

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

Injury No.: 09-055742

Employee: Orville Cooper
Employer: Hickman Mills C-1 School District (Settled)
Insurer: Missouri Employers Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 3, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Lisa Meiners, issued December 3, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD AS TO THE SECOND INJURY FUND

Employee: Orville Cooper

Injury No. 09-055742

Dependents: N/A

Employer: Hickman Mills C-1 School District (Settled)

Insurer: Missouri Employer's Mutual Insurance Company (Settled)

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

Hearing Date: November 9, 2012

Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: June 25, 2009
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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 in the course and scope of employment, employee pushed a dolly and heard a pop of his low back.
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: The June 25, 2009 incident was not the prevailing factor of Claimant's low back and right leg complaints.
14. Nature and extent of any permanent disability: None.

15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$750.00
19. Weekly compensation rate: \$410.46.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Second Injury Fund liability: The Second Injury Fund is not liable to Claimant for permanent total disability benefits.

Said payments to begin as of the date of the 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 lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Charles Gotschall

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Orville Cooper Injury No. 09-055742
Dependents: N/A
Employer: Hickman Mills C-1 School District (Settled)
Insurer: Missouri Employer's Mutual Insurance Company (Settled)
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: November 9, 2012 Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

On November 9, 2012, the parties appeared for trial. The Employee, Orville Cooper, appeared in person and with counsel, Charles Gotschall. The Employer and Insurer in this matter have settled which leaves the remaining party the Second Injury Fund who is represented by Ms. Maureen Shine.

STIPULATIONS

The parties stipulated to the following:

- 1) That the Employer and Employee were operating subject to Missouri's workers' compensation law on June 25, 2009;
- 2) That the jurisdiction was proper in Kansas City, Missouri, Jackson County;
- 3) That notice was properly given;
- 4) That the claim was filed within the time allowed by law;
- 5) That the average weekly wage was \$750 which would make the compensation rate for permanent total disability to be \$410.46/\$404.66;

ISSUES

The parties request this award address:

- 1) whether Claimant sustained an accident that arose out of and in the course of his employment on June 25, 2009, and
- 2) the liability of the Second Injury Fund.

The parties request this award address whether the incident of June 25, 2009 was the prevailing factor of Claimant's low back and right leg conditions. I find, and Claimant testified, that on June 25, 2009, he was carrying a dolly with a heavy file cabinet when he heard a loud pop and pain. Claimant states he felt the pop from the right knee replacement that was recently performed in 2008. Claimant described the pain as radiating up his low back. Claimant stated he had constant pain and could not lift

his right leg after the dolly incident. Based on Claimant's testimony, I find that Claimant sustained an accident that arose out of and in the course of his employment on June 25, 2009.

Prior to June 25, 2009, Claimant had significant pre-existing disabilities that were hindrances and obstacles to his employment. Claimant had pre-existing disability of his right knee and low back prior to this last accident. Indeed, Claimant had multiple surgeries and eventual joint replacement in 2008 of his right knee. Claimant was unable to perform many job tasks required of his job such as climbing, squatting, crawling and kneeling prior to 2009. At times Claimant ambulated with a cane prior to 2009 and had assistance from coworkers when performing his job duties.

Claimant also sustained injury of his low back in the late 1970s, and as a result, Claimant underwent pain management and work reconditioning. Eventually, Claimant and the Employer/Insurer reached a compromise settlement of 15 percent permanent partial disability body as a whole in 1979. Claimant five months prior to the work incident of June 25, 2009, experienced right lumbar radiculopathy into his right leg. In January 2009 A Dr. Stitt recommended epidural steroid injections and was diagnosed with right lumbar radiculopathy. It is my understanding through the experts' reports and Claimant's testimony that he was unable to move heavy furniture or lift heavy items prior to June of 2009 due to low back and right leg complaints.

Because of the documented low back and right leg radiculopathy in medical records generated close in time to June 25, 2009, the Employer denied the claim based on the Claimant's pre-existing low back diagnosis. As such, Claimant went on his own to receive treatment. Claimant underwent a 360 degree fusion of the L4-L5 level performed by Dr. Jackson. Despite receiving surgical intervention Claimant is still having severe neurologic symptoms and disabling back pain. Presently, Claimant walks with an altered gait due to his right knee and low back. Claimant no longer carries or lifts more than 15 pounds. He is unable to sit, stand or walk for more than 30 minute intervals. Indeed, based on Claimant's current physical conditions and limitations he is unemployable in the open labor market.

However, the question remains whether the popping incident of June 25, 2009, is the prevailing factor of Claimant's low back spondylolisthesis and right leg radiculopathy. The Claimant presented the deposition and reports of Dr. P. Brent Koprivica. Dr. Koprivica found the spondylolisthesis of the L4-L5 level was longstanding but that the June 2009 incident was the prevailing factor of a new disk herniation of the L4-5 level. According to Dr. Koprivica, the post discectomy and fusion with the failed back syndrome diagnosis was causally related to the June 2009 incident that resulted in a 50 percent permanent partial disability body as a whole.

Dr. Ciccarelli, the Employer's expert, after reviewing the same MRI diagnosed Claimant with a pre-existing severely collapsed isthmic spondylolisthesis of the L4-L5 level with severe foraminal stenosis. Dr. Ciccarelli, like Dr. Koprivica, found the spondylolisthesis and stenosis longstanding. Unlike Dr. Koprivica, Dr. Ciccarelli did not diagnose Claimant with a herniated disk at the L4-5 level. Instead, Dr. Ciccarelli found Claimant had longstanding pre-existing spondylolisthesis and severe foraminal stenosis of the L4-5 level. Dr. Ciccarelli opined the June 25, 2009 incident at work was not the prevailing factor of Claimant's low back and right leg pain.

While I find Claimant sustained an incident on June 25, 2009, pushing a dolly, I do not find the June 25, 2009 incident the prevailing factor of Claimant's symptomatic spondylolisthesis of the L4-5 level with severe foraminal stenosis. I find that Claimant had pre-existing longstanding spondylolisthesis and five months prior to the June incident right leg radiculopathy that was diagnosed by Dr. Stitt in January of 2009. Moreover, both experts note medical records generated just prior to June 25 indicate Claimant complained of low back and right leg pain. The low back and right radiculopathy complaints are the same symptoms Claimant told doctors before and after the June 25, 2009 injury. Indeed, no

medical records were presented to support Dr. Koprivica's conclusion of an annular L4-5 injury that occurred on June 25, 2009.

Furthermore, Dr. Koprivica wrote on December 30, 2009, that "I'm accepting Mr. Cooper's subjective history as being accurate." (See Claimant's Exhibit D, Deposition Exhibit No. 2.) However, Dr. Koprivica also found there "is a distinct difference in the subjective history Mr. Cooper is providing as opposed to the medical record documentation." (See Claimant's Exhibit D, Deposition Exhibit 2.) Based on those inconsistencies contained in Dr. Koprivica's report and lack of medical documentation of an annular injury, I am disregarding his opinion in this particular case with these particular facts regarding medical causation. As such, I find that Claimant did not meet his burden of proof based on the medical records presented and the opinion of Dr. Ciccarelli. The Second Injury Fund is not liable to Claimant for Second Injury Fund benefits.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation