

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

Injury No.: 05-114153

Employee: James Cunningham
Employer: Insituform Technologies
Insurer: Liberty Insurance Corporation
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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 23, 2010. The award and decision of Administrative Law Judge Matthew D. Vacca, issued July 23, 2010, 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 2nd day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Cunningham

Injury No.: 05-114153

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Insituform Technologies

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

Additional Party: Second Injury Fund

Insurer: Liberty Insurance Corporation

Hearing Date: June 21, 2010

Checked by: MDV

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: November 8, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Injured knee when earthen bank collapsed
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 knee
14. Nature and extent of any permanent disability: 40% left knee
15. Compensation paid to-date for temporary disability: \$13,242.42
16. Value necessary medical aid paid to date by employer/insurer? \$5,516.42

Employee: James Cunningham

Injury No.: 05-114153

- 17. Value necessary medical aid not furnished by employer/insurer? \$35,872.73
- 18. Employee's average weekly wages: \$1,200.00
- 19. Weekly compensation rate: \$696.97/\$365.08
- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$35,872.73
weeks of temporary total disability (or temporary partial disability)	\$7,666.60
64 weeks of permanent partial disability from Employer	\$23,365.12

22. Second Injury Fund liability: No

TOTAL: As per stipulation

23. Future requirements awarded: NONE

Said payments to begin 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: Padberg & Corrigan.

FINDINGS OF FACT and RULINGS OF LAW

Employee:	James Cunningham	Injury No.:	05-114153
Dependents:	N/A	Before the	
Employer:	Insituform Technologies	Division of Workers'	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Liberty Insurance Corporation	Checked by:	MDV

ISSUES PRESENTED

The sole issue is medical causation. The Second Injury Fund claim is left open.

FINDINGS OF FACT

Stipulations

1. Employee was injured on November 8, 2005, in the course and scope of employment. Compensation is \$696.97 per week for temporary total disability and permanent total disability and \$365.08 for permanent partial disability.
2. If the Court finds medical causation, the employer/insurer will pay 40% of the left knee (\$23,365.12), \$35,872.73 in unpaid medical benefits and temporary total disability benefits from May 9, 2006 through July 26, 2006, in the amount of \$7,666.60. Alternatively, if the Court determines that medical causation was not established, the employer/insurer will pay 7.5% of the knee.

FACTS

1. At the time of trial, Mr. Cunningham was 61 years old, married and living in Leed City, Texas. Claimant testified that in December 1997, he began working for Affholder/Insituform Technologies, Inc. (hereinafter "Insituform") in Houston, Texas. He was hired as a working labor foreman. In May 1998, Claimant's job with Insituform took him to St. Louis where he

continued working for several years as a working labor foreman. His job duties included, but were not limited to, determining where junction boxes were formed, creating new manholes, building lift stations, supervising crew members, tying steel and working the tunnel. His job required a significant amount of kneeling, squatting, bending, crawling on all fours, and lifting heavy equipment.

2. Claimant injured his knee prior to this claim in 1975 in Sarasota, Florida when he was playing softball and twisted his knee. He received conservative treatment. Later that year he reinjured his left knee at work and subsequently underwent left knee surgery to repair the meniscus. Mr. Cunningham testified that he fully recovered from the injury, and from 1976 through 1985 he did not miss any time from work due to his knee. He testified that he also maintained a very active lifestyle playing softball, tennis, bowling and golf.
3. In 1986, Mr. Cunningham had some issues with his left knee and went in for an outpatient arthroscopic surgery. He scheduled surgery on a Friday and was back at work by Tuesday. He had a full recovery and continued his physically demanding job as a mason. He did not miss any additional time from work due to his injury. Mr. Cunningham continued to participate in the aforementioned recreational activities.
4. Mr. Cunningham did not have any problems with his left knee until 2002. In 2002, Mr. Cunningham was working in St. Louis as a working labor foreman spending much of his time working in the tunnels, kneeling, squatting, bending, crawling on all fours, and lifting heavy equipment.
5. On July 1, 2002, Dr. Fagan, of Tesson Heights Orthopaedics, performed an arthroscopy of the left knee, a partial lateral meniscectomy and chondroplasty of the patella and chondroplasty of the medial femoral condyle and the lateral femoral condyle. On August 9, 2002, Claimant followed up with Dr. Fagan. Dr. Fagan noted in his record that Claimant's left knee was doing

very well post surgery. Dr. Fagan also noted that the Claimant had very few symptoms and that he was very happy with the results of the surgery.

