pain. Nevertheless, the right total knee replacement is a direct and natural result of the admittedly compensable primary injury. See, *Cypher v. Independent Plumbing and Interior Electric*, Injury No. 01-143256 (Mo.L&IRC March 21, 2006). The minor treatment immediately prior to this accident was to both knees, not just the right knee. There had been no other significant right knee treatment for 11 years leading up to this accident. Obviously something changed radically with the right knee following the January 18, 2002 injury and Dr. Markenson's surgery. The right knee markedly deteriorated. I think surgeries 4, 5 and 6 are work related.

Employee: David Busch

Injury No.: 02-031665

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*