

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

Injury No. 09-105379

Employee: Gary Emmons

Employer: Cassens Transport

Insurer: Self-Insured

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 January 23, 2015. The award and decision of Administrative Law Judge John K. Ottenad, issued January 23, 2015, 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 14th day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Gary Emmons

Injury No.: 09-105379

Dependents: N/A

Employer: Cassens Transport

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

Additional Party: N/A

Insurer: Self-Insured C/O Broadspire Services, Inc.

Hearing Dates: October 16, 2014 & October 23, 2014

Checked by: JKO

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: December 3, 2009
5. State location where accident occurred or occupational disease was contracted: Salina, Kansas
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 worked as a car hauler for Employer and twisted his right knee, when he missed the last step on the ramp and fell, as he was unloading minivans from his transport vehicle.
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: Right Knee
14. Nature and extent of any permanent disability: 5% of the Right Knee
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$233.64

Employee: Gary Emmons

Injury No.: 09-105379

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,266.48
- 19. Weekly compensation rate: \$807.48 for TTD/ \$422.97 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|---|------------|
| 8 weeks of permanent partial disability | \$3,383.76 |
|---|------------|

22. Second Injury Fund liability: N/A

TOTAL: \$3,383.76

23. Future requirements awarded: N/A

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: Mark A. Cordes.

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|--|------------------------------------|
| Employee: | Gary Emmons | Injury No.: 09-105379 |
| Dependents: | N/A | Before the |
| Employer: | Cassens Transport | Division of Workers' |
| Additional Party: | N/A | Compensation |
| | | Department of Labor and Industrial |
| | | Relations of Missouri |
| | | Jefferson City, Missouri |
| Insurer: | Self-Insured C/O Broadspire Services, Inc. | Checked by: JKO |

On October 16, 2014, the employee, Gary Emmons, appeared in person and by his attorney, Mr. Mark A. Cordes, for a hearing for a final award on his claim against the employer, Cassens Transport, which is duly self-insured under the statute C/O Broadspire Services, Inc. The employer, Cassens Transport, which is duly self-insured under the statute C/O Broadspire Services, Inc., was represented at the hearing by its attorney, Mr. L. David Green. The Second Injury Fund is not a party to this case.

Following the conclusion of the hearing, Employer filed a motion to reopen the record and introduce additional evidence in the form of a patient information form from Claimant’s December 10, 2009 visit to Sullivan Open MRI (Exhibit L). Employer’s motion was heard on October 23, 2014 and the motion hearing was made a part of the record of these proceedings. Although Employer argued that this documentation amounted to “newly discovered” evidence, Claimant objected to its admission, noting that there was nothing that prevented Employer from having collected this documentation at the same time they obtained the MRI report, which is already in evidence in Exhibit A, and, thus, there was no good reason why it was not introduced at hearing with all of the other evidence. Claimant further noted that allowing its admission after the hearing had concluded would necessitate reopening the testimony to allow Claimant to come back to the stand and testify regarding the document, which had not been introduced or otherwise discussed at the hearing in this matter.

Having found no good reason why the documentation/evidence could not have been obtained prior to trial and offered into evidence along with the rest of the medical records in this case, I denied Employer’s motion to reopen the record and introduce Exhibit L into evidence. Employer made an offer of proof regarding Exhibit L, at the time of the motion hearing, that also is a part of this record for the purpose of appeal to any reviewing body/court.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about December 3, 2009, Gary Emmons (Claimant) allegedly sustained an accidental injury.
- 2) Claimant was an employee of Cassens Transport (Employer).
- 3) Venue is proper in the City of St. Louis by agreement.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$1,266.48, resulting in applicable rates of compensation of \$807.48 for total disability benefits and \$422.97 for permanent partial disability (PPD) benefits.
- 7) Employer paid medical benefits totaling \$233.64.

ISSUES:

- 1) Did Claimant sustain an accident?
- 2) Did the accident arise out of and in the course of Claimant's employment for Employer?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged accident at work for Employer on December 3, 2009?
- 4) What is the nature and extent of Claimant's permanent partial disability attributable to this injury?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

1. Independent medical report of Dr. Dwight Woiteshek dated September 11, 2011
2. Curriculum vitae of Dr. Dwight Woiteshek
3. Medical treatment records of Concentra Medical Centers (KS)
4. Medical treatment records of Dr. Dean Lusardi

Employer/Insurer Exhibits:

- A. Certified medical treatment records of Patients First Internal Medicine (Dr. Jamie Borgmann)
- B. Certified medical treatment records of Concentra Medical Centers (MO)
- C. Deposition of Dr. Michael Milne, with attachments, dated June 3, 2013
- D. Cross-examination deposition of Dr. Dwight Woiteshek, with attachments, dated September 12, 2012
- E. Driver Log Summary Screens from November 2009 to November 2010 and from September 2013 to October 2014
- F. Driver's Daily Log for December 3, 2009 and December 5-13, 2009
- G. Select records from Claimant's personnel file with Employer
- H. Claimant's DOT medical examination reports from Concentra Medical Centers (KS) dated March 16, 2010, March 8, 2012 and February 27, 2013
- I. Claims for Compensation in Injury Numbers 04-093276 and 04-134849
- J. Calendar for December 2009
- K. Driver's Load Detail Reports from September 2009 through September 2014
- L. ***Not admitted into evidence—Offer of proof made by Employer***

Note: Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on October 16, 2014.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the medical treatment records, and the other documentary evidence in this matter, as well as based on my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 60-year-old car hauler, who has worked for Cassens Transport (Employer) for 19 years delivering new vehicles to car dealerships. Claimant explained that, as a car hauler, he is responsible for loading vehicles, strapping them down, driving to various dealerships in a 600-mile radius, unstrapping the cars and unloading them at the dealerships. He testified that his job duties include setting up ramps and driving the new vehicles on and off the car transport vehicle. Claimant noted that he works out of Kansas City now, but he was employed out of Fenton, when there was a car plant there. He said that he works on average, 50-60 hours per week, up to a maximum of 70 hours per week.
- 2) Claimant admitted to having a prior right knee injury in 1972 from playing football. He had surgery to the right knee, but testified that he had no problems with the knee and no limitations at work leading up to December 3, 2009 on account of the prior right knee injury.

- 3) Claimant also admitted having prior claims for left elbow epicondylitis, which was surgically treated, and perhaps a shoulder injury. Further, he broke his right thumb, last October. He denied having any prior or subsequent injuries to his right knee with Employer, except for the injury on December 3, 2009.
- 4) Claimant testified that on December 3, 2009, he was working in Salina, Kansas unloading minivans at a car dealership. He said that he was coming down ramp #4 on the transport vehicle, missed the last step, and fell approximately 2 feet and twisted his right knee. He described pain and a burning sensation in the right knee. He noted that he eventually had some swelling in the knee. He said that he continued working that day and finished his duties.
- 5) Claimant's **Driver's Daily Log** (Exhibit F) confirms that he was in Salina, Kansas at 1:00 p.m. on December 3, 2009. **Records from his personnel file** (Exhibit G) confirm that he was then on vacation the next week from December 7-11, 2009.
- 6) Claimant admitted that he did not report the injury that day. He said that he went back to the terminal in Kansas City, Kansas, and, then, went home to Union, Missouri because he already had a prescheduled physical examination on Monday with his primary care physician, Dr. Borgmann. Claimant testified that he told Dr. Borgmann about his right knee and had an X-ray and MRI taken of the knee.
- 7) Medical treatment records from **Dr. Jamie Borgmann at Patients First Internal Medicine** (Exhibit A) confirm Claimant was examined by Dr. Borgmann on Monday, December 7, 2009. Claimant reported a complaint of right knee pain. The medical records contain the following history: "HX of operation at age 18 for torn cartilage. Has started having problems over the past few months and progressively getting worse. States he works as a car hauler. Has a lot of pain when weather changes, when he steps/twists a certain way. States that it occas [sic] nearly gives out on him." There is absolutely no history of any right knee injury, much less an injury just days earlier, described in this record. On physical examination, Dr. Borgmann found a right knee medial scar (presumably from the prior surgery), but no effusion, negative anterior and posterior drawer signs, no ligamentous laxity and a negative Lachman's test. Dr. Borgmann diagnosed pain in the knee, ordered X-rays and suggested an MRI, given the complaint of the knee giving out. X-rays taken on that date showed mild-to-moderate degenerative changes based on the medial joint height loss, but no other bony abnormalities.
- 8) Claimant also had the right knee MRI performed on December 10, 2009 at **Sullivan Open MRI** (Exhibit A). It showed a resected medial meniscus with medial tibial plateau Grade 4 chondrosis and irregular Grade 3 and probable scattered Grade 4 medial femoral condylar weight bearing surface chondrosis, as well as a chronically torn, absent anterior cruciate ligament with mild anterior subluxation, and an elongated patellar lower pole extending into the patellar tendon (with the tendon otherwise intact and normal in appearance distally).

- 9) Claimant initially testified at hearing that he finally told his supervisor about the December 3, 2009 injury on the same day that he was sent to Concentra in Kansas City by Employer, December 22, 2009. However, on cross-examination, he said that he worked the full day on December 16, 2009, and, then, reported the injury to Employer the next day, December 17, 2009.
- 10) Claimant's **Driver's Load Detail Reports** (Exhibit K) confirm that after he returned from vacation, he worked on December 14, 2009, and December 16, 17 and 21, 2009, before going to Concentra Medical Centers (KS), the next day.
- 11) In any event, Claimant was examined at **Concentra Medical Centers (KS)** (Exhibit 3) on December 22, 2009. He provided a history at that examination of missing the last step as he was coming down a ladder and hurting his right knee. The record indicates that he "twisted" the right knee, while coming down a ladder on the truck. The physical examination revealed mild joint effusion in the right knee and that Claimant was walking with a moderate limp. He was diagnosed with unspecified internal derangement of the knee and referred to Concentra Medical Centers in St. Louis for further care, since Claimant was from the St. Louis area.
- 12) When Claimant was examined at **Concentra Medical Centers (MO)** (Exhibit B) the next day, December 23, 2009, the doctor noted that Claimant had already had an MRI done of the right knee that showed "only chronic changes" and he was referred to an orthopedic doctor, but, then, reported an injury. Claimant admitted that he had been working and he is not able to see anyone (presumably for treatment) until after the holidays. The physical examination showed mild laxity and decreased range of motion in the knee. The report indicates the MRI showed degenerative changes and a chronic ligament tear. Claimant was diagnosed with knee pain, released from care and referred to his primary care physician for further treatment of this "non-work related condition."
- 13) Claimant was examined by **Dr. Dean Lusardi** (Exhibit 4), an orthopedic specialist on referral of Dr. Borgmann, on December 31, 2009. Claimant provided Dr. Lusardi with a history of missing the last step when coming down a ladder on a truck and developing pain in his right knee. After a physical examination and additional X-rays, Dr. Lusardi diagnosed chronic right knee ACL tear with degenerative arthritis, primarily medial and patellofemoral compartment following probably previous meniscal excision. Dr. Lusardi provided a steroid injection for the right knee and an ACL brace, because of some symptoms of instability in the knee, "partially related to his anterior cruciate ligament deficient knee." When Claimant followed up with Dr. Lusardi on February 8, 2010, Dr. Lusardi confirmed that Claimant had previously had an injection "for degenerative arthritis with essentially bone-on-bone arthritis in the medial compartment." Claimant reported not really having much pain in the knee, following the injection. Dr. Lusardi felt Claimant was doing well status post right knee degenerative joint disease. He recommended that Claimant continue to use the ACL brace and released him to follow up as needed for further injections if the pain recurs.

- 14) Claimant testified that he missed a couple weeks of work after the injury, but he went back to full-duty work. He also admitted that he has continued to obtain his normal DOT physicals since this injury, where they check your blood pressure, weight and maybe vision, but they don't really examine your joints.
- 15) Claimant's **DOT physical performed at Concentra Medical Centers (KS)** (Exhibit H) on March 16, 2010 noted that he had a knee injury in December 2009, but he wrote "none" where the report asked for current limitations or medications. The physical examination showed no impairment in the extremities. Similarly, when DOT physicals were performed on March 8, 2012 and February 27, 2013, no limitations or impairments were noted with regard to the right knee.
- 16) Medical treatment records from **Dr. Jamie Borgmann at Patients First Internal Medicine** (Exhibit A) show that Claimant has continued to follow up with the doctor yearly for physical examinations (September 20, 2010, September 7, 2011 and December 21, 2012). There are absolutely no right knee complaints or problems listed in any of these examination records. Further, the physical examination in each case reveals no edema or any other abnormalities with the legs.
- 17) In terms of current complaints, Claimant testified that his right knee bothers him every day, depending on the weather. He noted that it is weaker and he takes ibuprofen (1000 milligrams) sometimes twice a day, for his complaints. He said that it is hard to get out of the truck sometimes after sitting for awhile and it feels like he has a "trick knee" with some giveaway weakness in the knee. Claimant noted that climbing causes problems, as does sitting for extended periods of time. In that respect, I would note that as Claimant was testifying in this case, sitting in the witness chair, I did observe that he was often flexing and extending the knee to apparently gain some relief of his right knee complaints. Claimant noted that he does not wear the ACL brace Dr. Lusardi gave him anymore, because it is too big and awkward. He said that instead he wears a knee sleeve that provides some stability.
- 18) The independent medical report of **Dr. Dwight Woiteshek** (Exhibit 1) shows that Claimant was examined by the doctor on September 6, 2011 at the request of Claimant's attorney. Dr. Woiteshek is a board certified orthopedic surgeon (Exhibit 2). He examined Claimant on that one occasion and issued his report on September 11, 2011. He provided no medical treatment to Claimant in this case. Dr. Woiteshek took a history from Claimant of injuring his right knee on December 3, 2009, when he was getting down off a ladder on his truck, missed the last step and twisted his right knee. He noted that despite the prior knee surgery, Claimant's knee was "just fine and pretty much asymptomatic" leading up to the December 3, 2009 injury. Claimant reported numerous problems with the knee including pain every day, difficulty walking more than a mile before resting, and problems with standing, walking, lifting, carrying, bending, reaching, pushing, pulling, climbing, squatting and kneeling. On physical examination, Dr. Woiteshek found a surgical scar over the right knee, pain and tenderness, small effusion, a slightly positive Lachman test and Drawer sign, a positive McMurray's sign, mild patellofemoral mistracking, some lost range of motion, and atrophy in the right knee.

- 19) Medically casually related to the work injury on December 3, 2009, Dr. Woiteshek diagnosed traumatic internal derangement of the right knee with a subsequent ACL tear seen on the MRI and aggravation of the osteoarthritis of the right knee. Pre-existing the December 3, 2009 injury, he diagnosed a torn medial meniscus of the right knee, status post surgery in 1972 and osteoarthritis of the right knee, which was completely asymptomatic. Dr. Woiteshek opined that the injury on December 3, 2009 was the prevailing factor in the cause of the traumatic internal derangement of the right knee with the subsequent ACL tear and aggravation of the knee osteoarthritis. He rated Claimant as having 20% permanent partial disability of the right knee related to the December 3, 2009 injury, and an additional 5% permanent partial disability that pre-existed the injury on account of the prior surgery and asymptomatic arthritis.
- 20) The cross-examination deposition of **Dr. Dwight Woiteshek** (Exhibit D) was taken by Employer on September 12, 2012, to make his opinions in this case admissible at trial. Although the doctor does not currently perform surgery, he noted that in the past he performed all types of orthopedic surgeries, including 25% of his practice spent performing knee surgeries. Dr. Woiteshek admitted that the X-rays taken of Claimant's right knee on December 7, 2009 and the MRI taken on December 10, 2009, showed degenerative changes (the knee was wearing out), which occurred over time. He noted that he thought the ACL tear discussed in the MRI looked more traumatic in nature and occurred subsequent to the December 3, 2009 injury. He explained that, even though the radiologist found it to be "chronically torn and absent," in his experience it can be folded on itself and look absent, "So the ability to date an anterior cruciate ligament is more difficult to do on an MRI scan." Despite the radiologist's opinion to the contrary, Dr. Woiteshek believed the ACL tear had not been present for longer than a week at the time the MRI of the knee was taken. However, upon further questioning, he opined that "you cannot date an anterior cruciate—it's very hard to date an anterior cruciate ligament rupture by the MRI scan...but in my experience as an orthopedic surgeon, that could definitely be a sign of an acute tear because the ligament can be folded on itself." Ultimately, he admitted that the actual MRI did not show an acute tear.
- 21) The deposition of **Dr. Michael Milne** (Exhibit C) was taken by Employer on June 3, 2013, to make his opinions in this case admissible at trial. Dr. Milne is a board certified orthopedic surgeon, who performs knee surgeries. He examined Claimant on one occasion, November 14, 2011, at Employer's request, and issued his report on that same date. He also issued an addendum report dated March 1, 2013 after reviewing Dr. Woiteshek's deposition testimony. He provided no treatment to Claimant. He took a history from Claimant of missing the last step when coming down a ladder and twisting his knee, reviewed the medical treatment records, and performed a physical examination of Claimant, in reaching his conclusions in this case. The physical examination revealed the scar from the prior surgery, no edema, patellofemoral crepitus and ligamentous stability. X-rays revealed moderate-to-severe joint line narrowing over the medial aspect of the knee.

