

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

Injury No.: 14-069626

Employee: Mark Cole

Employer: Alan Wire Company, Inc.

Insurer: Missouri Merchants and Manufacturing Association

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

**Introduction**

The parties asked the administrative law judge to resolve the following issues: (1) accident; (2) medical causation; (3) previously incurred medical aid; (4) additional or future medical aid; (5) temporary total disability benefits from October 27, 2014, through February 9, 2015; and (6) the employer's request for entry of a final award if all issues are found against the employee.

The administrative law judge issued a temporary or partial award resolving the issues as follows: (1) employee sustained an accident arising out of and in the course of his employment; (2) employee's injury to his right knee was medically causally related to the work accident that occurred on September 15, 2014; (3) employee's work for employer was the prevailing factor in causing employee's injury to his right knee; (4) further medical care and treatment is reasonably required to cure and relieve the effects of the injury; and (5) employer is liable for temporary total disability benefits from October 27, 2014, through February 9, 2015.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred because: (1) there was not sufficient competent evidence in the record to warrant making a finding that employee's injuries occurred in the course and scope of employment; (2) the administrative law judge erroneously credited the opinions of Drs. Cary Sanders and Dwight Woiteshek; (3) temporary total disability benefits are not payable as employee did not suffer a compensable work injury; and (4) the award should not be considered a temporary award as employee did not sustain a work-related injury.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

**Findings of Fact**

On September 15, 2014, employee was operating a forklift while performing his duties as an order-puller for employer. Employee was wearing steel-toed boots (required by employer) which he estimated weighed seven to nine pounds. After unloading a truck with the forklift, employee parked it and stepped down to the ground, a height of about

Employee: Mark Cole

- 2 -

15 to 20 inches. He took a step and heard a pop in his right knee, accompanied by immediate pain and swelling.

Employee had previously experienced issues with instability affecting his right knee, including buckling for several years, and even some unexpected falls owing to his knee giving out. He also experienced popping in his right knee prior to the forklift event on September 15, 2014. Employee had not sought any treatment for these conditions.

After suffering the pop, pain, and swelling in his knee at work on September 15, 2014, employee stopped working and went to the break room, where he put ice on his knee until going home for the night. Employee worked modified duty for employer on September 16, 2014, performing sweeping duties.

On September 17, 2014, employer sent employee to see Dr. Thomas Marsh, who took a history including employee's complaint of preexisting buckling, with falls, affecting both knees. At that time, Dr. Marsh diagnosed a right anterior medial line nodule, minimally symptomatic and without a history of direct trauma. Given employee's report of preexisting buckling causing falls, and the fact he was minimally symptomatic on that date and had a full range of motion of the right knee, Dr. Marsh determined employee's knee complaints were preexisting rather than traumatic/work-related, and recommended employee seek treatment on his own.

Employee sought medical care from the Veterans Administration. An MRI of September 29, 2014, revealed mild right knee patellofemoral compartment chondrosis; a focal area of increased signal in the anteromedial soft tissues of the right knee, likely a contusion; and a focal pocket of multiloculated fluid in the anteromedial aspect of the right knee just deep to the medial retinaculum, deemed by the radiologist to represent a possible ganglion cyst, as no definite communication with the remainder of the joint fluid was seen. On October 3, 2014, employee saw Dr. Cary Sanders, who diagnosed meniscal cysts based on the MRI findings, and recommended an arthroscopic surgery of the knee with excision of the cysts, which Dr. Sanders performed on October 27, 2014.

During the surgery, Dr. Sanders found and excised one small parameniscal cyst. Dr. Sanders also found that the ACL appeared to be intact, although there was some "stranding and thinning" of the ACL. *Transcript*, page 287. Dr. Sanders did not perform any surgical procedure to address this stranding and thinning of the ACL, nor did he surgically address any other condition of the right knee apart from the small parameniscal cyst that he excised.

Following the surgery, employee underwent a course of physical therapy, and Dr. Sanders kept him off work from October 27, 2014, through February 6, 2015, whereupon employee returned to his work for employer. Employee initially experienced a good result from the surgery, but suffered recurrent bouts of knee pain, for which he sought additional treatment in July 2015.

Currently, employee experiences pain in his right knee that reaches an occasional 5 to 6 out of 10 in severity; occasional swelling and stiffness; and trouble sleeping referable

Employee: Mark Cole

- 3 -

to his right knee complaints. He seeks a temporary award reimbursing his past medical expenses, finding that he has not reached maximum medical improvement, and ordering employer to furnish additional medical treatment to him.

Expert medical opinion evidence

Employee advances the expert medical opinion of Dr. Dwight Woiteshek, who believes that employee's action of getting off the forklift was the prevailing factor causing employee to suffer traumatic internal derangement of the right knee in the form of stranding and thinning of the ACL, but that the parameniscal cyst excised during Dr. Sanders's surgery preexisted the forklift incident of September 2014. In his report, Dr. Woiteshek did not opine that the forklift incident caused the cyst (which he believed was "completely asymptomatic") to become symptomatic. And, at his deposition, he confirmed he did not believe the cyst (or excision thereof) was the source of employee's ongoing pain, and that the *only* medical condition he believed to have resulted from the forklift incident was the stranding and thinning of the ACL:

- Q. So when you say internal derangement and ACL stranding and thinning, it's really just saying ACL stranding and thinning?
- A. Yes, with clinical deficiency. His knee was giving out.
- Q. Let me see what you say here. "Traumatic internal derangement of the knee with some stranding and thinning of the ACL." So you're—just so I understand completely, I'm not trying to take your words and spin them around or anything, the stranding and thinning of the ACL is what you're saying is the internal derangement that was caused by this work injury?
- A. Yes.
- Q. Okay. Anything else?
- A. No.

*Transcript, page 63-64.*

Critically, though, Dr. Woiteshek erroneously believed that employee did not suffer from any preexisting instability or buckling in his right knee; in his report, he specifically noted this erroneous belief as underlying his opinion that the forklift incident was the prevailing factor causing thinning and stranding of the ACL in employee's right knee. But as employee admitted to Dr. Marsh and at the hearing (and as we have found above) employee did suffer from preexisting instability affecting his right knee, including buckling and falls, for years before the forklift incident occurred. In our view, any medical causation opinion premised upon a demonstrably incorrect version of the employee's preexisting complaints and history—especially that history specifically referable to the very same body part claimed to have been injured—would appear to lack adequate foundation.

Employee: Mark Cole

- 4 -

Other circumstances detract from the persuasive value of Dr. Woiteshek's opinions in this case. For example, Dr. Woiteshek opined generally in his report that the disputed medical treatment that employee received from Dr. Sanders and the Veterans Administration was reasonably required to cure and relieve the effects of the injury—yet, he confirmed during his deposition his understanding that Dr. Sanders did not repair the ACL, i.e., the injury Dr. Woiteshek believes employee sustained. Also, during his deposition, it was revealed that Dr. Woiteshek believed employee had previously suffered left, but not right knee pain, which had prompted employee to undergo an MRI in August 2014. On cross-examination, though, it was pointed out to Dr. Woiteshek that this MRI was from another individual. Dr. Woiteshek failed to address the extent to which this error may have affected his opinions. Finally, Dr. Woiteshek believed (as set forth in his report) that employee had worked for employer for 27 years, but at his deposition, he conceded, when confronted with evidence to the contrary, that employee had actually worked for employer less than 1 year. Dr. Woiteshek was unable to explain where this erroneous information had come from.

After careful consideration, we find that Dr. Woiteshek's opinions fail to persuasively support employee's claim, primarily because they are premised on a demonstrably incorrect understanding of employee's preexisting complaints and history with regard to the right knee.<sup>1</sup>

In addition to procuring the evaluation from Dr. Woiteshek, employee also sent a letter to Dr. Sanders, asking whether he believed that a "work related event was the '**prevailing factor**' of any condition (injury or occupational disease) of the employee." *Transcript*, page 41 (emphasis in original). Dr. Sanders was evidently unwilling to go that far. Instead, he responded as follows:

I do believe based on [employee's] history that the condition began arising from his workers compensation claim. His diagnosis was parameniscal cyst which *could be* a result of trauma sustained at that time. There was no tearing of the meniscus.

*Transcript*, page 43 (emphasis added).

Dr. Sanders did not address the prevailing factor standard at any point in his causation letter to employee. Nor did he identify the thinning and stranding of the ACL that he saw during his surgery as having any causal relationship to the forklift incident. Instead, he offered the opinion (directly contrary to that of Dr. Woiteshek) that the parameniscal cyst he excised *could have been* a result of trauma associated with employee's workers' compensation claim. Because his opinion regarding the alleged resulting medical condition caused by the forklift incident is directly contrary to that of employee's retained expert, and because, in any event, Dr. Sanders declined to address the appropriate statutory test (despite having been specifically directed to such by employee), we do not find his opinions to provide persuasive support for employee's claim.

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<sup>1</sup> We are wholly unpersuaded by Dr. Woiteshek's testimony, after having been confronted with his error as to employee's preexisting right knee complaints, that his opinions in this matter would not have been any different if he had been provided the correct information.

Employee: Mark Cole

- 5 -

Employer, meanwhile, advances the expert medical opinion of Dr. Luke Choi, who believes that employee's step down from the forklift could not have caused any change in pathology in employee's ACL. Instead, Dr. Choi believes the thinning and stranding of employee's ACL was age-appropriate and preexisted the forklift incident of September 2014. Dr. Choi concurred with Dr. Woiteshek in that he believes that the cyst excised by Dr. Sanders also preexisted the forklift incident. Clearly, Dr. Choi did not provide any opinions that would support an award of compensation in favor of the employee.

### **Conclusions of Law**

#### Accident

The parties dispute whether employee suffered an "accident," as that term is defined in § 287.020.2 RSMo, which provides, in relevant part, as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

The popping and pain in employee's knee when he stepped down from his forklift on September 15, 2014, constituted, in our view, an unexpected traumatic event; the event is identifiable by time and place of occurrence; the event produced at the time objective symptoms of injury; and the event was specific and occurred during a single work shift. We conclude, therefore, that employee suffered an accident for purposes of the foregoing statutory definition.

#### Medical causation

Section 287.020.3(1) RSMo sets forth the statutory test for medical causation applicable to this claim, and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

It was employee's burden to satisfy the foregoing test. Owing to the complex nature of the claimed injury (internal derangement affecting the internal structures comprising employee's right knee joint, superimposed on a history of preexisting instability and buckling), we conclude that we cannot rely on our own lay opinions that the forklift incident caused the claimed injury.<sup>2</sup> See *Bock v. City of Columbia*, 274 S.W.3d 555, 561 (Mo. App. 2008). Instead, credible and persuasive opinions from the medical experts are necessary to support an award in employee's favor.

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<sup>2</sup> Nor can we adopt the basic "chronology therefore causation" approach employee advances in his brief, as much as that argument may appear to comport with a common sense understanding of the facts of this case, such as the sudden onset of pain and swelling at the time of the accident.

Employee: Mark Cole

- 6 -

As detailed above, however, we have found the expert medical opinions advanced by employee to be unpersuasive. The treating surgeon, Dr. Sanders, who had firsthand insight into the internal pathology affecting employee's right knee, failed to apply the appropriate statutory test, and opined merely that the parameniscal cyst he excised "could have" resulted from the accident. The independent evaluating expert, Dr. Woiteshek, did address the appropriate statutory test for purposes of § 287.020.3(1), but he lacked critical information regarding employee's preexisting buckling/instability with regard to the right knee, and identified a "resulting medical condition" (stranding and thinning of the ACL) that he ultimately agreed was not addressed in the disputed surgery performed by Dr. Sanders.

In sum, we find on this record an absence of persuasive expert medical opinion evidence to support employee's claim. For this reason, we must conclude that the accident was not the prevailing factor causing the medical conditions and disability for which employee claims compensation herein.

*Injury arising out of and in the course of the employment*

Owing to our foregoing determination with respect to the issue of medical causation, this issue is obviously moot, but we deem it appropriate to provide the following comments, owing to what we perceive to be considerable confusion in this case with regard to the appropriate inquiry under § 287.020.3(2) RSMo.

At the hearing before the administrative law judge, the parties did not place in dispute any issue regarding whether employee sustained an injury arising out of and in the course of employment. On the other hand, the parties did not *stipulate* this issue, and given that employer's application for review advances the contention that employee's injuries did not occur "in the course and scope of employment," and its brief references § 287.020.3(2) and recent case law interpreting that subsection, we deem the issue to be appropriately before us.<sup>3</sup>

Employer argues that, because employee did not feel the pop in his knee until *after* both of his feet had reached the ground upon stepping down from his forklift, this case is like *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009), wherein our Supreme Court determined that a highway worker's knee injury did not arise out of and in the course of employment where the risk or hazard that caused the injury was merely that of "walking." *Id.* at 674. Employer argues that because both of employee's feet reached the ground, the risk or hazard from which employee's injuries came was merely that of "taking a step," i.e. "walking," such that *Miller* compels a denial of compensation as a matter of law.