6. At trial, Mr. Cunningham testified that he had an excellent recovery from the 2002 surgery. He took one week's vacation and then returned to work with no restrictions. He continued to do all of his job duties without incident. Mr. Cunningham testified that after Dr. Fagan released him in 2002, his left knee did not prevent him from doing any of his job duties and he continued to work 50 hours per week.
7. Claimant presented to Dr. Fagan again on November 3, 2003, after he aggravated his left knee when he was moving. Dr. Fagan gave him an injection and prescribed some pain medication. He told Claimant that if he continued to have persistent problems to contact him. Mr. Cunningham recovered quickly and returned quickly to work. Claimant testified that at that visit Dr. Fagan mentioned that at some point in the future, after he retired from his job, he may want to consider a total knee replacement of his left knee. Mr. Cunningham said that Dr. Fagan made it clear that it was not a surgery he needed at that time but that, if he continued to have issues, he could consider it in the future after he retired from his physically demanding job.
8. Mr. Cunningham testified that he continued working without restrictions or physical problems with his left knee until November 8, 2005. On that date, Mr. Cunningham sustained a severe injury to his left knee while working as a labor foreman for Insituform. He and his co-workers had been working on restoring a tunnel pipe in a creek bed in Maryland Heights. They finished tunneling so he and some other employees were restoring the creek bed by pinning filter fabric on the bank. As Mr. Cunningham was walking up the bank to finish pinning, he took a step with his right foot, and the bank collapsed and he fell 5-8 feet. All his weight went onto his left leg and the leg twisted behind him and was pinned under his backside as he fell. When he came to a rest, his left foot was awkwardly pinned beneath the back pocket of his pants. He felt

a pop in his left knee when he fell and severe pain in his leg but he continued to work. Around lunchtime he informed his boss of his injury but he continued to work even though the pain was increasing. By the end of the day, his knee had become extremely swollen and he was in a significant amount of pain.

9. After work, Mr. Cunningham went home but around 4 a.m. he was in so much pain that he had his wife, Cynthia, take him to the emergency room at St. Anthony's Medical Center. There he was diagnosed with a non-displaced fracture in the fibular neck and advanced osteoarthritis associated with small joint effusion. He was then discharged with an immobilizer, crutches and pain medication. The pain continued to get worse so he returned to St. Anthony's Medical Center around 7 p.m. and they aspirated his knee.
10. On November 11, 2005, he presented to Concentra at the request of his employer. There he was diagnosed with a fractured fibula, knee effusion and strain, and severe degenerative joint disease of his left knee. He was prescribed pain medication, ordered to stay off the leg, remain off work and to see an orthopedic surgeon.
11. On November 14, 2005, Mr. Cunningham presented to Dr. Bicalho at Tesson Heights Orthopaedics. Dr. Bicalho ordered an MRI of Claimant's left knee which revealed degenerative changes, a loose body in the posterior knee joint, questionable bone infarct and cyst between the tibia/fibula, a chronically torn ACL and degenerated and torn menisci.
12. Claimant followed up with Dr. Bicalho several times and participated in physical therapy at Jefferson County Rehab. On November 22, 2005, Dr. Bicalho released Mr. Cunningham to return to work light duty but he had already been terminated from Insituform due to his injury. Dr. Bicalho aspirated Mr. Cunningham's left knee on December 27, 2005, and January 19, 2006, removing 90 cc and 70 cc of fluid respectively. Dr. Bicalho recommended surgery.

13. The employer then sent Mr. Cunningham to Dr. Richard Lehman, who subsequently testified on behalf of the employer/insurer regarding medical causation. On February 9, 2006, Dr. Lehman diagnosed Mr. Cunningham with end stage degenerative arthritis of his left knee, loose bodies, chronic torn ACL, and a lesion in the anteromedial tibia. Dr. Lehman aspirated his left knee, gave him a cortisone injection and recommended a biopsy and surgery. Dr. Lehman testified that, in his opinion, Mr. Cunningham's work-related injury on November 8, 2005, caused a soft tissue injury, but that his need for ongoing treatment and total knee replacement was due to end stage degenerative arthritis. He placed him at maximum medical improvement and gave him a disability rating of 5% at the left knee. Insituform then released Mr. Cunningham and refused to cover additional treatment.
14. On March 9, 2006, Mr. Cunningham saw Dr. James Burke. Dr. Burke ordered x-rays of Claimant's left knee which demonstrated end stage bone on bone lateral and medial compartment arthritis, large loose body posterior knee and moderate degenerative changes in the patellofemoral joint. Dr. Burke recommended a total knee replacement. Dr. Burke noted that the November 8, 2005 work injury was clearly a significant injury because Claimant had absolutely no problem with his knee when he crawled 800 feet through underground pipe the day before the fall. Dr. Burke noted that the work injury was clearly significant and not incidental.
15. Surgery was originally scheduled for May 3, 2006, but was canceled because of an irritation and rash on Mr. Cunningham's left knee. On May 9, 2006, Dr. Burke performed a total left knee replacement surgery at Missouri Baptist Medical Center. Mr. Cunningham was discharged home on May 12, 2006, on Coumadin and pain medications. He continued to follow-up with Dr. Burke and participated in physical therapy until July 24, 2006, when Dr. Burke advised him

to continue his home exercise program, continue full weight bearing, return to work, and to return for an annual checkup.

16. Mr. Cunningham testified that he had a good recovery after the total knee replacement but he did not regain the flexibility in his knee he once had. Consequently, he was forced to give up his 20-year career as a working foreman and become a truck driver of an automatic transmission truck.
17. On April 27, 2007, Mr. Cunningham was evaluated by Dr. Volarich, Claimant's expert on medical causation. Dr. Volarich, credibly testified that Claimant's November 8, 2005 work incident caused his injury and need for surgery. Dr. Volarich concluded that work-related injury on November 8, 2005 was the prevailing factor which caused the aggravation of Mr. Cunningham's underlying degenerative arthritis and made it symptomatic to the point that required a total knee joint replacement. Dr. Volarich acknowledged that the Claimant had preexisting degenerative arthritis and preexisting surgical repairs to the knee but he opined that since the July 2002 surgery Mr. Cunningham was asymptomatic and able to work full unrestricted duty without any hindrance in his ability to do his job.
18. Dr. Volarich rated his injury at 50% permanent partial disability of the left lower extremity rated at the knee due to the aggravation of underlying degenerative arthritis that required a total knee replacement.
19. Claimant was a very credible witness who testified in a direct and forthright manner and whose testimony had the ring of truth when he testified he was not in pain for two years prior to this injury as he crawled on his knees in conduits, tunnels, culverts and creek banks.

RULINGS OF LAW

1. Claimant's November 8, 2005 fall at work was the prevailing factor in causing his left knee injury and need for total left knee replacement surgery on May 9, 2006.
2. Claimant is entitled to temporary total disability benefits from May 9, 2006 through July 26, 2006, in the amount of \$7,666.60.
3. Claimant is entitled to the unpaid medical benefits for the treatment of his left knee in the amount of \$35,872.73.
4. Claimant sustained 40% permanent partial disability of the left knee as a result of his work-related injury.

DISCUSSION

The sole issue before the Court is medical causation. The employer/insurer contends that the Claimant's need for total knee replacement surgery was not caused by the work-related accident on November 8, 2005. Dr. Volarich and Claimant's evidence tends to show that the November 8, 2005 accident was the prevailing cause in his need for total knee replacement surgery.

Under the current statute, a work injury "is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." Savage v. Treasurer of Mo., 308 S.W.3d 771 (Mo. App. E.D. 2010) (quoting Section 287.020.3). [Section 287.020.3\(1\)](#) provides, in part, "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." [Mo. Rev. Stat. Section 287.020.3\(1\)](#) Supp. 2006.

"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 causes." Gordon v. City of Ellisville, et al., 268 S.W.3d 454 (Mo. App. E.D. 2008). Dr.

Volarich, Claimant's medical causation expert, presented compelling medical testimony that the November 8, 2005 work injury was the prevailing factor in causing Mr. Cunningham's injury and his need for total knee replacement surgery.

Dr. Volarich testified that Mr. Cunningham's November 8, 2005 work-related injury, which occurred when a retaining wall collapsed causing Mr. Cunningham to fall and land on his backside with his left leg twisted underneath him, was the substantial contributing factor and the prevailing factor in causing the aggravation of his underlying degenerative arthritis that made it symptomatic to the point that required a total knee replacement.

Dr. Volarich agreed that Mr. Cunningham had a clear preexisting history of degenerative arthritis and preexisting surgical repairs to his knee; however, the work injury was the prevailing factor because prior to November 8, 2005, Mr. Cunningham had been working at full unrestricted duty since his prior knee surgery in July 2002 without any hindrance in his ability to do his job. Dr. Volarich also pointed out that there was evidence of an acute injury as a result of the November 8, 2005 fall. The November 21, 2005 MRI from Florissant Open M.R.I. indicated a fracture. Furthermore, diagnostic studies done at St. Anthony's Medical Center and Concentra shortly after the fall showed a fractured fibula. It is also important to note that prior to the November 8, 2005 injury, Mr. Cunningham never had to have his knee aspirated. By contrast, after the work injury he had to have his knee aspirated several times.

Dr. Lehman, on the other hand, did not consider the fact that Mr. Cunningham had been working full unrestricted duty at his physically demanding job for over two years before the work incident in 2005. Dr. Lehman's testimony is less credible because he failed to consider the fact that Mr. Cunningham was asymptomatic prior to the November 8, 2005 injury, and fully capable of performing his job. Further, the medical records demonstrate that Mr. Cunningham recovered from each of his prior knee injuries. Based on Dr. Lehman's own definition of end stage arthritis (i.e.

arthritis at its worst), Mr. Cunningham could not have performed the physically demanding requirements of his job as a labor foreman, which required him to do extensive kneeling, squatting and crawling on his hands and knees, if he had end stage arthritis. Yet that is what Mr. Cunningham did for over two years.

Claimant's entire life changed dramatically after the November 8, 2005 incident. Prior to the accident, the Claimant enjoyed a very active lifestyle. Even though he had prior knee injuries he had always recovered and resumed his active lifestyle. He also enjoyed a very physically demanding job. Even after his surgery in 2002, Mr. Cunningham was able to perform all of the requirements associated with his physically demanding job as a labor foreman working in underground tunnels. As part of his job building underground tunnels, Mr. Cunningham spent a significant amount of time on his hands and knees crawling through underground tunnels. He was required to bend, kneel, squat and lift heavy equipment. I do not believe he could have engaged in these activities with end stage arthritis.

By contrast, after the incident on November 8, 2005, Mr. Cunningham was unable to comply with the physical demands of his job and was forced to change careers. His current position as a truck driver (he drives an automatic truck) is not as physically demanding as his job as a working labor foreman. He was also forced to give up many of the recreational activities he enjoyed before the work incident on November 8, 2005. This change in lifestyle is also evidence that the accident did, in fact, have a prevailing negative causative effect on Claimant's condition.

Mr. Cunningham recovered fully from his prior knee injuries. Mr. Cunningham had been asymptomatic and performing his work duties in a physically demanding job for over two years before the November 8, 2005 work injury. Prior to November 8, 2005, he did not miss a day of work due to his knee following the July 2002 surgery.

Claimant's medical records, which signal a change or acute injury by virtue of the fractures, regarding his pre and post injury abilities, and the lack of pain pre-injury, Dr. Volarich's testimony, and

Mr. Cunningham's live testimony, all tend to establish that Mr. Cunningham's November 8, 2005 fall at work caused a significant acute knee injury that required total knee replacement surgery. There is no evidence Mr. Cunningham needed total knee replacement surgery the day before his work injury. Even Dr. Fagan noted in his record that Mr. Cunningham was too young for the surgery. It was simply an option should he need it in the future. The medical evidence and testimony shows that he did not need the surgery until after the acute November 8, 2005, accident.

Date: _____

Made by: _____

MATTHEW D. VACCA
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation