

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

Injury No.: 98-116889

Employee: DeAndre Collins
Employer: United Parcel Service, Inc.
Insurer: Liberty Mutual Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: October 22, 1998
Place and County of Accident: St. Louis County

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. The parties stipulated that the employee sustained an injury due to an accident arising out of and in the course of his employment. 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 July 5, 2006. The award and decision of Administrative Law Judge Joseph E. Denigan, issued July 5, 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 14th day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Deandre Collins

Injury No.: 98-116889

Dependents: N/A
Employer: United Parcel Service, Inc.
Additional Party: Second Injury Fund (Open)
Insurer: Liberty Mutual Insurance Co.
Hearing Date: April 21, 2006

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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: October 22, 1998
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:
Claimant contused knee on a steel bar.
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: 25% permanent partial disability of right knee
15. Compensation paid to-date for temporary disability: \$3,450.78
16. Value necessary medical aid paid to date by employer/insurer? \$17,891.48

Employee: Deandre Collins Injury No.: 98-116889

17. Value necessary medical aid not furnished by employer/insurer? See Narrative Award
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$180.27/\$180.27
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

40 weeks of permanent partial disability from Employer \$7,210.80

22. Second Injury Fund liability: Open

TOTAL: \$7,210.80

23. Future requirements awarded: None

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:

Alvin Wolff (see narrative award)

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Deandre Collins	Injury No.: 98-116889
Dependents:	N/A	Before the
Employer:	United Parcel Service, Inc.	Division of Workers'
Additional Party:	Second Injury Fund (Open)	Compensation
Insurer:	Liberty Mutual Insurance Co.	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

This case involves a compensable right knee injury resulting to Claimant with the reported accident date of October 22, 1998. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund remains open for a determination of liability at a future date. Claimant proceeds **pro se** pursuant to Hardship Petition.

Issues for Trial

1. medical causation (attainment of maximum medical improvement);
2. liability for unpaid medical expenses;

3. liability for past due temporary total disability;
4. nature and extent of permanent partial disability (PPD);
5. liability for future medical treatment;
6. assessment of attorney lien.

FINDINGS OF FACT

Stipulations

The parties stipulated that Claimant sustained a fall at work and that Claimant's TTD/PPD compensation rates are \$180.27/\$180.27. Employer paid medical benefits to date in the amount of \$17,891.48 and TTD benefits in the amount of \$3,450.78. Parties further stipulate receipt of a Medicaid lien in the amount of \$26,541.81.

Dispositive Evidence

Claimant's Testimony

Claimant testified that, prior to his June 22, 2000 surgery with Dr. Nogalski, he was advised by Dr. Nogalski that physical therapy would be important in his recovery process. He also recalls the instruction and use of the continuous passive motion (CPM) machine for his right knee. Claimant testified he did not present to physical therapy earlier because he did not have the prescription.

Claimant testified that, post-operatively, he was groggy from the medication ordered from the right knee surgery by Dr. Nogalski. The records document Claimant was prescribed Lodine and Tylenol III, post-operatively. Because he was too groggy, Claimant claims his mother called Dr. Nogalski's office multiple times seeking the prescription for physical therapy for the right knee. Claimant testified he did not receive the prescription until he received it *in the mail* on or about July 27, 2000.

Claimant admits did not call Dr. Nogalski's office himself anytime between June 22, 2000 and his first presentation to physical therapy on July 27, 2000. He explains this was because he was too groggy from the medication. (The surgery was apparently an outpatient procedure allowing Claimant to return home that same day.) Dr. Nogalski's office notes contain do not reflect the multiple phone calls to the office regarding physical therapy. Exhibit A-7. Claimant admitted he was authorized to use a cab when needed for rides to make medical and physical therapy appointments.

Claimant was released by Dr. Nogalski in September and began treating with Dr. Lehman a month later. Dr. Lehman performed five surgical procedures thereafter. Claimant asserts minimal relief from these procedures.

Current complaints include pain on a daily basis. He thinks his knee has improved since September 2004. He states he takes Ultracet on a daily basis. According to Claimant, this is ordered by Dr. Perry whose records are not in evidence.

Mrs. Van Hook

Claimant's mother, Beverly Van Hook, testified on behalf of Claimant. She contradicted Claimant both in regard to the number of calls to Dr. Nogalski's office (i.e. she called once) and with respect to receipt of the actual prescription (i.e. she drove to the office and picked it up). Claimant lives with his mother. She also testified that she witnessed Claimant call Dr. Nogalski's office on one occasion. Both versions contrast with the medical records. (Exhibits A-4 and A-7.)

Treatment Record

Claimant sustained a contusion to his right knee. Claimant was immediately treated and subsequently released from the emergency room at St. Joseph's Emergency Room in St. Charles, Missouri. Claimant had an abrasion and x-rays ruled out fracture. He first treated with Dr. Meadows on October 27, 1998 who prescribed medication and physical therapy. Eventually he was referred to an orthopedist, Dr. Richard Rende, on November 16, 1998.

Dr. Rende felt Claimant had been immobilized too long and discontinued use of the immobilizer. An MRI, which

was performed on November 23, 1998. It showed some swelling and an “equivocal” tear of the medial meniscus. Dr. Rende ultimately diagnosed Claimant with a right knee contusion. Dr. Rende concluded Claimant was not a candidate for arthroscopic surgery. Dr. Rende repeatedly advised Claimant to discontinue use of the immobilizer and discontinue use of a cane. Dr. Rende ultimately discharged Claimant on December 18, 1998, because Claimant was non-compliant with therapy in that he refused to bend his knee.

A second opinion was obtained from Dr. Nogalski on January 6, 1999. He diagnosed right knee pain with unexplained etiology. He recommended a change of therapist and aquatic therapy which was ordered through Dr. Meadows. Specifically, Dr. Nogalski recommended against arthroscopic surgery because it could make Claimant’s complaints worse. (Exhibit A-7, 1/6/99.) At this time, Claimant could not flex his knee beyond thirty degrees. Dr. Nogalski continued to evaluate Claimant and ordered a bone scan on February 2, 1999, which did not reveal any clear findings warranting further care. Exhibit A-7. Dr. Nogalski returned Claimant to seated work as a permanent restriction and discharged him from care.

In March 1999, Claimant was evaluated by Dr. Richard Lehman. Dr. Lehman recommended an evaluation by a neurologist to rule out reflex sympathetic dystrophy (RSD). By July 6, 1999, Dr. Lehman found Claimant had no evidence of RSD and recommended closed manipulation and possible arthroscopy. Claimant requested treatment from the employer. The employer authorized Dr. Hogan who examined Claimant on September 7, 1999, and found no evidence of RSD. Dr. Rende re-examined Claimant, almost one year after the reported injury, on October 14, 1999. Dr. Rende diagnosed chronic ankylosis related to the fact that Claimant simply refused to bend his right knee. Dr. Rende agreed that if Claimant could bend the knee on his own, a manipulation under anesthesia may be considered.

FIRST SURGERY --- TWENTY MONTHS POST-ACCIDENT

Dr. Nogalski subsequently performed an arthroscopic debridement of adhesions of the right knee on June 22, 2000. The medial meniscus was normal. Dr. Nogalski was able to flex Claimant’s knee to ninety degrees in the operating room after surgery. Post-operatively, Claimant did not pursue physical therapy until one week before the follow-up on August 1, 2000. This, despite the fact that physical therapy was ordered at the first post-operative visit on June 28, 2000. Claimant testified he was aware that physical therapy was necessary after Dr. Nogalski’s surgery, but claims not to have received the physical therapy prescription order.

Dr. Nogalski notes some inconsistencies regarding Claimant’s claimed use of the CPM at 50 degrees of flexion and Dr. Nogalski’s physical exam findings of less than that. Exhibit A-7, 8/1/00. Dr. Nogalski noted Claimant was displaying behavior causing concern about Claimant’s rehabilitation, reliability and cooperation.

The HealthSouth Rehabilitation records document Claimant did not present for physical therapy until approximately four weeks after surgery, or until July 27, 2000. (Exhibit A-4.) The HealthSouth records include a copy of Dr. Nogalski’s prescription dated June 28, 2000 for physical therapy three times per week. In addition, Dr. Nogalski’s records, dated June 28, 2000, document a physical therapy prescription was provided to Claimant at this visit.

Dr. Nogalski examined Claimant again on August 1, 2000 whereupon he first learned Claimant received physical therapy approximately one week prior, despite the fact that physical therapy was ordered post-operatively on or about June 28, 2000. Dr. Nogalski expressed concerns and noted an inconsistency between Claimant’s claimed use of the CPM machine and the motion Claimant displayed on physical exam. Dr. Nogalski found Claimant had reached maximum medical improvement, placed permanent restrictions for a seated job and encouraged continued exercise and strengthening programs on his own. On September 12, 2000, Dr. Nogalski rated Claimant at twenty-three percent PPD of the right knee.

DR. LEHMAN’S ASSUMES TREATMENT --- TWO YEARS POST-ACCIDENT

Claimant commenced treatment privately with Dr. Lehman who performed five additional surgeries the first of which occurred on December 4, 2000. Claimant agrees he did not ask the employer to pay or provide treatment with Dr. Lehman beforehand. Dr. Lehman performed surgery on December 4, 2000, in the form of a closed manipulation, a release and repair of the patellar tendon and release and repair of the quadriceps tendon. (Claimant testified that surgery did not help him regain motion in his right knee.)

On April 23, 2001, Dr. Lehman performed an open debridement of the right knee and noted scar tissue in the joint was “severe”. Dr. Lehman debrided the knee and intra-operatively flexed the knee to 120 degrees. (Claimant testified that

the second surgery by Dr. Lehman was not helpful in permanently regaining motion in the right knee.)

On January 28, 2002, Dr. Lehman performed a *third* surgery in the form of a close manipulation under anesthesia to the right knee. (Claimant testified that this procedure did not have lasting, positive effects.) On January 13, 2003, Dr. Lehman performed a right knee arthroscopy documenting significant scar tissue, which was debrided in addition to some grade III chondromalacia. (Again, Claimant did not have lasting benefit from this procedure.)

On March 8, 2004, Dr. Lehman performed a *fifth* right knee arthroscopy and performed extensive debridement and a right tibial osteotomy. (This occurred five and one-half years after the reported accident.)

Other Treatment

Claimant agreed he did not ask UPS to pay or provide medical treatment before he began treatment with Dr. Lehman which led to the first surgery on December 4, 2000. Dr. Lehman, through the course of his treatment, prescribed physical therapy. Claimant offered physical therapy bills to ProRehab an exhibit at trial for \$2,000.00 in out-of-pocket expenses. He agreed that this physical therapy was ordered by Dr. Lehman. He also agreed he did not ask UPS to pay or provide physical therapy with ProRehab.

Claimant agreed that he was in physical therapy since the last surgery on March 8, 2004. He agrees that during the course of that physical therapy he was unable to participate in part because of the death of two family members. He was also unable to participate because of a personal unrelated surgery for himself.

Finally, Claimant submitted as an exhibit the records from Dr. Padda. Claimant testified Dr. Padda was a physician to whom Claimant sought treatment at the recommendation of Dr. Lehman. Claimant agreed he did not ask UPS to pay or provide medical treatment with Dr. Padda prior to obtaining it.

Opinion Evidence

Claimant was re-examined by Dr. Nogalski on September 17, 2003, at the request of the employer and insurer. Dr. Nogalski described Claimant's scenario as "difficult." He noted the waxing and waning improvement in motion and a reversion back to decreased motion after each of the procedures performed by Dr. Lehman. Dr. Nogalski confirmed there is no objective of evidence to date supporting a diagnosis of RSD. He believed time itself will improve Claimant's knee. Dr. Nogalski found a volitional component to Claimant's activity and lack of motion. Dr. Nogalski change his rating to eighteen percent PPD at the September 17, 2003 examination. Finally, Dr. Nogalski opines that Claimant was at MMI on August 23, 2000 regarding the October 22, 1998 date of injury. The treatment after the June 22, 2000 surgery and discharge was not due to the reported injury.

Dr. Nogalski further commented that with regard to a patient-physician relationship and treatment issues, it is "reasonable" for a physician to try to provide every possible opportunity for a patient to minimize discomfort and in that sense, further treatment could be deemed "reasonable." However, Dr. Nogalski opines the treatment ordered by Dr. Lehman was not "necessary" because he believed Claimant's overall function would have improved as he became more active and used his leg more on a volitional basis. Specifically, Dr. Nogalski observes that after several procedures there is some form of chondromalacia that has increased within the knee. He states that it is possible these procedures alone could contribute to the chondromalacia found, and it is for this very reason that aggressive multiple procedures are clearly not the method to gain motion or function in these circumstances.

Dr. Nogalski again re-examined Claimant on September 29, 2004. Dr. Nogalski concludes there was no clear indication or justification in the medical records preceding the March 8, 2004 surgery performed by Dr. Lehman. Specifically, there was no mention made in Dr. Lehman's notes of patellar mobility or immobility. Dr. Nogalski states that it does not appear the March 8, 2004 procedure was directly related to the initial injury and the justification for the procedure was not clearly indicated in the medical records by Dr. Lehman. Dr. Nogalski again reduced the work-related PPD rating and assigned sixteen percent PPD of the right knee. Dr. Nogalski recommended restrictions in the form of no lifting more than 20 pounds, no kneeling or squatting and no climbing more than three feet off the ground.

RULINGS OF LAW

Medical Causation/Maximum Medical Improvement

Claimant has the burden to prove all elements of his case and on the issue of medical causation, must do so with competent and substantial evidence. At issue is whether the October 22, 1998 injury was the substantial cause of the current condition of the right knee and the record of treatment, specifically, the five surgeries during the four years following release by Employer's surgeon. This issue is deemed beyond the scope of lay opinion and, rather, the subject of expert opinion.

Here, Claimant did not present any expert opinion evidence to support his contention that medical treatment ordered by Dr. Lehman was necessary to cure and relieve the effects of the October 1998 injury. Thus, Claimant failed to present competent and substantial evidence that the treatment rendered by Dr. Lehman was substantially caused by the October 22, 1998 injury. Employer is liable for only part of Claimant's current knee condition. Dr. Nogalski placed Claimant at maximum medical improvement in August 2000. He stated Claimant's motion would have improved with time and volitional activity.

Dr. Nogalski and Dr. Rende questioned Claimant's motivation according to the documentation that Claimant was instructed multiple times to discontinue use of the immobilizer and cane. Dr. Nogalski points out inconsistency on physical exam which parallels Dr. Rende's experience. Claimant did not pursue physical therapy after the first surgery for four weeks and his explanations were not only unconventional but contradicted by his own witness.

More importantly, Dr. Nogalski, not surprisingly, suggested the multiple procedures performed by Dr. Lehman likely contributed to the chondromalacia present in Claimant's right knee. IT is recognized medically that each surgical procedure performed is accompanied by an increased risk of development of scar tissue. Thus, the evidence compels the conclusion that Dr. Lehman's surgical treatment was unauthorized, unrelated to the reported injury, and the predominant explanation for Claimant's current knee complaints.

Nature and Extent of PPD

Claimant agrees that after the last surgery with Dr. Lehman on March 8, 2004, that he attended physical therapy three times per week, three hours per day, including riding a bike, walking a treadmill, doing push-ups, sit-ups and stretches. He agrees that he has been in enough physical therapy to understand the home exercise regime on his own.

Claimant provided no evidence that Dr. Lehman excused Claimant from work for any length of time after any of the procedures documented. Claimant presented no evidence regarding the nature of any temporary restrictions. Claimant presented no medical evidence of permanent restrictions he is currently under for his right knee since the March 8, 2004 surgery or any other surgeries by Dr. Lehman.

Claimant agrees he can drive, sit, stand, and walk. He is able to walk stairs with some care. He does not use a cane or any other assisted device to walk. Claimant ambulated in and out of the courtroom with no apparent defect and he sat, flexed his right knee greater than ninety degrees and stood up without difficulty. Claimant nevertheless states he does not carry groceries. He has no problems with balance regarding his left leg.

Dr. Nogalski assigned a sixteen percent PPD of the right knee attributable to the October 1998 injury. Claimant presented no PPD opinion evidence to rebut Dr. Nogalski's opinion. Employer treated Claimant almost two years; thereafter, Claimant undertook four years of unauthorized surgery which Dr. Nogalski suggests was ill advised. No liability may be imposed against Employer for this four-year episode which followed the work related treatment given by Employer. The record suggests a PPD finding in the range of fifteen to twenty percent PPD of the right knee.

Temporary Total Disability Benefits

Claimant alleges temporary total disability from October 22, 1998 through September 2005. Claimant stipulated he was paid TTD by Employer during authorized treatment periods. Dr. Lehman performed the five unauthorized treatments on Claimant's right knee between December 4, 2000 and March 8, 2004. No off-work slips are in evidence.

Claimant's failure to prevail on the issue of medical causation precludes a finding for Claimant on past due TTD relative to the unauthorized and unnecessary surgeries performed by Dr. Lehman during the period October 2000 through 2004. Therefore, Claimant fails to meet the requisite burden of proof necessary for a finding of temporary total disability. Employer cannot reasonably be suggested to be liable for any TTD benefits beyond that already paid.

Unpaid Medical Expenses/Medicaid Lien

Medicaid apparently paid for Dr. Lehman's bills and all of the medical bills for physical therapy except for those in Exhibit 1-A. Claimant paid out-of-pocket medical bills submitted as Exhibit 1-A from ProRehab Physical Therapy in the amount of \$2,040.00.

The claimed medical expenses herein, including all out-of-pocket expenses and the Medical Lien, are not compensable under Chapter 287 for the same reasons stated above regarding medical causation and TTD benefits. Claimant admitted not making demand on Employer for treatment by Dr. Lehman or ProRehab and also failed to present proper opinion evidence as to the medical causation and necessity thereof. Indeed, Employer's expert suggested just the opposite. Employer prevailed on those issues.

The admission of the Medicaid Lien herein as an exhibit is not a proof of liability but merely an undisputed notice thereof. Neither the Division nor the Employer are the guarantor of Dr. Lehman's surgical services. No basis exists in the record for imposing liability for those medical expenses accumulated during the years 2000 through 2004. The Division does not speculate on the criteria of Medicaid for determining payment to the above providers.

Future Medical Expense

Claimant presented no evidence supporting a claim for future medical. Thus, it is unknown what if any treatment is necessary other than perhaps symptom relief. He testified he currently takes Ultracet for his right knee at the order of Dr. Clayton Perry. Claimant failed to submit any evidence regarding the same in the form of medical records from Dr. Perry indicating that any prescription for Ultracet was due to the October 22, 1998 injury at issue. Once, again, this argument fails for the same reasons stated above regarding medical causation. Employer is not responsible for future medical care.

Attorney's Liens

Mr. Alvin Wolff testified that he was hired on January 6, 1998 to represent Claimant in this case, however, the injury did not occur until October 22, 1998. Thereafter, Attorney Matthew Padberg represented Claimant until September 7, 2000. (Exhibit C.) Mr. Wolff was discharged in approximately May 1999. He began representation again in September 2001 and withdrew on or about May 28, 2005. Mr. Wolff testified at the trial and submitted Exhibit I, which documents \$1,075.16 in unreimbursed expenses. Mr. Wolff estimates the total time invested during the representation of the case equals 54.2 hours.

The record contains no evidence of omission and Mr. Wolff discussed a settlement offer he negotiated that paralleled the disputed issues herein. His discharge is otherwise unexplained. The record compels an award of attorney fees in the amount of his twenty-five percent contingent fee plus expenses. In the absence of any evidence, no fee may be determined for Mr. Padberg who presumably waives his lien as indicated by his absence at hearing, despite Notice hereof. Kuszvara v. Continental Baking Co., 24 S.W.2d 712, 714 (Mo.App. 1999).

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have attained maximum medical improvement in Autumn 2000 and sustained a twenty-five percent PPD of the right knee. No other benefits are awarded. The SIF remains open.

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