We are not persuaded by employer's invitation to create a "one step" rule insulating an employer from workers' compensation liability whenever an employee (appears to) suffer an injury *moments after* performing a job-related effort or exertion such as

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<sup>3</sup> Incidentally, we are not aware of any independent "course and scope" test that must be satisfied in this case, as our Supreme Court has instructed that "[t]he express terms of the workers' compensation statutes as revised in 2005 instruct that section 287.020.3(2) must control any determination of whether [the employee's] injury shall be deemed to have arisen out of and in the course of her employment." *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509-10 (Mo. 2012).

Employee: Mark Cole

- 7 -

stepping 15 to 20 inches down to a concrete floor from a forklift. If the *Miller* employee had experienced the pop in his knee moments after stepping down from the bed of a work truck, the result reached by the *Miller* court may have been very different. For this reason, we find *Miller* distinguishable.

Further, nothing in the plain language of § 287.020.3(2), or in the analysis set forth in *Miller* or the other cases interpreting that sub-section, compels us to so microscopically isolate the accident from its surrounding circumstances that we lose sight of what actually happened to the employee. In our view, the risk or hazard from which this employee's injuries came was not that of merely "taking a step," instead it was "taking a step after climbing 15 to 20 inches down from a forklift while wearing heavy, work-mandated, steel-toed boots." If the medical causation evidence in this case had persuasively established that this was the risk/hazard from which employee's injuries came, we would have concluded that his injuries arose out of and in the course of the employment, because this risk/hazard was unquestionably related to employee's work for employer. See *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010).

### Decision

We reverse the award of the administrative law judge. Employee's claim for compensation is denied because the accident was not the prevailing factor in causing the medical conditions and disability for which employee claims compensation herein.

The award and decision of Administrative Law Judge Maureen Tilley, issued December 10, 2015, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 16<sup>th</sup> day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Mark Cole

### **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 Worker's Compensation Law, I believe the decision of the administrative law judge should be affirmed.

I disagree with the Commission majority's choice to disregard the expert medical opinion testimony from Dr. Woiteshek. Although Dr. Woiteshek did take a history from employee that failed to note employee's preexisting buckling affecting the right knee, it is uncontested that Dr. Woiteshek had the records of Dr. Marsh memorializing those complaints, and there is no suggestion on this record that Dr. Woiteshek made a decision to disregard or ignore the import of those records in performing his causation analysis. In fact, at his deposition, he was specifically asked about Dr. Marsh's records, and testified that he reviewed them and was aware of the buckling complaints employee voiced to Dr. Marsh. Therefore, I must disagree with the Commission majority's view that Dr. Woiteshek lacked essential facts. Instead, it appears to me that the other members of this Commission have appointed themselves the de facto medical experts in this case, faulting Dr. Woiteshek for failing to address facts they deem—in *their lay opinions*—important. This is inappropriate, as the Supreme Court of this state has recently reminded us:

Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause. ... [T]his is not a case in which the commission made a credibility determination as to competing medical experts. Instead, this case involves an overly technical and parsed analysis of [an expert's] testimony that overlooks the plain meaning of what he said. As Missouri courts have recognized, the words a medical expert uses are often important, not so much in and of themselves, but as a reflection of what impression such witness wishes to impart.

*Malam v. Dep't of Corr.*, No. SC95170 (Mo. June 28, 2016)(citations omitted).

Employee unequivocally testified he was not suffering any *pain and swelling* in his right knee prior to the work injury on September 15, 2014. Dr. Woiteshek says that the *pain and swelling* in employee's right knee is the product of internal derangement of the ACL suffered in the work injury. It is this *pain and swelling* for which employee claims workers' compensation benefits. Consequently, the majority's curious focus on preexisting buckling strikes me as exactly the sort of "overly technical and parsed analysis" cautioned against by the *Malam* court.

The majority also fails to recognize that employee suffers from preexisting low back problems including a bulging disc, and that this condition caused radiating pain *and numbness* into both of his legs all the way to the knees. Dr. Marsh, in fact, specifically memorialized these radicular complaints referable to the low back, yet summarily dismissed them as a possible cause of employee's knee buckling, because employee's

Employee: Mark Cole

- 2 -

knee complaints seemed to him to be “disassociated with any back complaints.” *Transcript*, page 257. Dr. Marsh did not explain further, but it’s obvious to me from the tone and tenor of his report that this occupational medicine practitioner is keenly aware of his role and of the interest in rendering favorable opinions so that employers will continue to send injured employees to him. Notably, despite summarily dismissing employee’s symptoms as the product of a preexisting problem, Dr. Marsh had no indication that employee had ever complained of *pain and swelling* (the injury for which employee claims compensation herein) before the work injury.

I find it telling that Dr. Marsh, after denying treatment to this clearly injured employee, took him off work for an unrelated condition: employee’s sleep apnea. This resulted in an immediate loss of income for employee combined with a need to spend more money just to get a medical clearance to return to work. Clearly, Dr. Marsh was ready and willing to put the interests of this employer first. I am not persuaded by his opinions or theories in this case.

Likewise, I find the opinion from employer’s paid expert, Dr. Choi, insufficient to rebut the opinion from Dr. Woiteshek. Dr. Choi disagreed with the diagnosis from Dr. Sanders, the treating surgeon. Specifically, he testified that employee was suffering from the effects of a ganglion cyst, as opposed to the parameniscal cyst that Dr. Sanders found and excised, and was not suffering from any ACL pathology. What basis did Dr. Choi give for disregarding what Dr. Sanders *actually* saw during his surgery? Dr. Choi explained that he reviewed the MRI films himself and decided there was no ACL pathology and that it looked more like a ganglion cyst to him, and besides, in Dr. Choi’s opinion, the action of stepping down from a forklift is not traumatic enough to have caused any internal derangement to employee’s knee.

Aside from the fact that Dr. Choi’s ultimate opinion is essentially circular—the accident could not have caused the injury because, in Dr. Choi’s opinion, the accident could not have caused the injury—Dr. Choi apparently failed to consider the fact employee was wearing heavy steel-toed boots, or that employee stepped approximately 15 to 20 inches down from the forklift to the concrete floor. Nor did Dr. Choi specify whether he himself has ever stepped down from a forklift. Consequently, it appears to me that Dr. Choi lacked an adequate factual foundation for his opinion that stepping down from a forklift could not have caused any injury to employee.

With regard to the opinion from Dr. Sanders, who arguably is in the best position to discuss the internal pathology affecting employee’s right knee, I disagree with the majority’s choice to write off his opinion simply for failing to incorporate the “prevailing factor” magic language. The Commission majority has lost sight of the longstanding rule in Missouri that “[c]autious or indefinite expert testimony on medical causation combined with lay testimony can provide sufficient competent evidence to support causation of injury.” *Wright v. Sports Associated*, 887 S.W.2d 596, 600 (Mo. 1994). This rule is especially important in the context in which this case came up for hearing: a request by employee for entry of a temporary award.

It appears to be uncontested (as even Dr. Choi recognized) that the surgery Dr. Sanders performed was not ultimately effective in relieving the symptoms employee traces back to

Employee: Mark Cole

- 3 -

the injury of September 15, 2014. Employee has been unable to seek more treatment, because he can't afford to pay for it. Thus, employee concedes—indeed, asserts—that he is not at maximum medical improvement, and that additional investigation and workup of the right knee is warranted. For this reason, he has sought a temporary or partial award ordering employer to pay for that investigation and workup.

Under § 287.510 RSMo, “in any case a temporary or partial award of compensation may be made, and the same 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.” The statute further recognizes that a final award may not always be “in accordance” with a temporary award. *Id.* In other words, our legislature has specifically contemplated situations just like the one presented here, in which an employee's injuries and medical condition warrant further workup and investigation.

Our courts, for their part, have recognized that a different, more lenient standard for medical causation should be applied in such cases. For example, in the case of *Downing v. Willamette Indus.*, 895 S.W.2d 650 (Mo. App. 1995), the court rejected an employer's argument the employee had failed to meet his burden of demonstrating which of several accidents caused the injury for which he sought a temporary award of medical care, with the following, very pertinent comments:

Appellant asserts that Downing must present expert medical testimony to establish that the accident at Willamette on January 4, 1992, caused his need for surgery and not one of Downing's other accidents. Appellant relies heavily on the following four cases: *Goleman v. MCI Transporters*, 844 S.W.2d 463 (Mo. App. 1992); *Bersett v. National Super Mkts., Inc.*, 808 S.W.2d 34 (Mo. App. 1991); *Plaster v. Dayco Corp.*, 760 S.W.2d 911 (Mo. App. 1988); and *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697 (Mo. App. 1973). Each of the cited cases is immediately distinguishable from the instant case in that *permanent* disability was involved to some degree while only temporary disability is involved in Downing's claim. Appellant fails to appreciate the different causation standard that thus applies. 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. ... 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.

*Id.* at 655 (emphasis in original).

In their narrow and overly technical parsing of Dr. Woiteshek's opinions, the Commission majority appears to have lost sight of the context in which this dispute over medical causation has arisen. Again, it is effectively undisputed that employee's right knee has not, to date, been effectively treated. All of the doctors who have testified or offered opinions in this case have disagreed over one point or another: this should be enough to demonstrate that more investigation and workup are needed before the issue of medical causation in this case can be effectively resolved. But by entering a final award and

Employee: Mark Cole

- 4 -

denying benefits, the Commission has forever foreclosed employee's chance at receiving the benefits to which, I at least, believe he is entitled.

In sum, I find that Dr. Woiteshek's opinion best conforms to the facts surrounding the accident and the injuries employee claims that he suffered. I would affirm this temporary award so that employee can get the further treatment he needs to cure and relieve the effects of the accident of September 15, 2014. Because the Commission majority has decided otherwise, I respectfully dissent.

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Curtis E. Chick, Jr., Member

Employee: Mark Cole

Injury No. 14-069626

ISSUED BY DIVISION OF WORKERS' COMPENSATION

## **TEMPORARY OR PARTIAL AWARD**

Employee: Mark Cole

Injury No. 14-069626

Dependents: N/A

Employer: Alan Wire Company, Inc.

Additional Party: N/A

Insurer: Missouri Merchants and Manufacturing Association

Hearing Date: September 16, 2015

Checked by: MT/kg

### **SUMMARY OF FINDINGS**

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: September 15, 2014.
5. State location where accident occurred or occupational disease was contracted: Sikeston, Scott County, Missouri.
6. Was above claimant 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 employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was Employer insured by above Insurer? Yes.
11. Describe what Claimant was doing and how accident occurred or occupational disease contracted: Employee stepped down a 17" to 19" drop from a forklift when he felt a pop in his right knee.
12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Right lower extremity.
14. Nature and extent of any permanent disability: To be determined.
15. Compensation paid to date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by Employer-Insurer: \$1,112.18
17. Value necessary medical aid not furnished by Employer-Insurer: \$15,522.16
18. Claimant's average weekly wages: \$676.99
19. Weekly compensation rate: \$451.02 for PPD, \$451.35 for TTD, PTD or Death Rate.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: Yes.

This award is only temporary and 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.**

## **FINDINGS OF FACT AND RULINGS OF LAW**

On September 16, 2015, the employee, Mark Cole, appeared in person and with his attorney, Kimberly A. Heckemeyer, for a hearing for a temporary award. The employer was represented at the hearing by its attorney, Jared Vessell. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. At the conclusion of the hearing the record was closed and a briefing schedule was set.

The undisputed facts and issues, together with the Findings of Fact and Rulings of Law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. That on September 15, 2014, the employer, Alan Wire Company, Inc. was operating under and subject to the provisions of Missouri Worker's Compensation Act.
2. That on September 15, 2014, Mark Cole was an employee of Alan Wire Company, Inc. and was working under and subject to the Missouri Workers' Compensation Act.
3. Notice: Employer had notice of Employee's accident.
4. That the employee's claim was filed within the time allowed by law.
5. That the average weekly wage for the injuries that occurred September 15, 2014, was \$676.99 and the rate of compensation for purposes of permanent partial is \$451.02 and for permanent total disability, temporary total disability and death rate is \$451.35.
6. That employer has furnished \$1,112.18 in previously incurred medical.
7. No temporary total disability has been paid to date.
8. If medical bills are awarded herein to Employee, then Employer-Insurer shall take responsibility for medical bills to ensure the Employee is not held responsible for same.

### **ISSUES**

1. Accident
2. Medical causation
3. Previously incurred medical aid: \$15,522.16
4. Additional medical aid
5. Temporary total disability benefits from October 27, 2014, to February 9, 2015
6. Employer-Insurer is requesting that if all issues are found against Employee that this Award be made final.

## **EXHIBITS**

The following exhibits were offered and admitted into evidence:

### Employee's Exhibits

1. Report of Dr. Sanders and Curriculum Vitae
2. Deposition of Dr. Dwight Woiteshek
3. Medical Records
  1. John J. Pershing
  2. Dr. Thomas Marsh
  3. Missouri Delta Medical Center
  4. Dr. Cary Sanders
  5. Southeast Missouri Hospital
  6. Auburn Park Imaging
  7. Sikeston Rehab
4. Medical Bills
  1. Missouri Delta Medical Center
  2. Auburn Park Imaging
  3. Dr. Cary Sanders
  4. Sikeston Rehab

### Employer-Insurer's Exhibits

- A. Dr. Choi report 3/17/15
- B. Dr. Choi report 6/30/15
- C. Dr. Marsh records
- D. Dr. Choi deposition

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

### **STATEMENT OF THE FINDINGS OF FACT-**

#### *Employee's Testimony*

Employee, Mark Cole, testified that he is 47 years of age, has been married since 1992 and currently lives in East Prairie, Missouri. He testified that he has two children who are ages 24 and 19. Employee testified that he graduated from Sikeston High School in 1986 and that he served in the United States Marine Corp from 1986 -1990 from where he received an Honorable Discharge in 1990.

Employee testified that he went to work for Todd Uniforms washing clothes where he worked for approximately a year in 1990 and that he had no work-related injuries.

Employee testified that thereafter, from approximately 1992 -1993, he worked at Service Master where he cleaned houses and sustained no work injuries and was not under a doctor's care for any medical condition.

Employee testified that he next went to work at Good Humor as a hand packer in the early 90s, he had no condition or complaints of the knee, and that he had no work-related injury.

Employee testified that he thereafter moved to Kansas where he went to work at Coca Cola as a stocker. He testified that he injured his back during the course of his work there, but that he did not file a workers' compensation claim nor did he receive any settlement related to that injury. He testified that he was working in Johnson City, Kansas when this happened. He testified specifically that he had no injuries or condition to his right knee at that time.

Employee testified that he worked at Foot Locker from approximately 1996-1997 as a supervisor, where he worked without complaint to his knee.

Employee testified that he thereafter became ill with Graves' disease and that he drew Social Security Disability for approximately five years until he got the disease under control and was able to return to the workforce after retaining a work release from his doctor.

Employee testified that he moved to Americus, Georgia and worked for approximately five years at Odom Sales. Employee testified that he had no knee pain or complaints at that time, but that he did sustain an injury to his back during the course of that employment and that he had pain that shot down his right leg related to the back injury. He testified that he did not file a workers' compensation claim as a result of that injury, and that he did not receive a settlement related thereto. He testified he received treatment through the Veterans Administration.

Employee testified that he moved back to Missouri in October of 2010 and went to work at Unilever as a hand packer for approximately a year, where he had no knee complaints and he had no work-related injuries.

Employee testified that he thereafter worked at Green Meadows in approximately 2011. He testified he had no knee pain or complaints and had no work-related injuries during the course of that employment.

Employee testified that his next job was at Cross Roads where he worked for a couple of years as a "care taker". The employee testified he had neither a work-related injury nor any knee pain or complaints at that time.

Employee testified that he began working at Alan Wire in May of 2013 part-time while he was in school working on a Bachelors Degree, but that he eventually became a full-time employee at Alan Wire where he was an order puller, which involved loading and unloading trucks.

Employee testified that on September 15, 2014, when he went into work, his right knee was not hurting or swelling. He stated that when he and a coworker were operating forklifts to perform their job duties, he stepped down out of his forklift. He stated that at the time that he stepped down, he felt and heard a pop in his right knee. He stated that this caused immediate pain and severe swelling. Employee said that it was unlike any symptom like he had ever had before with his right knee. He testified that at the time of his injury he was wearing steel-toed boots as required by his employer. The employee testified that the step down from the forklift to the

ground was approximately 17 -19 inches. He also stated that the steel-toed boots required by his work to perform his job are “heavy”. Employee testified that the pop in his knee was so loud that his co-worker, Billy Poyner, immediately asked if he needed help as it is his understanding that he heard it also.

Employee testified that he had never had pain or swelling in his right knee prior to that time.

Employee testified that he had had a prior broken foot that he sustained while playing basketball back in 2000, but that aside from that and the radiating pain from back pain he had never had pain in the lower extremity prior to this. He indicated that he had gone to the Veterans Administration for various other chronic conditions such as asthma and thyroid conditions, but that he had not previously sought treatment for his right knee.

Employee testified that supervisor, Billy Poyner, suggested that he go home but that after a call to the boss was made it was suggested that he simply sit in the break room and ice his knee, but that did not help. The employee testified that he went to the Veterans Administration soon after the work injury and that the employer sent him to Dr. Marsh for treatment of the knee, who ordered x-rays.

Employee said that Dr. Marsh essentially said that nothing was wrong with his right knee, but that Dr. Marsh became very concerned with his history of narcolepsy and suggested that he did not need to be doing his job given that history. Employee testified that Dr. Marsh took him off work, but not due to the work injury. Employee testified that he took him off of work because of narcolepsy. He testified that after the injury he was out of work and without income because of Dr. Marsh taking him off due to the narcolepsy.

The Employee testified that the knee complaints did not improve so he went to the Veterans Administration on his own. He said he saw a nurse practitioner for the pain and swelling in his right knee, and that the Veterans Administration approved him to see an orthopedic surgeon by the name of Dr. Cary Sanders.

Employee testified that Dr. Sanders recommended surgery after seeing him, and thereafter performed surgery at Missouri Delta Medical Center on October 27, 2014. Employee testified that Dr. Sanders recommended physical therapy shortly thereafter and that he underwent physical therapy at Sikeston Rehab for a period of time until his therapy was discontinued because he was unable to secure any means of payment, despite filing a worker’s compensation claim and requesting benefits.

Employee testified that Dr. Sanders kept him out of work from the date of the surgery until February 9, 2015. He testified that Dr. Sanders has recommended further physical therapy but that he has been unable to secure that due to lack of financing. Employee testified that he is asking that the Court order additional physical therapy, that his previously incurred bills be paid by the employer, and that he be compensated temporary total disability benefits from the date of the surgery, October 27, 2014 through the date of his release by Dr. Sanders on February 9, 2015.

Employee testified that he is continuing to have pain in his right knee that is sometimes a five or a six on a scale of one to ten, and that he still has pain and stiffness in the right knee.

On cross examination, the employee testified that he had had back pain in the past and that the pain in his right lower extremity was not knee pain, but was rather a burning, tingling sensation in his leg. He testified that when he had fallen previously at Alan Wire that he had fallen onto his left side, but that he had not fallen on the date of the injury.

The employee testified on cross examination that he was promoted by this employer in August 2015, to machinery operator, where he stands the entire shift to operate a machine.

Employee testified further on cross examination that Dr. Marsh was not concerned with his right knee when he saw him, but that he was concerned with his other chronic illnesses. Employee testified that because of Dr. Marsh taking him off work due to the preexisting sleep apnea (and therefore being taken out of work following a work-related injury but not due to that injury) he had to go and obtain a sleep study and a medical clearance for him to get back to work. Employee testified that because of Dr. Marsh he missed 1-2 weeks of income after he took him off of work due to the narcolepsy.

Employee offered the report of Dr. Cary Sanders, Orthopedic Surgeon. This was marked Employee Exhibit 1. On February 2, 2015, Dr. Sanders replied to correspondence of Attorney Kim A. Heckemeyer in regard to Employee's claim and testified that he felt that based upon Employee's history, that the condition began arising from the work injury and that he was not at maximum medical improvement at that time. Dr. Sanders stated in his letter "the only care I think he needs at this point is continued physical therapy." Dr. Sanders stated that he was aware that the employee had been off work since the date of the surgery on October 27, 2014, and that the diagnosis concerning the injury was "parameniscus cyst of the right interior lateral knee" and stated that the treatment provided was indeed reasonable and necessary to cure that condition.

The deposition of Dr. Dwight Woiteshek was marked Employee Exhibit 2. In his deposition, Dr. Woiteshek testified that when he had evaluated Employee, he had denied having any problems with his right knee prior to September 15, 2014. Dr. Woiteshek stated there were objective findings on physical examination. Dr. Woiteshek stated that this included loss of range of motion. Dr. Woiteshek also concluded Employee had sustained a "traumatic internal derangement of the right knee with some stranding and fitting of the ACL." Dr. Woiteshek testified that it was his opinion that the work injury on September 15, 2014, where he was debarking the forklift and felt a pop was the prevailing factor of the diagnosis. Furthermore, when asked, Dr. Woiteshek replied, "Yes" in that the work injury was indeed the prevailing factor in the cause of the disability. Dr. Woiteshek testified that the treatments rendered were reasonable and necessary to help cure and relieve the work injury. Dr. Woiteshek stated that in his opinion, Employee had been unable to work since the date of the surgery through the unforeseeable future in the present condition as of the date that he saw him on December 19, 2014. Dr. Woiteshek testified that Employee was not yet at maximum medical improvement.

Employee was seen on September 17, 2014, by Dr. Marsh for "right knee history of buckling, recent work activity, pain getting off of forklift." It was noted that he was a fulltime order puller

who principally operated a forklift. At that time he noted that he had worked at Alan Wire since May, 2014, that prior to that had worked at Cross Roads for two and a half years without any work related problems, and that he was under the care of the VA for several conditions. Dr. Marsh indicates that Employee had reported that on Monday, September 15, 2014, he had felt and heard a pop in his right knee when getting out of the forklift and had felt a sense that his knee was going to “give out.” Dr. Marsh noted that Employee reported to him that he complained of a knot that would get larger when he was on his feet. Dr. Marsh noted that Employee had a history of narcolepsy. Dr. Marsh stated “[i]t is unclear whether indeed this information dealing with his narcolepsy, since he does forklift activities (safety sensitivity activities) was ever communicated to any one when he was undergoing his physical for the company. It is extremely doubtful since he would need to be on medications to even be remotely safe to do forklift activities.” Dr. Marsh noted that Employee “favors the right knee when he walks.” Dr. Marsh’s impression from this initial visit was “right anterior medial joint line nodule, 2 x 2.5 centimeters, minimally symptomatic and without a history of direct trauma though occurring in a knee that has had a history of chronic recurrent buckling causing falls at times, and the buckling chronically is occurring in both knees, which have never been evaluated or even communicated (by the individual) to his treating Veterans Administration physician.” At this time Dr. Marsh determined the knee condition to be “not work related” and told Employee to contact the VA.

Records from the Veterans Administration indicated that on September 18, 2014, Employee was seen for an injured right knee and the chief complaint states “injured right knee after stepping off forklift at work Monday night, he heard a pop and then a knot swelled up.” The records noted that there was a “small dime size knot to right knee medial area” and noted a history of trauma. Nursing notes from September 18, 2014 state “here to f/u on right knee pain. Pt was injury right knee at work – seen at SE Hosp.”

An added comment dated September 19, 2014, in the Veterans Administration records note that Employee had been approved for a “non va ortho consult.”

A knee brace was requested September 18, 2014. It was noted that “patient working at allen wire around 5 pm on Monday and was unloading the truck stepped off the forklift and felt a “pop” in the right knee and a knot popped up on the medial surface by left knee cap.” It was noted that x-rays had been re-ordered, that nsaid’s had been prescribed and that he was unable to work until evaluated.

Employee was seen at the VA for follow up on September 25, 2014, for sleep study and right knee injury. On that date he discussed needing a letter of release to work following narcolepsy related sleep study.

Missouri Delta Orthopaedics records reflect that Employee was evaluated on October 3, 2014 for right knee pain that “began on 9/15/2014” that varied, was moderate and daily and it was noted that the Employee stated that “the symptoms are chronic and are poorly controlled.” The onset date was noted as 9/15/2014 and the records state “stepped off a forklift at work at this time not a w/c claim”. He rated that pain as an 8/10. The Assessment as “cyst, meniscus, knee.”

The September 29, 2014 MRI of Employee states “1. Mild right knee patellofemoral compartment chondrosis. 2. Focal area of increased T2 signal in the anteromedial soft tissues of the right knee, likely a contusion. No definite foreign body is seen. 3. Focal pocket of multiloculated fluid in the anteromedial aspect of the right knee ...deep to the medial retinaculum. This may represent a ganglion cyst as no definite communication with the remainder of the joint fluid is seen.”

Dr. Cary Sanders saw Employee on October 3, 2014, for right knee pain and reported that “the symptoms began on 9/15/2014...the symptoms are reported as being moderate. The symptoms occur daily.”

Section 1 contains medical records from John P. Pershing Veterans Hospital. These reflect that on October 8, 2014, the claimant was seen for a CPAP machine and the diagnosis was sleep apnea.

October 13, 2014, it was noted that a right knee diagnostic arthroscopy and excision of the parameniscus cyst had been approved and that pre op had been approved at the VA.

MDMC records from October 27, 2014, reflect that Dr. Cary Sanders performed surgery on Employee and the postoperative diagnosis was “parameniscal cyst lateral right knee.”

Dr. Sanders noted on November 11, 2014, that Employee had returned for follow up and his sutures were removed but that he had not yet started PT.

Sikeston Rehab notes are found in both sections 4 and 7 of Exhibit 3. These reflect that Employee began physical therapy on November 12, 2014, and reported that the knee pain began when he was “at work and stepped off fork lift and knee locked up with a “pop” and onset of pain on September 15, 2014. Underwent knee scope on October 27, 2014.”

When Employee returned to see Dr. Sanders on December 9, 2014, he reported his symptoms were acute and improved and that his knee ached with walking and standing for extended periods. Dr. Sanders noted that Employee reported the physical therapy had improved his condition. Dr. Sanders ordered another month of physical therapy.

An x-ray dated December 23, 2014, from the VA states “two views of the left knee reveal mild degenerative skeletal change with no acute osseous or adjacent soft tissue abnormality.”

VA records from January 9, 2015 state that the “Veteran cannot travel to VA facility due to geographical inaccessibility. This veteran has been out of work for several months and does not have the money to travel to PB”. At that date the chief complaint was “s/p right knee arthroscopy with excision of parameniscal cyst.” It was noted that “pt has received extensive physical therapy and MO Delta Rehab and through their generosity, they have continued to treat this veteran w/o authorization from VAMC. This veteran’s place of employment REFUSES to allow him to rtn to work until he has undergone 4 weeks of ‘work conditioning’. He does not have a car and is unemployed at this time as a result of his knee surgery. Sikeston rehab has

been providing transportation to enable this veteran to receive treatment necessary before he can return to work. We are begging for the COS to reconsider this request.”

Dr. Sanders followed up with Employee on January 9, 2015, who noted that he was doing “a lot better. Everyday, it just aches. Constant aches” and that elevating the knee was a relieving factor. At that time Dr. Sanders stated “Patient to continue with physical therapy 3x week for 1 month. Patient to be off work during that time due to having to lift...PT to work on work hardening.”

Sikeston Rehab notes are located in Section 7 of Exhibit 3. These reflect that Employee underwent physical therapy from November 2014, through February 2015. The note from February 5, 2015 states: “Patient not able to secure payor source. Therefore, no formal objective data to report.”

On February 6, 2015, Dr. Sanders noted that Employee had returned for a return to work release and at that time was denying problems, complaints or concerns.

Employee was seen at MDMC on July 14, 2015, by Dr. Cary Sanders for “right knee pain.” Employee reported that he had been in pain the last week, but there had been no new injury. Employee reported that the aggravating factors included walking and bending and that elevation, sitting, and rest gave relief. On that date Employee was given an injection and further physical therapy was recommended.

Exhibit A was the report of Dr. Luke Choi. In his report Dr. Choi states that “there was no traumatic event” and that “however, Mr. Cole states that he was getting off of his forklift, which he has done many times, when he experienced a popping sensation in his right knee and felt his knee was giving out on him. He subsequently developed swelling. He continued to experience discomfort, mostly on the parapatellar region of his left knee and reported it to a supervisor...”

Dr. Choi noted that in his opinion that Employee had “right knee patellofemoral chondromalacia” and that “in terms of the mechanism of injury in question from the work-related incident on September 15, 2014, he did not experience a traumatic event. He did not fall, he did not twist his knee. He performed a maneuver that he would have done multiple times as a forklift operator.” Dr. Choi noted that he had reviewed photos of the forklift and that the drop from the ground to the step of the forklift is approximately 17 inches. Dr. Choi stated in his opinion that stepping down 17 inches was not sufficient to cause Employee’s condition stating “I do not believe that stepping off the forklift as described by Mr. Cole is traumatic in nature.”

In his addendum to his report Dr. Choi states that after reviewing the MRI film, his opinion that Employee did not have a work-related injury or require further treatment had not changed.

Dr. Choi’s deposition was marked Exhibit D and admitted into evidence. In his deposition Dr. Choi testified that he diagnosed Employee with “right knee chondromalacia of patellofemoral joint and MRI finding show a multilobular, essentially, ganglion cyst.” Dr. Choi testified that chondromalacia is a degenerative process “or if there’s a traumatic component to it, then usually people are more descriptive, in terms of suggesting that there is a bony edema surrounding the

cartilage or there is a full thickness cartilage defect with an associated loose body.” Dr. Choi testified that Employee had a ganglion cyst. Dr. Choi testified that in his opinion there was no ACL pathology. Dr. Choi said in his opinion there was “no work-related traumatic event that was the prevailing factor...I mean, walking off of a forklift, which he has done multiple times, does not cause an injury to his patellofemoral joint...he certainly could have walked off the forklift, twisted his knee or fell on his knee. That may explain why he experienced the popping sensation. But that needs to be correlated with subsequent MRI or exam that shows that there was a meniscal pathology or there was some sort of a traumatic event that you could correlate with the mechanism of injury, but I don’t see anything like that.”

Dr. Choi testified that “usually, almost certainly all the time, parameniscal cyst occurs because there is a tear in the meniscus. So you can make an argument that if someone injured their knee and there was a meniscal tear and subsequently developed a parameniscal cyst, that that could be attributed to an injury.”

Dr. Choi was asked about what Dr. Sanders meant by “stranding or thinning of the ACL” and Dr. Choi replied, “Oh, first of all, I don’t know exactly what Dr. Sanders was alluding to, because I wasn’t there. But I imagine that he may have saw some fibers within the ACL and he described it as some fraying. I’m not sure if he called it – or suggested that it was pathology. It may have been some myofibers that were loose.”

On cross examination Dr. Choi agreed that he referenced a 17-19 inch drop from the forklift to the ground in his reports and when asked if he could agree that in general the drop of a step such as those in stairs in buildings in 7 inches he replied “no” that he wouldn’t have a reason to disagree. Dr. Choi agree that there are things that a surgeon sees during a surgical procedure that cannot be visualized or ascertained on diagnostic studies and that Dr. Sanders had operated on Employee and that he had not. When asked whether two people could look at the same set of diagnostic studies and see different things within those diagnostic studies he replied “I think that’s a theoretical possibility. Yes.”

On cross examination Dr. Choi agreed that Employee had replied that he had had no prior injuries to his right knee.

## **RULINGS OF LAW:**

### ***Issue 1. Accident; Issue 2. Medical causation; and Issue 3. Previously incurred medical expenses***

The employee credibly testified that he had never had right knee pain, swelling, or other complaints prior to September 15, 2014. The employee credibly testified that he had had no right knee swelling prior to September 15, 2014. The employer has ostensibly offered the records of Dr. Marsh to suggest that the employee had had some prior “buckling” of his knees prior to the date of injury, but it is noteworthy that the mention of “buckling” contained in the reports of Dr. Marsh is mentioned nowhere else in the treatment records and the employee credibly testified he had had no prior knee pain, buckling, or swelling in the right knee. The

employee testified that the step down from the forklift was approximately 17-19 inches and that when the injury occurred he was wearing “heavy” steel-toed boots as required by his employer.

Dr. Choi testified that stepping down a 17-19” drop was not adequate to constitute a “work related traumatic event” that would be the prevailing factor of the employee’s disability. Dr. Woiteshek, however, testified that in his opinion the prevailing factor in the cause of the disability and the need for the treatment rendered by Dr. Sanders was the incident when he debarked the forklift.

Treating orthopedic surgeon Dr. Cary Sanders states in his report dated February 2, 2015, that he “believe[s] based on his history that the condition began arising from his workers compensation claim. His diagnosis was parameniscal cyst which could be a result of trauma sustained at that time.”

After taking a detailed work history from the employee, reviewing the medical records and examining the Employee, Dr. Dwight Woiteshek opined that the condition that Employee had treated by Dr. Sanders was medically, causally related to the September 15, 2014 work injury. Dr. Woiteshek opined that the Employee’s parameniscal cyst was, according to the history given by the employee, asymptomatic prior to the work injury on September 15, 2014, and that the employee had “internal derangement of the right knee with some stranding and thinning of the ACL.” Dr. Woiteshek stated that the work injury Employee sustained when debarking the forklift was the prevailing cause in the need for medical treatment that Employee underwent under the care of Dr. Cary Sanders.

Dr. Choi, on the other hand, did not operate on the employee and did not evaluate him at the request of the employer until nearly five months after the surgery performed by Dr. Sanders. Dr. Choi, following his evaluation, diagnosed Employee with right chondromalacia of the patellofemoral joint and MRI findings of a multilobular ganglion cyst of the Hoffa’s fat pad. This diagnosis by Dr. Choi in March, 2015, differs significantly from that of the treating surgeon, Dr. Cary Sanders, in Dr. Sanders’ October 27, 2014 operative report. Dr. Choi discussed at length that in his opinion from looking at the MRI that the cyst was a ganglion cyst, not a parameniscal cyst, but agreed that a parameniscal cyst could be attributed to an acute injury. On cross examination, however, Dr. Choi agreed that there are observations a surgeon can discern during a procedure that cannot be visualized or ascertained on diagnostic studies and he agreed that Dr. Sanders operated on Employee and he did not. Dr. Choi was asked whether two people can “look at the same set of diagnostic studies and see different things in those diagnostic studies” and he replied “I think that is a theoretical possibility. Yes.”

The employee credibly testified that prior to September 15, 2014, he had no pain, knots, swelling or other symptoms of the right knee. I specifically find that the opinions of the treating surgeon Dr. Cary Sanders and Dr. Dwight Woiteshek to be more credible than the opinion of Dr. Choi on the issues of accident, medical causation, and previously incurred medical aid. Based on all of the evidence presented, including the employee’s credible testimony and the medical opinions, I find that Employee met his burden of proof that he sustained an accident arising out of and in the course of his employment. I also find that Employee’s injury to his right knee was medically causally related to the work accident that occurred on September 15, 2014. Furthermore, I find

that Employee's work at Alan Wire Company, Inc. was the prevailing factor in causing Employee's injury to his right knee.

It is clear the employee had no choice but to seek treatment on his own in this matter once Employer-Insurer refused to provide treatment after receiving proper notice of the employee's work injury. Furthermore, based on all of the evidence presented, I find that the medical bills were reasonable and necessary. Furthermore, I find that the employee met his burden of proof that there was a causal relationship between the accident and the medical bills. The employer-insurer is therefore liable for \$15,522.16 of previously incurred medical bills, as specifically set forth below, and shall hold Employee harmless from these medical bills.

***Issue 4. Claim for additional or future medical aid***

Based upon the employee's credible testimony and all of the evidence presented, I find that the employee has met his burden of proof that there is a "reasonable probability" that he needs further medical treatment. I further find in accordance with the ruling in **Landers v. Chrysler Corporation** that there is competent medical evidence that the medical care requested "flows" from the work injury the employee sustained on September 15, 2014. I further find that the claimant is entitled to an award of future medical benefits based upon my finding that the work injury aggravated a preexisting condition to the point that the claimant is likely to need future medical care as determined in **Conrad v. Jack Wyser Transportation Company**. I further find that the Worker's Compensation Law does not incorporate a "prevailing factor" test into the determination of medical care and treatment required to be afforded for a compensable injury by Section 287.140.1 and that this section requires nothing more than a demonstration that certain medical care and treatment is reasonably required to cure and relieve the effects of an injury as determined in **Sickmiller v. Timberlind Forrest Products**. I further find that there is competent evidence that a work place accident occurred on or about September 15, 2014, where Employee was injured and that further medical care and treatment is reasonably required to cure and relieve the effects of the injury.

Therefore, based on all of the evidence presented, Employer-Insurer is directed to provide treatment for the employee's right knee injury in order to cure and relieve the effects of the injury.

***Issue 5. Additional temporary total disability***

Dr. Cary Sanders states in his February 2, 2015 report that the employee had been off work due to the work injury since the surgery on October 27, 2014. Dr. Sanders' notes reflect that he released Employee to return to work on February 9, 2015. Based on all of the evidence presented, I find that Employee reached his burden of proof on the issue of temporary total disability. I find that Employer is responsible for temporary total disability benefits for the time periods of October 27, 2014, through February 9, 2015. Therefore, Employer-Insurer is directed to pay Employee \$6,770.25 in temporary total disability benefits.

Given my findings on issues 1-5 the issue of final award is moot and therefore shall not be ruled

upon.

**ATTORNEY'S FEE:**

Kim Heckemeyer, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Made by:

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Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*