

FINAL AWARD ALLOWING COMPENSATION  
(After Mandate from the Missouri Court of Appeals for the Western District of Missouri)

Injury No.: 04-061506

Employee: Clifford Conrad  
Employer: Jack Cooper Transport  
Insurer: Liberty Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

On October 21, 2008, the Missouri Court of Appeals for the Western District (Court) issued an opinion reversing the February 8, 2008, award and decision of the Labor and Industrial Relations Commission (Commission). *Conrad v. Jack Cooper Transp. Co.*, WD69407, (Mo.App. W.D., Oct. 21, 2008). By mandate dated November 12, 2008, the Court remanded this matter to the Commission for proceedings consistent with the Court's opinion. In particular, the Court ruled the Commission erred in denying employee future medical benefits.

Pursuant to the Court's mandate, we issue this award. Having reviewed the evidence and considered the whole record, we find that the administrative law judge's award of future medical benefits should be affirmed. The testimony of Dr. Jones established that employee's work injury is one of the reasons that he will need future medical treatment. Accordingly, employee has shown that future medical treatment is reasonably necessary to cure and relieve him of the effects of his work injury.

Pursuant to §286.090 RSMo, we affirm the award and decision of the Administrative Law Judge R. Carl Mueller dated September 7, 2007. That award and decision is attached hereto and incorporated.

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 13th day of February 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## FINAL AWARD

Employee: Clifford L. Conrad Injury No: 04-061506

Dependents: N/A

Employer: Jack Cooper Transport

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Hearing Date: August 14, 2007

Briefs Filed: August 29, 2007 Checked by: RCM/lh/rm

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 30, 2004.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Wyandotte County, Kansas (Parties stipulate to venue in Lafayette County, Missouri.)
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:  
While exiting a truck, Employee stepped down onto the ground and twisted his left knee causing injury to his left knee.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Left lower extremity at the knee
14. Nature and extent of any permanent disability: Twenty-five percent (25%) – left lower extremity at the level of the knee
15. Compensation paid to-date for temporary disability: \$4,827.15 at \$662.55 per week from June 28, 2004 through August 17, 2004.
16. Value necessary medical aid paid to date by employer/insurer? \$9,698.61
17. Value necessary medical aid not furnished by employer/insurer? None to date.
18. Employee's average weekly wages: \$1,063.07
19. Weekly compensation rate: \$662.55 TTD/\$347.05 PPD
20. Method wages computation: Mo. Rev. Stat. §287.250
21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred .....	\$9,698.61
Less credit for expenses already paid (\$9,698.61)	
Total Medical Owing .....	<u>\$0.00</u>

Temporary Disability

7 and 1/7s weeks (06/28/2004 to 08/17/2004)	\$4,827.15
Less credit for benefits already paid (\$4,827.15)	
Total TTD Owing	<u>\$0.00</u>

Permanent Partial Disability

25% disability of left leg at the knee (.25 x 160 weeks) x \$347.05/week	<u>\$13,882.00</u>
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Total Award: \$13,882.00

22. Second Injury Fund liability: Not addressed by agreement at this hearing.
23. Future requirements awarded: Open for further treatment as needed.

Said payments to begin as of date of this award 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 twenty-five percent (25%) lien totaling \$3,470.05 in favor of Mark D. Chuning, Attorney, for reasonable and necessary attorney's fees pursuant to Mo.Rev.Stat. §287.260.1.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Clifford L. Conrad Injury No: 04-061506

Dependents: N/A

Employer: Jack Cooper Transport

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Liberty Mutual Insurance Co.

Hearing Date: August 14, 2007

Briefs Filed: August 29, 2007 Checked by: RCM/lh/rm

On August 14, 2007, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Clifford L. Conrad, appeared in person and with counsel, Mark D. Chuning. The employer appeared through Stephanie Warmund. The Second Injury Fund is a party to the case; however, Assistant Attorney General Meredith Moser advised by letter dated July 26, 2007 that she agreed for that claim to be heard at a separate proceeding. The primary issues the parties requested the Division to determine were whether Mr. Conrad suffered any disability arising out his April 30, 2004 accident, and if so, the nature and extent of any such disability, and whether the Employer must provide him with future medical care. For the reasons noted below, I find that Mr. Conrad sustained twenty-five percent (25%) disability to his left lower extremity at the knee, and that the Employer shall provide such future medical treatment - including a total knee replacement - as is necessary to cure and relieve Mr. Conrad from the effects of his injury.

### STIPULATIONS

The parties stipulated that:

- On or about April 30, 2004 (“the injury date”), Jack Cooper Transport (“JCT”) was an employer operating subject to Missouri’s Workers’ Compensation Law with its liability fully insured by Liberty Mutual Insurance Co.;
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- Mr. Conrad was its employee working subject to the law in Kansas City, Wyandotte County, Kansas as an employee who had contracted for employment in Missouri;
- Mr. Conrad both notified JCT of his injury, and filed his claim within the time allowed by law;
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- JCT provided Mr. Conrad with medical care costing \$9,698.61; and,
- The Employer paid Mr. Conrad seven and one-sevenths weeks temporary total disability (“TTD”) compensation totaling \$4,827.15 at \$662.55 per week from June 28, 2004 through August 17, 2004.

## ISSUES

The parties requested the Division to determine:

- Whether Jack Cooper Transport must provide the employee with additional medical care?
- Whether Mr. Conrad suffered any disability and, if so, the nature and extent of the Employee's disability?

## FINDINGS

Mr. Conrad testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Rating Report of Lowry Jones, MD dated September 13, 2004.
- Exhibit B – Rating Report of Lowry Jones, MD dated July 25, 2005.
- Exhibit C – Rating Report of Lowry Jones, MD dated August 16, 2005.
- Exhibit D – Operative Report of Lowry Jones, MD dated June 28, 2004.

Although the employer did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1 – Medical Records, Lowry Jones, MD
- Exhibit 2 – Medical Records, St. Mary's Hospital
- Exhibit 3 – Claim for Compensation

I note that, although marked separately, all the medical records and opinions came only from the Employer-authorized treating physician, Lowry Jones, Jr., M.D.

Based on the above exhibits and the testimony of Mr. Conrad, I make the following findings. Mr. Conrad is a 51-year old male, who lives in Lone Jack, Missouri. Mr. Conrad worked for JCT for over 31 years until he retired in June 2007 after a successful career with the Employer.

On April 30, 2004, Mr. Conrad was working for JCT in his position as a truck hostler. Part of Mr. Conrad's duties was to move trucks - that had been parked by the road drivers the night before - up to fuel pumps in the service area in the JCT Wyandotte County Kansas truck yard, and to fuel and service the trucks in preparation for the day. Once a truck was serviced, Mr. Conrad would move that truck from the pumps, walk back in line and retrieve the next truck to bring it to the pumps to be serviced. During this process, Mr. Conrad was exiting a truck and turned to walk back to the next truck. As he turned, Mr. Conrad twisted his left knee and experienced immediate pain. Mr. Conrad immediately reported the incident to his supervisor. Mr. Conrad continued to work for a few days to allow the left knee to improve on its own. After no improvement in the swelling and pain in his left knee, Mr. Conrad was referred by JCT to the Wyandotte Occupational Health clinic on May 6, 2004. An MRI was ordered to rule out a meniscus tear.

Mr. Conrad suffered a prior non-work related injury to his left knee that resulted in arthroscopic surgery for a meniscal tear at St. Mary's hospital in 1993, as well as a previous work related injury to his right knee in 2001 that was treated by Dr. Lowry Jones. The 2001 injury to Mr. Conrad's right knee settled with 15% disability to his right knee. Mr. Conrad's prior 1993 left knee injury did not result in a disabling condition. The medical records of St. Mary's Hospital for prior treatment to his left knee were submitted as Employer's Exhibit 2. Medical records of Dr. Lowry Jones, submitted as Employer's Exhibit 1, indicate that Dr. Jones was fully aware of Mr. Conrad's prior injuries.

An MRI of Mr. Conrad's left knee was performed on May 10, 2004 which revealed a medial meniscal tear. On May 12, 2004, Mr. Conrad was referred by JCT to Dr. Lowry Jones for treatment of his meniscal tear.

On June 28, 2004, Mr. Conrad underwent arthroscopic surgery to his left knee by Dr. Jones. The preoperative diagnosis was "Medial meniscus tear with chondromalacia patella." See, Employer's Exhibit 1 at 32. The Operative report documents a postoperative diagnosis of:

Grade 3 chondral flap tear of the medial femoral condyle, grade 2 lesion of the lateral femoral condyle, grade 2 to grade 3 fragmentation of the trochlear groove, patellar chondromalacia grade 1, as well as a complex tear of the medial meniscus.

*Id.*

The "Description of Procedure" section of the report further describes that:

The patellofemoral joint showed some mild chondral wearing of the patella, grade 1, without much fragmentation. He had a fragmented trochlear groove inflection at about 30 degrees of flexion down to about 90 degrees of flexion" and noted the discovery of a "large chondral flap tear of a large portion of the weightbearing surface of the medial femoral condyle.

*Id.*

Mr. Conrad's left knee was further found to have "excellent thickness of the articular surface in the medial condyle except for the flap tear . . ." The medial meniscus was found to have "a complex horizontal tear that extended from the posterior horn to the mid body." After debridement and repair of the tears, Mr. Conrad's left knee is reported as "fairly normal." *Id.*

After a period of recovery, Mr. Conrad was returned to work on August 17, 2004. On September 13, 2004, Dr. Jones opined that Mr. Conrad sustained "15-percent permanent partial impairment at the level of the knee." *Id.* at 34. Mr. Conrad returned to work at full duty as directed by the Employer's physician; however, Mr. Conrad continued to experience discomfort in his left knee. Mr. Conrad returned to Dr. Jones on April 18, 2005 and the treatment note revealed that:

He has been having some persistent pain in the knee, swelling mostly along the medial joint line.

We placed him on a combination of two Aleve twice a day and some glucosamine sulfate/chondroitin sulfate complex.

*Id.* at 26.

On July 25, 2005, Dr. Jones issued an additional "Disability Rating" which stated that Mr. Conrad had "ten-percent (10%) permanent partial impairment at the level of the knee." *Id.* at 19.

To clarify the two previous reports, Dr. Jones issued a "Disability Rating Addendum" dated August 16, 2005. Dr. Jones stated that Mr. Conrad had:

. . . presented to my office with continued medial joint line pain and patellofemoral pain. This represented articular wear, which was noted at the time of arthroscopy. He had grade III chondral wear and fragmentation. Although I originally felt this was pre-existing disease, with persistent pain that has not resolved with arthroscopic debridement, I added this to his rating.

*Id.* at 17.

Dr. Jones further opined:

This reflects his ongoing persistent knee pain, the fact that he had considerable chondral wear although it predated his injury, appears to have been significantly aggravated by his injury. (emphasis added)

*Id.*

Regarding a need for additional treatment, Dr. Jones opined:

I do think he has considerable chondral wear. He would be a candidate to consider a hyaluronic acid product, and some day in the future, likely will need a total knee replacement. It appears from the history that his injury did aggravate his underlying disease process enough to consider this part of his persistent claim. (Emphasis added)

*Id.*

Regarding impairment, Dr. Jones opined that "In summary, his total partial-permanent impairment is 22 percent." *Id.*

In addition to the reports offered by the Claimant, the Employer offered two reports obtained from Dr. Jones designated by Dr. Jones to be in response to discussions with Employer's counsel and contained in Employer's Exhibit 1. The first such report is dated January 30, 2007 - over a year-and-a-half after Dr. Jones last saw Mr. Conrad.

In this report, Dr. Jones again confirmed that Mr. Conrad indeed is a candidate for future total knee replacement surgery. *Id.* at 14. Dr. Jones observed that "his injury mechanism was consistent with a meniscal tear . He was found to have a complex meniscal tear." Curiously, though, Dr. Jones now does not mention the large chondral flap tear of a large portion of the weightbearing surface of the medial femoral condyle as reflected in the operative report. He does mention "fragmentation of the articular cartilage consistent with chronic patellofemoral wear." However, the operative report (quoted above) read, "patellofemoral joint showed some mild chondral wearing of the patella, grade 1, without much fragmentation." Dr Jones then opined that "The injury although it may have aggravated to some degree is [sic] articular patellofemoral pain, again was not the primary source for the eventual need for a total knee replacement." (emphasis added). *Id.* at 14.

The second letter from Dr. Jones contained in Employer's Exhibit 1 is dated March 15, 2007 and is stated by Dr. Jones to be in response to a letter from Employer's counsel dated March 7, 2007 (which was not included in the exhibit). Dr. Jones stated "I apologize if my previous dictation was not specific enough." *Id.* at 7. Dr. Jones then opined that "Specifically, the April 30, 2004, accident that Mr. Conrad had resulted in a primary meniscal tear. It was not the substantial contributing factor that would require him to undergo a total knee replacement in the future." (Emphasis added) *Id.* at 7. Dr. Jones again failed to mention - as he did in

his January 30, 2007 letter - the large chondral flap tear of a large portion of the weightbearing surface of the medial femoral condyle.

Mr. Conrad testified that he has continued to follow the exercise program given him by the Employer's physician and physical therapists and has undergone a significant weight reduction to attempt to continue to care for his left knee. Mr. Conrad engages in activity, including jogging occasionally on an indoor padded track - aimed at continued strengthening of his knee and avoids activities that cause pain in an attempt to avoid re-injury or further damage to his knee.

## RULINGS

I find the testimony of the claimant and the reports of Dr. Jones credible as to the disability suffered by Mr. Conrad as a result of his compensable accident on April 30, 2004, and to the nature and extent of said disability. Dr. Jones' indication of a combined rating of 22% clearly appears to be a clerical error in that the two previous reports indicate ratings of 15 and 10 percent. In any event, Dr. Jones' ratings were of "impairment" - not disability. Impairment differs significantly from disability. The American Medical Association Guides to the Evaluation of Impairment define the difference this way: "Stated another way, '*impairment*' is what is wrong with a body part or organ system and its functioning; '*disability*' is the gap between what the individual *can* do and what the individual *needs* or *wants* to do." (emphasis original) Guides to the Evaluation of Permanent Impairment, Third Edition (revised), American Medical Association, Chicago, 1990, p.1. Thus, a finger amputation may *impair* a concert pianist and a bus driver equally, but completely *disable* the concert pianist from his occupation while not affecting the bus driver at all in his occupation. Professor Larson notes in his treatise that "... the distinctive feature of the compensation system ... is that its awards ... are made not for physical injury as such [impairment] , but for '*disability*' produced by such injury." See Larson's Workmen's Compensation Law, Vol. 2, §57.11.

Some states, such as Kansas, utilize impairment as the guide to evaluating workers' compensation injuries. See, Kan. Stat. Ann. § 44-510d(23) (1993). However, Missouri's Worker's Compensation Law clearly requires a determination of disability, and consistently refers to disability, not impairment. See, Mo. Rev. Stat. §§ 287.141.2, 287.190.1, 287.190.6, 287.197.3, 287.210.5, 287.210.7, 287.220.1, 287.220.2, 287.220.4, 287.250.3, and 287.250.6. The Legislature in the Second Regular Session of the 87th General Assembly in the Spring of 1994 considered -- in Senate Bill 717 -- whether to add a new section to Missouri's Workers' Compensation Law -- § 287.140.14 -- and adopt the impairment scheme precisely according to the AMA Guides; the Senate did not adopt Senate Bill 717.

Considering all of Mr. Conrad's complaints together with Dr. Jones' reports - which I am not bound by anyway [See, Pavia v. Smitty's Supermarket, 118 S.W.3d 228 (Mo.App. S.D. 2003)] - I find that he has sustained twenty five percent (25 %) permanent partial disability of the left lower extremity at the one hundred sixty week level. Thus, I order Jack Cooper Transport to provide Mr. Conrad with forty (40) weeks permanent partial disability benefits for permanent disability compensation totaling \$13,882.00.

Regarding future medical care, I must consider the opinions of two doctors: The first doctor is the Dr. Lowry Jones who opined contemporaneously with actually having examined the Employee in 2005 that "his injury did aggravate his underlying disease process enough to consider this [a total knee replacement] part of his persistent claim". The second doctor is the Dr. Lowry Jones who opined after being contacted by the insurer's attorney a year-and-a-half later in 2007 (without the benefit of examining the employee) first that "the primary reason" was pre-existing wear, and then later that the injury "was not the substantial contributing factor" causing need for more treatment. I find the first Dr. Lowry Jones who opined in 2005 at the time he examined and had treated Mr. Conrad for his injury to be more credible than the second Dr.

Lowry Jones who opined after being contacted by the insurer's attorney in 2007.

Thus, I find that the need for future treatment of Mr. Conrad's left knee as outlined by Dr. Jones flows from his compensable injury that occurred on April 30, 2004. In a Workers Compensation proceeding, the finder of fact may reject all or part of an expert's testimony. Bennett v. Columbia Health Care, 134 S.W.3d 84, 92 (Mo. App. 2004) (holding that knee replacement surgery necessitated by aggravation of pre-existing degeneration by the work related injury). Disability sustained by the "aggravation of a preexisting nondisabling condition or disease caused by a work-related accident is compensable even though the accident would not have produced the injury in a person not having the condition." Kelley v. Banta & Stude Constr. Co., 1 S.W.3d 43, 48 (Mo. App. E.D. 1999). The analysis for an award of future medical treatment was very recently addressed in Lawson v. Ford Motor Co., 217 S.W.3d 345 (Mo. App. E.D. 2007). In Lawson the Court of Appeals stated:

An employee does not have to present "conclusive evidence" of the need for future medical treatment to receive future benefits. Fitzwater v. Department of Public Safety, 198 S.W.3d 623, 628 (Mo.App.2006) (citation omitted). Instead, the employee needs only to show a "reasonable probability" that the future treatment is necessary because of his work-related injury. Id. The employee must show that the need for future medical care "flow[s] from the accident." Id.; (quoting Landers v. Chrysler Corp., 963 S.W.2d 275, 283 (Mo.App.1997), overruled on other grounds by Hampton, 121 S.W.3d at 226.)

*Id.* at 351.

In the instant case, Dr. Jones provided his opinion that Mr. Conrad "likely will need a total knee replacement" in the future as well as being a candidate for additional less invasive future treatment. And, also as noted above, Dr. Jones further opined that any pre-existing condition in Mr. Conrad's left knee was "significantly aggravated" by his April 30, 2004 work related injury and that the aggravation was significant enough to be considered part of his "persistent" claim. The employer is responsible for medical treatment to cure and relieve from the effects of the injury. See Mo.Rev.Stat. §287.140.1.

The most recent report of Dr. Jones dated March 15, 2007, wherein Dr. Jones provides the opinion that the meniscal tear was not the substantial contributing factor that would require Mr. Conrad to undergo a total knee replacement, fails to address the full range of medical findings in Dr. Jones' previous reports and medical records and, therefore, lack credibility. The previous reports of Dr. Jones (including the report dated January 30, 2007 offered by the employer wherein Dr. Jones opines that the meniscal tear is not the "primary" reason for knee replacement) indicate his opinion of the need for future medical care flowing from Mr. Conrad's April 30, 2004 work related injury. Nothing in Dr. Jones' most recent reports indicate that Dr. Jones has changed his opinion that the work related injury aggravated the preexisting condition nor has Dr. Jones attempted to reduce his disability rating that he previously attributed, in part, to the aggravation of Mr. Conrad's prior condition. It would seem incredible to reason that disability arising from aggravation of a preexisting nondisabling condition is compensable and yet future treatment of the effects of the compensable disability is not. Therefore, even if Dr. Jones' statement that the work related injury is not the substantial contributing factor that would require a future knee replacement could be seen as credible, the medical evidence is sufficient to show a reasonable probability that the future treatment is necessary because of Mr. Conrad's work-related injury and that the need for future medical care flows from the accident.

Therefore, I order Jack Cooper Transport to provide Mr. Conrad with additional medical care and that the issue of future medical care shall be kept open to allow for such reasonable and necessary treatment to Mr. Conrad's left knee, including total knee replacement surgery, to be provided herein.

Mr. Conrad's attorney requested a fee equal to 25 percent of all amounts awarded for disability. I find that such request is fair and reasonable and order a lien attach to this award for \$3,470.05 until paid in full.

Date: \_\_\_\_\_ Made by: \_\_\_\_\_

Carl Mueller  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
*Director*  
*Division of Workers' Compensation*