

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

Injury No.: 10-095853

Employee: Aaron Dye
Employer: Lafayette County
Insurer: Self-Insured

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated March 13, 2012.

Preliminaries

On November 19, 2010, employee injured his left knee at work while subduing an unruly inmate. Employee had a prior injury to his left knee on December 28, 2009. Employee proceeded to final hearing of his claims against employer for the November 19, 2010, work injury.

The ALJ found that as a result of the November 19, 2010, work injury employee sustained 22.5% permanent partial disability to his left knee. The ALJ also found employer liable for the future medical care reasonably necessary to cure and relieve employee from the effects of the November 19, 2010, injury.

Employer appealed to the Commission alleging that the ALJ's award of 22.5% permanent partial disability of the left knee is not supported by competent and substantial evidence. Employer further alleges that the ALJ erred in awarding employee future medical care.

Findings of Fact

Employee suffered an injury to his left knee at work on November 19, 2010. Employee suffered a prior injury to his left knee on December 28, 2009. While employee did file a separate claim for compensation for the December 28, 2009, injury, employee's claim for compensation concerning the November 19, 2010, injury is the only claim currently before the Commission.

On November 19, 2010, employee was working at the jail as a lieutenant in the Lafayette County Sheriff's Department when he heard an altercation going on between an arrestee and a jail staff member in another room. Employee responded to the altercation, grabbed the arrestee, and took him to the ground. In the process, he heard a loud pop followed by a series of cracking sounds and pain in the left knee. He stepped away from the altercation and was later transported by patrol car to Lafayette Regional Health Center in Lexington, Missouri. Employee was diagnosed with a tibia plateau fracture and referred to Dr. Wise, an orthopedic surgeon, for treatment.

¹ Statutory references are to the Revised Statutes of Missouri 2010 unless otherwise indicated.

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Dr. Wise performed surgery on employee's left knee on November 20, 2010. The operative report from that date stated that a "small lateral meniscal tear" was shaved back to a stable base. Some loose bodies were removed. The lateral tibial plateau was then lined up perfectly and held together "with a couple of" screws. The small poke holes were closed with staples and a final inspection revealed a well-reduced lateral articular surface.

After one month of physical therapy, employee underwent a knee manipulation with anesthesia to break through scar tissue in order to regain additional range of motion. Employee completed his treatment and last saw Dr. Wise on May 5, 2011. At that last visit, Dr. Wise noted that employee had achieved maximum medical improvement and could return to work without restrictions.

In a letter dated July 15, 2011, Dr. Wise confirmed that employee had reached maximum medical improvement as of May 5, 2011, and no further appointments had been scheduled. Dr. Wise opined that the only medical condition employee suffered as a result of his work injury of November 19, 2010, was a left knee contracture, and that as a result, he suffered a permanent partial disability of 5% of the left knee.

With regard to employee's December 28, 2009, left knee injury, the medical records reveal that he was last seen for this prior injury on August 30, 2010, by Dr. Singh. Dr. Singh referenced the December 28, 2009, accident, and indicated that employee was experiencing increased pain and stiffness in the left knee along with significant pain when he bent the knee. Dr. Singh was concerned that there was some internal derangement of the knee. He prescribed Naproxen (Aleve) 500 mg twice daily and recommended an MRI. An MRI scan was never performed, however, and the next record of any treatment is November 19, 2010, after the injury that is the subject of this appeal.

Dr. Stuckmeyer saw employee on July 14, 2011, for an independent medical evaluation. Dr. Stuckmeyer pointed out that employee had suffered two separate injuries to the same knee, one on December 28, 2009, and the second on November 19, 2010. Dr. Stuckmeyer also pointed out that prior to the November 19, 2010, accident, there was a discussion of proceeding with an MRI scan, which was never obtained. Dr. Stuckmeyer contemplated in his report that the lateral meniscus may have been torn prior to the accident of November 19, 2010, but stated that "this would be speculation."

Dr. Stuckmeyer stated that his major concern at the time of the evaluation was the long-term effects of employee's tibial plateau intraarticular fracture. He pointed out that Dr. Wise described that there were "missing pieces" from the articular surface of the lateral tibial plateau. Dr. Stuckmeyer then stated that "[i]t would be the opinion of this examiner within a reasonable degree of medical certainty that with that commentary, and based on the nature of this type of fracture, that Mr. Dye is more likely than not predisposed to advancing degenerative arthritis in the left knee. From an orthopedic standpoint, I would therefore opine that the medical should remain open in regard to the left knee."

Dr. Stuckmeyer opined that employee sustained 40% permanent partial disability to the left knee. He stated that said 40% disability "would represent a *combination* of the two injuries in discussion." (emphasis added).

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Employee testified that he can pretty well do everything required of him at work, just not at the same pace or level of intensity. Outside of work, employee testified that he has pain traversing stairs, walking on uneven terrain, and getting in and out of vehicles. He has pain and stiffness in the mornings, he has pain and discomfort getting on the ground to play with his kids, and he has pain operating the clutch on his riding lawnmower. Employee stated that he experiences an occasional popping sensation in the left knee, pain with prolonged standing, he walks with a noticeable limp, and has a muscle tone difference between his right and left leg. Employee testified that he takes Aleve four to five times per week.

Discussion

The ALJ's award was very brief. The ALJ pointed out Dr. Wise's opinion that employee sustained 5% permanent partial disability of the left knee; and Dr. Stuckmeyer's opinion that employee sustained 40% permanent partial disability of the left knee. Without providing any additional findings or supporting analysis, the ALJ simply split the difference between the two ratings and concluded that employee sustained 22.5% permanent partial disability of the left knee as a result of the November 19, 2010, injury.

While we acknowledge that the ALJ was not bound by the percentage estimates of the medical experts and was free to consider all of the evidence in determining the percentage of employee's permanent disability,² we find that the ALJ's award of 22.5% permanent partial disability of the left knee is not supported by competent and substantial evidence.

Dr. Wise provided his 5% permanent partial disability rating based solely on the November 19, 2010, injury; whereas, Dr. Stuckmeyer provided his 40% permanent partial disability rating based on a *combination* of the December 28, 2009, injury and the November 19, 2010, injury. Dr. Stuckmeyer did not attribute a specific portion of his 40% permanent partial disability to the November 19, 2010, injury. In other words, the two doctors' ratings are not comparable because they are not based on the same set of variables. The ALJ did not even acknowledge this dissimilarity between the two doctors' ratings before simply splitting the difference "based on [employee's] credible testimony and evidence presented...."

We find that this distinction between the two doctors' ratings is crucial because "when a preexisting disability is present, the claimant is required to prove the extent of the preexisting disability so that such percentage can be evaluated against the disability percentage existing after the compensable injury." *Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo. App. 2008), citing *Plaster v. Dayco Corp.*, 760 S.W.2d 911, 913 (Mo. App. 1988). In *Moriarty v. Treasurer of the State of Missouri*, 141 S.W.3d 69 (Mo. App. 2004),³ the court held that when preexisting disability to the same body part is present, "[f]ailure to offer expert testimony regarding the percentage of disability derived from the compensable injury bars the claimant from recovering permanent partial disability benefits." *Id.* at 73, quoting *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo. App. 1994).

² See *Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo. App. 2008).

³ Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. Banc 2003).

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Of course, the aforementioned is premised upon the assumption that the matter is not within the realm of lay understanding. In deciding whether a matter is not within the realm of lay understanding and, therefore, requiring expert testimony, the court in *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 704-05 (Mo. App. 1973) held that the issue “depends upon whether the injury or injuries are ‘sophisticated,’ meaning requiring surgery or ‘highly scientific technique for diagnosis.’ And an additional injury to the same area is simply more likely to place the matter outside the realm of lay understanding.”

In light of employee’s two injuries to his left knee and subsequent surgical procedures to repair the same, we find that attributing a percentage of disability between the two left knee injuries is not within the realm of lay understanding and, therefore, an expert opinion attributing a specific percentage of disability to the November 19, 2010, injury is necessary for the Commission to arrive at a decision on this issue. Because Dr. Stuckmeyer’s 40% rating fails to attribute a specific percentage of disability to the November 19, 2010, we do not give it any weight in our determination. Dr. Wise’s 5% rating accounts solely for the November 19, 2010, injury and, therefore, is the only credible expert opinion we can rely on with respect to the nature and extent of employee’s permanent partial disability.

As mentioned above, the ALJ was not bound by the percentage estimates of the medical experts and was free to consider all of the evidence in determining the percentage of employee’s permanent disability. However, in this case, the ALJ simply listed a small portion of the evidence presented, failed to acknowledge Dr. Stuckmeyer’s combination rating, and provided no legal analysis or rationale for her finding that employee sustained 22.5% permanent partial disability of the left knee.

We find, based upon the credible medical expert testimony and opinions, the medical records, employee’s testimony, and the record as a whole, that as a result of the November 19, 2010, injury, employee sustained 5% permanent partial disability of the left knee. Employee failed to meet his burden of proving that he sustained more than 5% permanent partial disability in his left knee.

With respect to employer’s argument that the ALJ erred in awarding employee future medical care, we find that the competent and substantial evidence supports the ALJ’s award of future medical care. Dr. Stuckmeyer provided the only medical opinion regarding the issue of employee’s need for future medical care and stated that employee is “more likely than not predisposed to advancing degenerative arthritis in the left knee,” and that “it is more probable than not that he will need to undergo a unicompartmental joint arthroplasty.” Based upon Dr. Stuckmeyer’s opinion and the record as a whole, we find that employee met his burden of proving a reasonable probability that additional medical treatment is needed and that the reasonable probability arises from the work injury.

Award

For the foregoing reasons, we modify the award of the ALJ and find that as a result of the primary injury, employee sustained 5% permanent partial disability of the left knee. We affirm the ALJ’s award of future medical care.

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The award and decision of Administrative Law Judge Lisa Meiners issued March 13, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ's allowance of attorney's fee as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 21st of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Aaron Dye Injury No. 10-095853
Employer: Lafayette County
Insurers: Self-Insured
Hearing Date: February 29, 2012 Checked by: LM/cy

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 19, 2010
5. State location where accident occurred or occupational disease was contracted: 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: Claimant sustained injury of his left knee in the course and scope of employment while trying to subdue an inmate.
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: 22.5% percent permanent partial disability of the left knee.
15. Compensation paid to-date for temporary disability: \$1,439.22
16. Value necessary medical aid paid to date by employer/insurer? \$63,687.34
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$418.58
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Compensation payable: The employer is liable to Claimant for 22.5% percent permanent partial disability of the left knee or \$15,068.88.
22. Future requirements awarded: Employer is liable to the Employee for future medical care in order to cure and relieve the effects of the left knee injury sustained on November 19, 2010.

Said payments to begin as of 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 in favor of the following attorney for necessary legal services rendered to the Claimant: Gary Bradley.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Aaron Dye Injury No. 10-095853
Employer: Lafayette County
Insurers: Self-Insured
Hearing Date: February 29, 2012 Checked by: LM/cy

On February 29, 2012, the parties appeared for hearing. Aaron Dye appeared in person and with counsel, Gary Bradley. The Employer, Lafayette County, through its' authority to self-insure, was represented by Rick Montgomery and Alex Wulff.

STIPULATIONS

The parties stipulated to the following:

- 1) That the Employer was operating subject to Missouri workers' compensation law on November 19, 2010;
- 2) That Employer was insured through their authority to self-insure;
- 3) That Mr. Dye was an Employee;
- 4) That Employee was working subject to the law in Lafayette County, Missouri;
- 5) That Employee sustained an accident that arose out of and in the course and scope of his employment on November 19, 2010;
- 6) That Employee provided proper notice;
- 7) That a Claim was filed within the time allowed by law;
- 8) That the Employer had paid \$63,687.34 in medical expenses, as well as \$1,439.22 in temporary total disability benefits;
- 9) That the permanent partial disability rate is \$418.58.

ISSUES

The issues to be tried by this hearing are as follows:

- 1) Whether the Employee sustained any disability and, if so, the nature and extent of that disability;
- 2) Whether Employer is liable to Employee for future medical care stemming from the November 19, 2010 accident.

The parties stipulated that on November 19, 2010, Claimant sustained injury of his left knee was subduing an unruly inmate. Indeed, Claimant felt a loud pop and immediate pain while attempting to bring the inmate to the floor. Claimant went immediately to the hospital emergency room where doctors diagnosed a tibial fracture and lateral meniscus tear of the left knee. As such, Claimant underwent open reduction and internal fixation with hardware, as well as a meniscectomy of the left knee.

On January 6, 2011, Claimant underwent a second procedure due to a frozen left knee. Indeed, Dr. Wise performed a left knee manipulation. On May 5, 2011, Claimant was released from medical care and given a 5% percent permanent partial disability of the left knee by Dr. Christopher Wise.

Presently Claimant experiences hindrances and obstacles to his employment as a result of the November 19, 2010 injury by accident. Claimant has difficulty squatting, bending, climbing, running, and walking on uneven surfaces that he did not experience prior to November 19, 2010. Additionally, Claimant is unable to stand or walk for prolonged periods and has difficulty maneuvering out of his patrol car due to the left knee restrictions.

Claimant presented James A. Stuckmeyer as a medical expert. Dr. Stuckmeyer found the November 19, 2010 accident was the prevailing factor of Claimant's disability to the left knee. Dr. Stuckmeyer performed a physical examination and reviewed Claimant's medical history before opining Claimant sustained a 40% percent permanent partial disability of the left knee.

I find based on Claimant's credible testimony and evidence presented, that Claimant sustained a 22.5% percent permanent partial disability of the left knee as a result of the November 19, 2010 injury by accident. The Employer is liable to the Employee for 36 weeks of compensation, or \$15,068.88.

The parties request this award also address whether the Employer is liable to Claimant for future medical care of his left knee. I find Claimant met his burden of proof in this case and based on these particular facts. Dr. Stuckmeyer found Claimant's left knee is missing articular joint pieces that stem from the November 19, 2010 injury and, therefore, will need future medical care. As such, I find the Employer is liable to the Employee for future medical care of his left knee pursuant to Dr. Stuckmeyer's report.

The Claimant's attorney, Mr. Bradley, request a 33 ½ % attorney's fee. However, the reasonable and customary fee in workers' compensation cases, whether they go to trial or whether settled by compromise, is 25% percent. As such, I award a 25% percent fee to Mr. Bradley for services rendered.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation