Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-020762

Employee: Dennis S. Dugan

Employer: Lowe's

Insurer: Self-Insured

Date of Accident: March 1, 2002

Place and County of Accident: St. Louis County, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 24, 2007. The award and decision of Administrative Law Judge Joseph E. Denigan, issued April 24, 2007, 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 30th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED
Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe

the administrative law judge erred in concluding that employee was permanently and totally disabled.

Permanent and total disability is defined by section 287.020.7 RSMo. 2000, as the "inability to return to any employment and not merely . . . the inability to return to the employment in which the employee was engaged at the time of the accident."

> The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

Employee's medical expert, Dr. Cohen, gave employee an 80% permanent partial disability rating of the left knee and opined that employee was not capable of gainful employment. However, Dr. Cohen admitted that he was not qualified as a vocational expert and would defer to such an expert to determine whether employee was employable in the open labor market.

Dr. Kriegshauser, employee's treating doctor, believes that employee is employable in the open labor market. He gave employee 50% permanent partial disability rating of the left knee. The only restrictions he placed on employee were to refrain from squatting, kneeling or climbing. Based on this, Dr. Kriegshauser is of the opinion that employee can perform sedentary work. Clearly, as employee's treating physician, Dr. Kriegshauser's opinion is extremely credible and reliable.

Mr. Weimholt testified as employer's vocational expert. He testified that employee is computer literate and capable of learning complex skills based on employee's previous work as a pilot. He also believes that employee has very strong verbal and language abilities. When taking into consideration the limitations placed on employee by Dr. Cohen and Dr. Kriegshauser, Mr. Weimholt believes that employee is employable in the open labor market in a sedentary position, such as a customer service or office position where he was sitting approximately two thirds of the time.

Even employee's vocational expert, Mr. England, felt that employee could work at a sedentary level. He believed that employee was likeable, sharp and had the ability to pick-up new tasks. He also testified that employee tested adequately in math, reading, problem solving and vocabulary skills for jobs in the open labor market, and that employee has a wide variety of job skills based on his prior work history.

Furthermore, Mr. England's opinion took into consideration the effects that employee's esophageal cancer had in causing employee to appear thin and frail. He believed that such an appearance would be a factor in a prospective employer's decision of whether or not to hire employee. Employee was not diagnosed with esophageal cancer until October 2003, well after his March 1, 2002, work injury. Therefore, employee's esophageal cancer and its effects should not have been a factor in determining his disability and should not have been considered by Mr. England in formulating his opinion. However, even when improperly taking those effects into consideration, Mr. England still felt employee could work in a sedentary position.

The record also shows that after his work injury, employee was prepared to return and work for employer in a customer service/operator position. However, for reasons unrelated to his physical capabilities, employee was not given that job. The jobs that he did apply for after his work injury, such as a greeter at Wal-Mart, are clearly not sedentary, and therefore not the type of job employee is qualified for.

Based on all of the above, I do not believe employee to be permanently and totally disabled. It is clear that employee is able to work in a sedentary position of employment. This is especially true considering employee was ready to return to work for employer in a customer service position after his injury. As such, I would not award employee permanent total disability benefits. However, I do believe that employee's work related injury resulted in 60% permanent partial disability of his left knee.

Therefore, employee failed to show that he is permanently and totally disabled as a result of his work-related knee

injury. Accordingly, I would reverse the decision of the administrative law judge and award employee benefits for his work related injury which resulted in 60% permanent partial disability of his left knee.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Alice A. Bartlett, Member

AWARD

Employee: Dennis S. Dugan

Injury No.: 02-020762

Dependents: N/A

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

Employer: Lowe's

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: January 29, 2007 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: March 1, 2002

5. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.

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:

Employee lifted a lawnmower onto a shelf with a co-worker and upon turning away his left knee gave out causing him to fall to the ground.

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 160 week level

14. Nature and extent of any permanent disability: Permanent total disability from primary injury.

15. Compensation paid to-date for temporary disability: $45,809.14

16. Value necessary medical aid paid to date by employer/insurer? $112,248.48

Employee: Dennis S. Dugan Injury No.: 02-020762

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: $387.89

19. Weekly compensation rate: $258.59

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits from Employer beginning July 26, 2005,
in the amount of $258.59 per week for Claimant's lifetime Indeterminate

22. Second Injury Fund liability: No

TOTAL: INDETERMINATE

23. Future requirements awarded: Yes (See narrative Award)

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:

Ronald J. Wuebbeling

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dennis S. Dugan Injury No.: 02-020762

Dependents: N/A

Employer: Lowe's

Additional Party: N/A

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

Insurer: Self-Insured

Checked by: JED:tr

This case involves a severe left leg injury resulting to Claimant with a reported accident date of March 1, 2002. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund is not a party to this Claim.

Issues for Trial

1. Occurrence of an accident;
2. whether injury arose out of and in the course of employment;
3. future medical expenses (post MMI);
4. nature and extent of Permanent disability (alleged PTD).

FINDINGS OF FACT

Dispositive Evidence

Claimant, age 57, graduated high school in 1968. He was drafted by the Army and served as a helicopter mechanic (and pilot) in Vietnam and Korea. He received an honorable discharge in 1977. He worked as a warehouseman for Shell Oil from 1978 through 1993 when he exercised an early retirement option. While at Shell Oil he operated forklifts and other equipment and trucks. He worked for Central Hardware for seven months. His wife was able to get him a job with Act Media, an advertising company, which later became News America Marketing and then Field Marketing Management. His employment with these companies lasted from approximately 1994 through 2000 and required that he travel from store to store in up to a five state region. He would drive up to 2,000 miles every two weeks. Claimant also worked for Huffy for one year where he assembled and repaired equipment for various different companies. Claimant had also previously worked for Employer's as a seasonal employee.

Claimant returned to work for Employer in February of 2002. He was hired as a Sales Representative and

his duties included stocking and assisting customers on the floor. He was paid $10.30 per hour and worked between 33 to 37 hours per week. He worked at the Employer's located in Fenton, Missouri. On March 1, 2002 at approximately 2:00PM Claimant and a co-worker had lifted a push mower and placed it on a display that was about 4 ½ feet above the floor. After lifting the mower, he stepped back and turned to go down the aisle to do additional work in a different area of the store. As he stepped back and turned, his left knee buckled and he fell to the ground. The store manager then transported Claimant to Concentra.

Claimant was treated at Concentra on March 1, 2002 and was diagnosed with a severe left knee injury. He was given crutches, a knee immobilizer, and a prescription for Darvocet. He was instructed not to work and referred to Dr. Mark Miller with Missouri Bone & Joint. On March 6 Dr. Miller diagnosed an anterior cruciate ligament tear and a grade II-III medial collateral ligament tear. Dr. Miller requested an MRI and gave Claimant a long leg hinged knee brace. Employer refused to authorize the MRI or any additional treatment. On March 18 Claimant was examined by Dr. Knapp a family care physician.

On or about March 18, 2002 Claimant filed his claim for compensation. The employer/insurer filed its answer on April 2, 2002. Because Claimant did not have health insurance or other resources to afford treatment on his own, he sought treatment through the Veterans' Administration. However, the earliest the VA could provide him treatment was in July and then scheduled an MRI for September 15, 2002. Claimant filed his first Request for Hardship Setting on August 14. On August 29, 2002, six months post-accident, Employer tendered medical and TTD benefits.

Claimant was first treated by Dr. Kriegshauser on September 18, 2002 when he recommended an MRI and surgery. Dr. Kriegshauser noted that "the surgical treatment for this complex knee injury and his overall prognosis for good recovery of knee function has undoubtedly been made more difficult by this prolonged delay in treatment." The MRI revealed a complex bucket-handle type tear of the lateral meniscus, a complete disruption of the anterior cruciate ligament, and grade 2/3 chondromalacia of the posterior patella.

On October 8, 2002 Dr. Kriegshauser performed arthroscopic surgery on Claimant's left knee. Claimant had recurrent problems with instability in the knee which according to Dr. Kriegshauser was "a definite risk to happen because of the lateness of the repair". Dr. Kriegshauser recommended a total knee replacement which was performed on April 1, 2003. Following this surgery Claimant again underwent extensive physical therapy. Unfortunately, Claimant continued to have significant instability in the left knee. Dr. Kriegshauser recommended a *third* knee surgery.

On September 3, 2003 Claimant was examined by Dr. Walentynowicz for a second opinion. Dr. Walentynowicz agreed that additional surgery was necessary and recommended a total joint specialist. On January 12, 2004, Claimant was examined by Dr. Whiteside. Dr. Whiteside recommended prolonged physical therapy and if that failed, then a left knee revision.

Additional physical therapy did not improve Claimant's left knee instability and on December 8, 2004 Dr. Kriegshauser performed a revision left total knee replacement. On February 7, 2005 it was prognosticated that Claimant would not be able to return to his prior employment. Claimant had been using a cane for ambulation. On March 7, 2005 Dr. Kriegshauser thought Claimant was at MMI and thought any future employment would need to be sedentary sitting most of the day with only occasional walking and standing demands. He should not engage any squatting, kneeling or climbing activity.

On March 7, 2005 Claimant asked if there was a position of employment with Employer which would accommodate the restrictions placed by Dr. Kriegshauser. Employer did not have a position for Claimant which accommodated the restrictions placed by Dr. Kriegshauser. Claimant requested that Employer provide vocational

rehabilitation which demand was refused.

Because Claimant's left knee continued to give out while walking, despite use of a cane and an elastic brace, Claimant did not believe he was at MMI. On March 29, 2005 Claimant was examined by an independent physician, Dr. Daniel Schwarze, who recommended additional treatment in the form of additional surgery or an extra-articular brace. Claimant was fitted for an extra-articular brace which he continues to use. Employer refused to authorize or pay for the brace until after Claimant filed his second Request for Hardship Setting. Subsequently, in June 2005, Claimant began vocational rehabilitation through the State of Missouri.

Claimant was examined by Dr. Kriegshauser for the last time on July 25, 2005 at which time he noted that the extra-articular brace was beneficial to Claimant since it improved ambulation. Dr. Kriegshauser felt that Claimant had a fifty percent permanent partial impairment of his left knee.

On November 3, 2005 Claimant was examined by Dr. Raymond Cohen who diagnosed Claimant as status-post three left knee surgeries including a total left knee replacement and a revision of the total left knee replacement. Dr. Cohen also diagnosed chronic left knee pain and instability. Dr. Cohen noted that Claimant's gait with the brace was extremely slow and unsteady, that he used a cane in the left hand, and that he had an obvious limp. Claimant had marked atrophy of the quadriceps, severe valgus with weight bearing, and laxity with lateral movements. Dr. Cohen opined that the work injury of March 1, 2002 was the substantial factor in Claimant's disability. He opined Claimant would need to take anti-inflammatory agents and analgesic pain medication for the rest of his life. He would need the knee brace for the rest of his life. He also concluded that Claimant will need additional knee surgeries in the future.

Dr. Cohen concluded that Claimant has an eighty percent permanent partial disability at the left knee. It is his further medical opinion that Claimant is permanently and totally disabled and not capable of gainful employment. Dr. Cohen restricted Claimant from any type of work or activity which required prolonged sitting, standing, walking, climbing, stooping, kneeling, crawling, stair climbing, ladder work or driving.

Mr. James England, a vocational expert, evaluated Claimant and his report was introduced into evidence. Mr. England noted that Claimant had very obvious difficulties just getting around and opined that employers would view Claimant as an older worker who looks as if he might easily fall just trying to move about the building. He opined these problems alone will make it very difficult for Claimant to be picked over virtually any other candidate for alternate employment. Mr. England opined that Claimant would not be able to sustain work at even a sedentary level because he must sit with his leg elevated. Mr. England opined Claimant is totally disabled from vocational alternatives. He opined Claimant was not able to compete in the open labor market.

Mr. Gary Weimholt evaluated Claimant on behalf of Employer. Mr. Weimholt, a vocational rehabilitation consultant in Jefferson City, opined that Claimant was qualified for some jobs within the sedentary physical demand level. He acknowledged that Claimant's brace is obvious and would be a red flag to potential employers.

RULINGS OF LAW

Compensability

Claimant presented unrebutted evidence of accident and resulting work related injury on March 1, 2002. Claimant testified as to how the accident occurred and his testimony was consistent with the medical records. Each treating physician and evaluating physician related Claimant's condition to his work injury. Nothing in the record suggests the injury did not occur as a result of an accident. There was no evidence offered to remotely suggest that this injury did not arise out of and in the course of employment. Employer essentially abandoned these stated issues. Lifting, turning, and walking are incidental to Claimant's employment as a sales representative. Claimant's injury was incidental to and not independent of the relation of employer and employee. See Bennett vs. Columbia Health Care, 134 S.W.3d 84 (Mo. App. 2004). This record compels the conclusion that the reported accident and injury arose out of and in the course of employment.

Nature and Extent of Permanent Disability

In this case, prior to March 1, 2002, Claimant had no injuries or conditions which interfered with his ability to perform work. He had testicular cancer but has been in remission since 1994. He administers a B12 injection once a week for anemia. He received treatment for esophageal cancer for approximately 7 months and other than eating small meals six times a day, has no restrictions. Prior to March 1, 2002, Claimant had no restrictions or limitations which curtailed his activity.

On March 1, 2002 Claimant sustained a serious injury to his left knee. A very significant delay in treatment, i.e. six months, resulted in a failed reconstructive surgery. Claimant subsequently underwent a total knee replacement and a revision of the total knee replacement in the span of less than three years. Claimant was temporarily and totally disabled from March 1, 2002 through July 25, 2005 when Dr. Kriegshauser placed him at MMI.

The record demonstrates little difference in the physical findings and limitations found by either expert. Dr. Kriegshauser thought any future employment would need to be sedentary sitting most of the day with only occasional walking and standing demands. He should not do any squatting or kneeling or climbing activities. Dr. Kriegshauser assigned a fifty percent PPD while Dr. Cohen found almost complete disability of the left knee. Dr. Cohen further concluded that Claimant is permanently and totally disabled and not capable of gainful employment. Dr. Cohen restricted Claimant from type of work or activity which required prolonged sitting, standing, walking, climbing, stooping, kneeling, crawling, walking up or down stairs, ladder work or driving.

Claimant testified to, and the medical records substantiate, the significant limitations he has as a result of his knee injury. The limitations not only prevent him from working, but also significantly interfere in his every day activities. Claimant testified that his current limitations prevent him from performing his prior job duties with any of his prior employers. Even though Employer refused to provide vocational rehabilitation, Claimant sought and received vocational rehabilitation through the State of Missouri. Since July of 2005 Claimant has applied to numerous different employers seeking employment in sedentary job levels. Despite Claimant's strong desire and

multiple attempts at employment, he has been denied employment from all of them.

Mr. England, a vocational expert concluded that Claimant is not able to sustain work even at a sedentary level and is not able to compete in the open labor market (Exhibit C, pp. 21-22). In order to simply walk, Claimant has to wear a heavy knee brace and use a cane with his left hand. Even then his gait is slow and unsteady. He can only carry items which he can hold in his right hand. He must keep his leg elevated. He is not able to sit or stand for longer periods of time. Mr. Weimholt's analysis does not adequately address undsiputed facts of ambulation deficits and maintenance medical care.

Claimant has labor or strength deficits that remove him from the labor market. PTD cases typically manifest as the inability to ambulate freely and the inability to engage in basic living activities. While undetailed in the record, it is inferred that Claimant can attend his personal care, albeit at his own pace. PTD usually entails involuntary sedentariness. Here, Claimant's sitting and rest requirements, together with any need for elevation of the left knee, foreclose any reasonable likelihood that an employer could hire Claimant in the open labor market.

Future medical expenses (post MMI)

Based on all of the medical evidence, it is clear that Claimant is in need of ongoing medical treatment. Dr. Kriegshauser testified that Claimant will need another total knee revision within the next five years or so or sooner (Exhibit 2, pp. 53-54). Dr. Kriegshauser also testified that Claimant's extra-articular brace will need to be maintained and/or replaced in the future (Exhibit 2, p. 61). Dr. Cohen testified that Claimant requires anti-inflammatory prescription drugs and analgesic pain medication for the remainder of his life (Exhibit A, pp. 15-16). Dr. Cohen also testified that Claimant will need future surgery and maintenance/replacement of his knee brace (Exhibit A, pp. 16-17).

If a question arises subsequently as to whether the specific medical treatment required is medically causally related to the original injury, the employer-insurer is free to present evidence opposing that treatment at the time Claimant makes a request for it. *Bradshaw vs. Brown Shoe Co.*, 660 S.W.2d 390 (Mo. App. 1983). The record contains no contrary evidence regarding Claimants need for ongoing treatment of the knee.

Conclusion

On the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained permanent total disability as a result of the reported injury. Employer is responsible of PTD benefits beginning July 26, 2005. In addition Claimant is entitled to future medical benefits as prescribed by a competent medical doctor. Employer shall maintain Claimant's current condition with respect to medications, pain treatment, physical therapy, braces, orthotics, and other devices to assist Claimant in ambulation. Future medical requirements extend to anticipated surgical treatment and hospitalizations attendant left knee replacement/revision.

Date: _____ Made by: _____

Joseph E. Denigan

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia “Pat” Secrest

Director

Division of Workers' Compensation