- 22) Dr. Milne reviewed the MRI films personally and testified that there was edema within the medial femoral condyle and medial tibial plateau that could be acute, or could be chronic, he was not sure. It also showed an absent ACL, absent medial meniscus and Grade 4 cartilage loss. Dr. Milne opined that most of the findings in the knee would be attributable to the prior injury and surgery. He said that Claimant likely had a medial meniscus tear and ACL tear at age 18, and they trimmed the meniscus but left the ACL alone. Dr. Milne explained that the resected medial meniscus showed that it was gone and had been cut out. Grade 4 chondrosis means a complete loss of cartilage, or bone on bone in the knee. He believed all of this pathology pre-existed the alleged December 3, 2009 injury, because the MRI that showed it was just ten days later. As for the ACL, Dr. Milne explained that if it was an acute tear, you could see fibers of the ligament, albeit disrupted, but in this case there were no fibers to even see, so it was chronically torn and absent, consistent with the injury and surgery years earlier. Dr. Milne also testified that he did not believe the mechanism of injury of twisting the knee from missing a step would correlate with an acute tear of the ACL, because it was not significant enough to tear the ACL in such a way that it would be completely absent on an MRI seven days later.
- 23) Dr. Milne diagnosed Claimant with right knee significant degenerative joint disease. He opined that the alleged injury on December 3, 2009 was not the prevailing factor in causing his condition. He noted that Claimant was working full duty and not in need of any work restrictions. Finally, he estimated Claimant's permanent partial disability, regardless of causation, at 6% of the right knee.
- 24) On cross-examination, Dr. Milne acknowledged that sometimes the findings during surgery are different from the findings on MRI, and in this case, it is possible that he could reach a different conclusion on whether the ACL tear was acute or chronic, but he thought that was "unlikely." Dr. Milne agreed that the alleged accident was an aggravating factor, in that it caused an increase in his pain and symptoms and it probably caused an increase in the bony edema seen on the MRI. He even acknowledged that it was sufficient to make an asymptomatic condition symptomatic.
- 25) Claimant testified on cross-examination at hearing, that he could not recall telling Dr. Borgmann that his knee was worsening over several months, but he also could not recall giving the doctor a history of the accident. Despite having a number of DOT physicals over the years, Claimant testified that he could not recall if he filled out any forms when he had the physicals, but, in fact, he does. He could not recall much about the physicals, but did not believe they were very thorough. Claimant could not recall telling Dr. Borgmann about his knee complaints in his follow-up physicals. In fact, Claimant was unable to recall many of the details of his examinations at all.

RULINGS OF LAW:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the medical treatment records, and the other documentary evidence in this matter, as well as based on my personal observations of Claimant at hearing, and based on the applicable statutes of the State of Missouri, I find:

As the first three issues in this matter are inter-related, I will address all three of them in the same section of the Award.

Issue 1: Did Claimant sustain an accident?

Issue 2: Did the accident arise out of and in the course of Claimant's employment for Employer?

Issue 3: Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged accident at work for Employer on December 3, 2009?

Considering the date of the alleged injury, it is important to note the statutory provisions that are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court "shall construe the provisions of this chapter strictly" and that "the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts." Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Under **Mo. Rev. Stat. § 287.120.1 (2005)**, every employer subject to the Workers' Compensation Act shall furnish compensation for the personal injury of the employee by accident arising out of and in the course of employee's employment. According to **Mo. Rev. Stat. § 287.020.2 (2005)**, accident is defined as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." Further, under **Mo. Rev. Stat. § 287.020.3 (1) (2005)**, "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.” Finally, under **Mo. Rev. Stat. § 287.020.3 (2) (2005)**, an injury is deemed to arise out of and in the course of the employment only if the accident is the prevailing factor in causing the injury and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment.

In order to meet his burden of proof in this matter, Claimant needed to present credible evidence that supports his contention that he sustained an acute, unexpected traumatic event or unusual strain while working for Employer that resulted in an injury to his right knee, identifiable by the time and place of occurrence and producing at the time objective symptoms of an injury, caused by a specific event during a single work shift, necessitating the treatment he ultimately received. Additionally, he needed to present competent, credible and reliable medical evidence to medically causally connect his right knee injury, need for treatment and disability to this acute, accidental injury at work. Having thoroughly reviewed and considered all of the evidence in this matter, I find that Claimant has met his burden of proof in this regard.

Claimant testified that he was working for Employer, unloading minivans at a car dealership on December 3, 2009 in Salina, Kansas, when he missed the last step of a ladder coming down the ramp of his transport vehicle, and he slipped approximately 2 feet and twisted his right knee. The fact that he was working for Employer in Salina, Kansas at or about the time of this injury on December 3, 2009 is confirmed by the Driver’s Daily Log (Exhibit F). I find that once Claimant reported the injury to Employer, the medical records contain a consistent history of the accident at work, from the initial Concentra visit all the way through the examinations with the various examining physicians in this case. I further find that also supporting the fact that an injury occurred on December 3, 2009 is the fact that even Employer’s medical expert, Dr. Milne, testified that, in his opinion, there was edema within the medial femoral condyle and medial tibial plateau seen on the MRI taken on December 10, 2009 that could be acute, as opposed to the majority of the findings on the MRI that were clearly chronic, and pre-existed the work injury. All of these facts lead me to conclude that Claimant suffered an accident at work on December 3, 2009, which arose out of and in the course of his employment for Employer.

Employer raises a number of issues with Claimant’s credibility that they believe should result in an outright denial of this Claim. First, Employer points to the original allegation in the Claim for Compensation that the injury occurred in St. Louis instead of Kansas. It is unclear to me if that original mention of St. Louis in the Claim was a drafting error or something else, but what is clear to me is that Claimant’s testimony, the work records and the histories provided to the various medical treating and examining physicians, all contain a consistent history of the accident occurring in Kansas. Therefore, I do not believe the mere mention of St. Louis, instead of Kansas, in the original Claim is fatal to the overall compensability of this matter.

Second, Employer cites the lack of history of a work injury in Dr. Borgmann’s medical record on December 7, 2009, as well as a history that is contained there of having progressive problems with the knee over the last few months, as evidence that undercuts Claimant’s credibility regarding the occurrence of a work injury. While I agree with Employer that the absence of a history of the work injury in that initial record from Dr. Borgmann, as well as the history that is there of progressive worsening of the right knee over the months leading up to the

injury, has a negative effect on Claimant's overall credibility in this case, I do not find it to be so negative and so fatal as to result in a complete denial of his Claim on this basis. Claimant's consistent reporting of a history of injury to all medical providers following his report to Employer, as well as his work records, and the arguably acute findings referenced above from Dr. Milne, all lead me to conclude that the history, or lack thereof, in Dr. Borgmann's notes does not necessitate a denial of all benefits in this case on that basis.

Finally, Employer argues that Claimant's failure to report the accident on the day it occurred, his working three or four more days before reporting it, and his "vague" description of when he finally did report the injury to Employer, should all necessitate a denial of this case. I disagree. There is nothing in the law that requires an injured worker to report the injury on the day it occurred or even within a week or two after that. In this case, where the injury occurred on the day before Claimant was scheduled to take vacation for a week and already had a scheduled visit to his primary care physician on the other side of the state by his home, I am not surprised that there may have been a delay in the reporting of the injury to Employer. In any event, Employer admitted that they received timely notice of the injury under the statute. Therefore, I do not believe the delay in reporting the injury to Employer is necessarily detrimental to the compensability of this injury Claim.

Having found that Claimant has met his burden of proving that he sustained an accidental injury that arose out of and in the course of his employment for Employer, I now move on to the medical causation issue in this case. In order to meet his burden of proof in this matter, Claimant also needed to present competent, credible and persuasive medical testimony to support his contention that the accident that occurred at work was the prevailing factor in causing the resulting medical condition and disability. Each party offered a medical expert opinion to substantiate the result they believed to be appropriate in this matter. Claimant offered the report of Dr. Dwight Woiteshek, who opined that medically causally related to the work injury on December 3, 2009, Claimant sustained a traumatic internal derangement of the right knee with a subsequent ACL tear, seen on the MRI, and aggravation of the osteoarthritis of the right knee. On the other hand, Employer offered the report and testimony of Dr. Michael Milne, who opined that the alleged injury on December 3, 2009 was not the prevailing factor in causing Claimant's significant right knee degenerative joint disease.

After thoroughly reviewing the doctors' reports and testimony, and after having evaluated their opinions in light of the rest of the evidence in this case, I find that while I cannot fully rely on all points from either of the medical experts, there is sufficient, competent and persuasive medical evidence in the record to find that Claimant has met his burden of proof on the medical causation issue in this case. From the medical evidence in the record, I find that there are essentially two medical conditions in the right knee at issue, an ACL tear and an aggravation of the osteoarthritis of the right knee, that Claimant attempts to prove are medically causally related to the work injury on December 3, 2009. As will be explained in more detail below, I find that Claimant has met his burden of proving that the aggravation of the osteoarthritis of the right knee is related to the work injury, but has failed to meet his burden of proving that the ACL tear is related.

Regarding the ACL tear, Claimant offered the report of Dr. Woiteshek, who opined that the ACL tear, discussed in the MRI, looked more traumatic in nature and occurred subsequent to

the December 3, 2009 injury. He explained that, even though the radiologist found it to be “chronically torn and absent,” in his experience, it can be folded on itself and look absent, “So the ability to date an anterior cruciate ligament is more difficult to do on an MRI scan.” Despite the radiologist’s opinion to the contrary, Dr. Woiteshek believed the ACL tear had not been present for longer than a week at the time the MRI of the knee was taken. However, upon further questioning, he opined that “you cannot date an anterior cruciate—it’s very hard to date an anterior cruciate ligament rupture by the MRI scan...but in my experience as an orthopedic surgeon, that could definitely be a sign of an acute tear because the ligament can be folded on itself.” Ultimately, though, he admitted that the actual MRI did not show an acute tear. Therefore, while he tried to connect the ACL tear to the December 3, 2009 injury, he was somewhat equivocal in that opinion by admitting the difficulty in being able to date an ACL tear from an MRI.

In addition to the radiologist, who read the MRI, clearly finding that the absent ACL was a chronic condition, Dr. Milne similarly opined that the torn and absent ACL clearly occurred long before the December 3, 2009 injury. Dr. Milne explained that if it was an acute tear, you could see fibers of the ligament, albeit disrupted, but in this case there were no fibers to even see, so it was chronically torn and absent, consistent with the injury and surgery years earlier. Dr. Milne also testified that he did not believe the mechanism of injury of twisting the knee from missing a step would correlate with an acute tear of the ACL, because it was not significant enough to tear the ACL in such a way that it would be completely absent on an MRI seven days later. I would also note that the ACL being chronically torn and absent, as opposed to being acutely torn from the injury, is more consistent with the balance of the profoundly degenerative findings in the right knee, including the absence of the medial meniscus, a complete loss of cartilage, and bone-on-bone arthritis in the right knee.

Therefore, with regard to the ACL tear, I find Dr. Milne’s opinions and testimony more persuasive and more properly supported by the rest of the medical evidence in this case, than the contrary opinion of Dr. Woiteshek in this regard. I find that Dr. Milne more clearly explained his opinions regarding the ACL tear and his ultimate opinion is supported by the radiologist, who read the MRI. Accordingly, I find that Claimant has not met his burden of proving that the ACL tear in the right knee is medically causally related to the December 3, 2009 work injury.

However, with regard to the aggravation of the osteoarthritis of the right knee, I find that Claimant has met his burden of proving that the work injury on December 3, 2009 is the prevailing factor in the cause of that medical condition and the disability that is associated with it. While I agree with Dr. Milne that the work injury on December 3, 2009 did not cause Claimant’s significant degenerative joint disease in the right knee, I find that it did aggravate that condition and caused it to become symptomatic, when it had not been symptomatic for years leading up to that 2009 injury. Even Employer’s medical expert, Dr. Milne, opined that the edema within the medial femoral condyle and medial tibial plateau that was discovered on the MRI taken one week after the work injury could be acute. In that respect, I believe that these findings represent objective symptoms of the injury at work that occurred on December 3, 2009. On the basis of these findings, while the degenerative arthritis in the knee was not caused by the work injury, I agree with Dr. Woiteshek that it was aggravated by the accident, such that it became a symptomatic condition and it manifested these objective differences in the pathology of the right knee.

Therefore, with regard to the aggravation of the osteoarthritis of the right knee, I find Dr. Woiteshek's opinions and testimony more persuasive and more properly supported by the rest of the medical evidence in this case, than the contrary opinion of Dr. Milne in this regard. Accordingly, I find that Claimant has met his burden of proving that the aggravation of the osteoarthritis in the right knee is medically causally related to the December 3, 2009 work injury.

Accordingly, I find that Claimant has met his burden of proof to show that he suffered an accident at work on December 3, 2009, which arose out of and in the course of his employment for Employer. He has also met his burden of proving that the accident on December 3, 2009 was the prevailing factor in the development of an aggravation of the osteoarthritis in his right knee, and, thus, that medical condition and the disability associated with it are medically casually related to that accident at work.

Issue 4: What is the nature and extent of Claimant's permanent partial disability attributable to this injury?

Under **Mo. Rev. Stat. § 287.190.6 (1) (2005)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id.*** at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Additionally, under the 2005 amendments to the Workers' Compensation Law, the Legislature added further provisions that have an impact on the determination of the nature and extent of permanent partial disability. **Mo. Rev. Stat. § 287.190.6 (2) (2005)** states,

Permanent partial disability... shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

Therefore, according to the terms of this statute, it is incumbent upon the claimant to have a medical opinion from a physician that demonstrates and certifies claimant's permanent partial disability within a reasonable degree of medical certainty. Further, if there are conflicting

opinions from physicians in a given case, then objective medical findings must prevail over subjective findings.

The issue of nature and extent of permanent partial disability is further complicated in this case by the pre-existing right knee condition/disability for which Claimant had received treatment prior to the December 3, 2009 work injury. **Mo. Rev. Stat. § 287.190.6 (3) (2005)** also provides that, "Any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment." Therefore, in the case at bar, when determining how much permanent partial disability Claimant has in the right knee attributable to the work injury, I find that it is necessary to divide out any disability that pre-existed the December 3, 2009 work injury attributable to the prior surgery, significant degenerative changes, absent meniscus, and chronically torn and absent ACL.

In awarding permanent partial disability for this injury under these new statutory provisions, it is, thus, necessary to deal with each of these sections. Considering the evidence listed above, I find that the medical opinion from Dr. Woiteshek demonstrates and certifies, within a reasonable degree of medical certainty, that Claimant sustained permanent partial disability as a result of the work-related injury on December 3, 2009, as well as his pre-existing right knee condition.

Accordingly, I find that Claimant has successfully met his burden of proof to show that Employer is responsible for the payment of permanent partial disability related to the December 3, 2009 injury.

By virtue of the prior right knee surgery and the profound degenerative changes in the right knee that pre-existed the December 3, 2009 accident, including the resected medial meniscus, chronically torn and absent ACL, and bone-on-bone degenerative arthritis, I find that Claimant had a significant pre-existing condition and disability at the level of the right knee, leading up to December 3, 2009. However, following this 2009 injury, I find that Claimant developed increased complaints in the right knee and additional acute findings demonstrated on the MRI, which required more aggressive conservative treatment (an injection and brace). That being said, Claimant has continued to work full duty without restrictions on account of the right knee. Additionally, records from examinations with Claimant's primary care physician, Dr. Borgmann, and records from his DOT physicals, between 2010 and the current time, do not show that Claimant is really having any significant enough complaints with the right knee so as to seek treatment or report limitations in his ability to function.

Based on all of this evidence, I find that Claimant has a total of 15% permanent partial disability of the right knee related to both his pre-existing condition and his compensable work injury of December 3, 2009. I further find that Claimant has permanent partial disability of 10% of the right knee on account of the prior surgery and significant degenerative changes in the knee, as described in more detail above, which pre-existed the work injury on December 3, 2009. Accordingly, I find that Employer is responsible for the payment of 5% permanent partial disability of the right knee related to this compensable accident at work on December 3, 2009.

Therefore, I find that Employer is responsible for the payment of 8 weeks of permanent partial disability benefits, related to this compensable accident at work on December 3, 2009.

CONCLUSION:

Claimant sustained an accident at work for Employer on December 3, 2009, arising out of and in the course of his employment, which resulted in an aggravation of the osteoarthritis in his right knee, status post non operative care. Claimant was performing his normal duties as a car hauler for Employer, unloading minivans at a car dealership on December 3, 2009 in Salina, Kansas, when he missed the last step of a ladder coming down the ramp of his transport vehicle, and he slipped approximately 2 feet and twisted his right knee. The accident on December 3, 2009 was the prevailing or primary factor causing the aggravation of the osteoarthritis in his right knee, which resulted in his need for conservative treatment for his complaints, and, thus, that medical condition, and the disability associated with it, are medically casually related to that accident at work. Employer is responsible for the payment of 5% permanent partial disability of the right knee (8 weeks) related to this compensable accident at work on December 3, 2009. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Mark A. Cordes for necessary legal services.

Made by: _____
JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation