

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

Injury No.: 06-064536

Employee: Phillinese Ezell

Employer: Famous-Barr

Insurer: Self-Insured c/o Federated Retail Holdings

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and we have considered the whole record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated May 12, 2009.

Preliminaries

The administrative law judge heard this matter to consider whether employee's work-related accident of July 5, 2006, was the medical cause of employee's back and bilateral knee injuries.

The administrative law judge found that employee sustained a permanent partial disability of 5% of each knee and 10% of the body as a whole referable to her back, as a direct result of the July 5, 2006, work-related accident.

Employer appealed to the Commission alleging the administrative law judge erred in finding that employee's work-related accident was the prevailing factor in causing her back and bilateral knee conditions.

Therefore, the primary issue currently before the Commission concerns whether the work injury of July 5, 2006, was the prevailing factor in causing employee's back and bilateral knee conditions.

Findings of Fact

Employee worked as a customer care representative in the collections department for employer from September 13, 1999, until her retirement on August 21, 2008. While performing her job, employee sat on a desk chair for the majority of her 8 hour work shift, except for the occasional bathroom or lunch break.

Work Fall

On July 5, 2006, employee stood up from her desk chair at work, when her right foot became caught underneath the wheel causing her to lose her balance and fall to the ground. After the fall, employee noticed pain in her back and knees, but did not believe that she needed medical treatment. Employee did not fill out an injury report on the day of the fall or request medical treatment. Employee completed her shift on the day of the

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fall. The following day, employee experienced swelling in her knees and increased pain in her back. Due to those symptoms, she requested medical treatment.

Employer referred employee to Concentra Medical Center. Employee was diagnosed with knee contusions and began physical therapy for her low back. Employee never received physical therapy for her bilateral knees. After several visits of therapy for her back, employee was released from Concentra's care.

Employee testified that after her release from Concentra, she continued to experience back and bilateral knee pain. Employee then went to her primary care physician, Dr. Gunby, for additional treatment. Employee saw Dr. Gunby for the first time after the work fall on August 25, 2006, which was 7 weeks after the fall, but did not mention a work injury or any history of an incident at work. Dr. Gunby prescribed Tramadol and Naprosyn for employee's back and ordered 4 or 5 physical therapy sessions for her back complaints. Dr. Gunby did not order any physical therapy for her knees.

Prior Back and Bilateral Knee Problems

Employee testified that three years before the work fall, she received medical care from Drs. Gunby and Rahimi for her back complaints. Dr. Gunby prescribed a Medrol dosepak and anti-inflammatory medication for her, and Dr. Rahimi once injected her lumbar back with a steroid epidural injection. Employee testified that prior to her work injury, her physical problems with her back would "come and go," but she was able to continue to work full-time. Employee treated with BJC Health Center (BJC) on May 26, 2004, and told her doctor that she "always" had low back pain "for as long as she could remember."

Employee testified that before the work fall she had an MRI of her back that showed degenerative disc disease and stenosis. Employee was then referred to Dr. Rahimi for pain management and treated with Dr. Rahimi before the work fall. On her questionnaire with Dr. Rahimi, which was completed before the work fall, employee listed her back pain as 9 out of 10 with an average daily pain near 10.

With regard to employee's bilateral knee pain, she had a total left knee replacement performed by Dr. Markenson on November 16, 2005 (less than a year **before** the work fall). Employee testified that she began to notice bilateral knee pain a few years prior to this surgery. Employee was diagnosed with arthritis in her bilateral knees and prescribed Naprosyn and Ibuprofen prior to the work fall. Employee indicated that she had difficulty walking prior to her work injury due to her knees.

On cross-examination, employee testified that she had seen Dr. Kramer for left knee problems as early as April of 1999. She stated that he injected her left knee. Employee testified that in July 2004, she was diagnosed with degenerative changes and both knees were aspirated and injected. Employee saw Dr. Kramer as recently to the work fall as March 16, 2005. On that day, Dr. Kramer aspirated and injected both her knees.

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Employee testified that she had also received treatment for her bilateral knees from BJC. Employee treated with BJC on multiple occasions during 2004, 2005, and 2006. Employee stated that she was prescribed a Medrol dosepak and Celebrex for pain, and continued to take those medications until the date of her work fall.

Employee testified that on May 22, 2006, approximately five weeks before her work fall, she reported back to BJC with complaints of left knee and back pain. Employee was also evaluated two weeks prior to the work fall, on June 23, 2006, when she complained of back and left leg pain. Employee acknowledged that she experienced persistent problems with her left knee after her 2005 surgery.

Independent Medical Evaluations

Dr. Levy saw employee for the purpose of performing an independent medical evaluation (IME) at the request of employee's attorney on June 7, 2007. Dr. Levy reported a history of employee's prior bilateral knee complaints and a diagnosis of arthritis. Dr. Levy did not mention or provide a summary of her prior back history in his report. Dr. Levy diagnosed her with a chronic lumbrosacral strain, degenerative disk disease at L4-5 and L5-S1, preexisting post left total knee replacement, degenerative arthritis of the right knee, and chronic strain to bilateral knees.

Dr. Levy opined that as a direct result of the July 5, 2006, injury, employee sustained 20% permanent partial disability of the body as a whole rated at the back and 10% permanent partial disability of each lower extremity at the knee.

Dr. Doll saw employee for the purpose of performing an IME at the request of employer on May 20, 2008. Employee advised Dr. Doll that she suffered from a thoracic sprain and indicated problems around her lumbar region. Dr. Doll opined that employee's complaints were inconsistent with her diagnosis. Dr. Doll noted that before the fall she was diagnosed with arthritis and stenosis in her lumbar region. Dr. Doll opined that her lumbar complaints were actually a chronic degenerative condition and not consistent with the fall that she sustained at work during July of 2006.

Dr. Doll opined that the work fall was not the prevailing factor in the cause of employee's back and knee symptoms. Dr. Doll opined that she had a preexisting condition and 0% of her current problems were attributable to her work fall.

Conclusions of Law

First of all, it is important to note that employee's alleged accidental injury occurred on July 5, 2006. Therefore, this case falls under the purview of the 2005 amendments to Missouri Workers' Compensation Law.

Section 287.120 RSMo Supp. (2006)¹ "requires employers to furnish compensation according to the provisions of the Workers' Compensation Law for personal injuries of

¹ Unless otherwise indicated, all statutory references are to RSMo. Supp. (2006).

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employees caused by accidents arising out of and in the course of the employee's employment." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

Section 287.020.2 RSMo defines "accident" 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." Pursuant to section 287.020.3 RSMo, an "injury" is defined to be "an injury which has arisen out of and in the course of employment." Section 287.020.3 RSMo further states that:

"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."

The administrative law judge found Dr. Levy to be more credible than Dr. Doll, but did not provide any rationale for said conclusion. Further, the administrative law judge, in awarding benefits, did not appear to focus on the primary issue in the case: Did employee satisfy her burden of proof that the July 5, 2006, work fall is the prevailing factor in causing her permanent partial disability to her back and knees? Although the administrative law judge used the language "prevailing factor" in his award, it appears that he and Dr. Levy actually viewed the work fall as an aggravation. Employee even argues in her brief that the work fall increased employee's permanent partial disability. Employee does not properly argue that the work fall was the "prevailing factor in causing both the resulting medical condition and disability."

Under current Missouri Workers' Compensation Law, "in order for an event that arises out of and in the course of one's employment to entitle an employee who has a prior disability to additional benefits, the event must be a prevailing factor that results in further disability. It is not sufficient that the event simply aggravates a preexisting condition." *Johnson v. Ind. Western Express, Inc.*, 281 S.W.3d 885, 893 (Mo. Ct. App. 2009), citing *Gordon*, 268 S.W.3d at 459.

As stated above, employee had an extensive medical history with regard to her back and both knees prior to the work fall. Although employee received some physical therapy from Concentra for her back shortly after the fall, she was released shortly thereafter without ever receiving any physical therapy or other treatment for her knees. In fact, seven weeks after the fall, when employee treated with her primary care physician with complaints of back and bilateral knee pain, she did not even mention the work fall as a cause of her pain complaints.

The fact that employee's prior history of back and bilateral knee problems is so extensive, including a diagnosis of degenerative disc disease and stenosis to her back, and a total knee replacement and a diagnosis of arthritis in her knees, we find Dr. Doll's opinion that the work injury was not the prevailing factor in the cause of her permanent partial disability to her back and knees more credible than Dr. Levy's. Dr. Levy did not

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provide a summary of employee's prior back history in his report, or even mention her prior back problems. On cross-examination, Dr. Levy agreed that he was provided medical records which revealed that employee previously underwent an MRI that revealed degenerative changes and that she had undergone an injection to her low back before the work fall. However, Dr. Levy testified that despite those records he did not rate any permanent disability in her back prior to the fall.

Although the administrative law judge acknowledged employee's prior medical history with respect to her back and bilateral knees, he did not properly weigh these prior medical problems when assessing the "prevailing factor" in causing employee's current permanent partial disabilities.

The Commission, based on the totality of the medical opinions and supporting facts in the record, finds Dr. Doll's opinion to be more credible than Dr. Levy's. Dr. Doll provided a more thorough summary of employee's prior medical history with regard to her back and bilateral knees and he also more logically assessed the effect that employee's prior history had on her current condition.

For the foregoing reasons, the Commission finds that the accident was not the prevailing factor in causing employee's permanent partial disabilities to her back and bilateral knees. Employee's claim for permanent partial disability benefits is, therefore, denied.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued May 12, 2009, is attached hereto for reference.

Given at Jefferson City, State of Missouri, this 7th day of October 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Phillinese Ezell

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

The administrative law judge made his determination after hearing live testimony, and reviewing the testimony of both medical experts. After considering the entire record, the administrative law judge found employee's evidence to be substantial, credible and persuasive.

It is illogical to presume that any employee with preexisting disabilities cannot experience an increase in permanent partial disability as a result of a traumatic event. Despite employer's allegations, Dr. Levy took into account employee's preexisting problems, and ultimately concluded that the work fall of July 5, 2006 was the prevailing factor in causing 20% permanent partial disability of the body as a whole rated at her back and 10% permanent partial disability of each lower extremity rated at the knees. On the other hand, Dr. Doll reviewed all of employee's medical records and determined that employee's work fall contributed 0% to her current problems.

The administrative law judge, after hearing live testimony and reviewing all of the depositions and reports, made a point to state that he found Dr. Levy to be more credible than Dr. Doll. I agree with the administrative law judge.

I believe the administrative law judge correctly applied the law, and made findings consistent with the overwhelming weight of the evidence. The evidence and employee's testimony fully establish that employee sustained an accident on July 5, 2006, arising out of and in the course of her employment, which is the prevailing factor in causing her current permanent partial disability to her back and bilateral knees.

I would affirm the award of the administrative law judge finding employer liable for employee's permanent partial disability benefits.

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

Jack Hickey, Member

AWARD

Employee: Phillinese Ezell Injury No.: 06-064536
Dependents: N/A Before the
Employer: Famous-Barr **Division of Workers'**
Additional Party: N/A **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Self Insured c/o Federated Retail Holdings
Hearing Date: March 3, 2009 Checked by: CTL: ms

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: July 5, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis 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 fell at work and sustained an injury to her knees and low back
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Knees and back
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$3274.96

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$582.84
- 19. Weekly compensation rate: \$388.58/376.55
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

56 weeks of permanent partial disability from Employer at the rate of \$376.55 per week

22. Second Injury Fund liability: No

TOTAL: \$21,086.80

23. Future requirements awarded:

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark Haywood

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Phillinese Ezell	Injury No.:	06-064536
Dependents:	N/A	Before the	
Employer:	Famous-Barr	Division of Workers'	
Additional Party:	N/A	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Self c/o Federated Retail Holdings	Checked by:	CTL: ms

PRELIMINARIES

A hearing was held in the above mentioned matter on March 3, 2009. The Claimant Phillinese Ezell, was represented by attorney Mark Haywood, and the Employer/Insurer was represented by attorney Loretta A. Simon.

STIPULATIONS

The parties stipulated the following:

1. Rate of compensation for permanent partial disability \$376.55.
2. Employer had paid medical benefits in the amount of \$3,274.96 and no temporary total disability benefits have been paid.

ISSUES

1. Medical causation.

FINDINGS OF FACT

1. Based upon substantial and credible evidence, I find: the Claimant, Phillinese Ezell, worked for Famous-Barr as a customer care representative from September 13, 1999 until she retired on August 21, 2008.
2. On July 5, 2006, Claimant was working when she got up out of her chair and got her foot caught beneath the wheel of her supervisors chair. As a result, Claimant fell on her knees and twisted her back. Claimant testified as a result of the fall she felt pain in her knees and low back. Claimant completed her workday and did not believe that she needed any medical attention. On July 6, 2006, Claimant returned to work and felt swelling in her knees and pain in her back and she sought medical treatment from her Employer.
3. The Employer sent Claimant to Concentra Medical Center where she was examined and she was diagnosed with knee contusions and also strain/sprain of low back, and she

received physical therapy for the low back. Claimant was last seen at Concentra on August 18, 2006.

4. After her release from Concentra's care, the Claimant testified she continued to have problems with her low back and bi-lateral knee pain, and she went to see her primary physician, Dr. Gumby who prescribed medication, and physical therapy for her back as well as physical therapy for her knees. Claimant also has gone for treatment with a chiropractor since October 2008.
5. Claimant testified that as a result of her fall on July 5, 2006, she has experienced back pain, as well as pain in her knees, and she has some physical limitations in that she is unable to work around the house like mopping her floors, buying groceries, or cleaning her house. Claimant further testified that although she did have prior problems that she noticed an increase in the problems in her knees and her low back as a result of the July 5, 2006 fall.
6. Claimant testified that after her fall of July 5, 2006 she did not miss any time from work and worked her job without restrictions.
7. Claimant prior to her work injury of July 5, 2006 had prior knee problems and was seen by Dr. Kramer for the bi-lateral knee complaints. The Claimant was diagnosed with degenerative changes and both knees were aspirated and injected.
8. Claimant prior to her fall of July 5, 2006 had been treated for knee problems as well as back problems by Dr. Kramer, BJC Health Center with complaints of knee and back problems.
9. On November 16, 2005 Claimant testified that she underwent total left knee replacement, which was performed by Dr. Markenson, but she did not undergo a total right knee replacement because she was not happy with the results of her left knee replacement.
10. With regard to Claimant's prior back problems before July 5, 2006, the medical records all show that she had complaints of back problems and was seen for her back and her knee problem by Dr. Kramer, St. Anthony's Hospital, BJC, and Dr. Rahimi.

From all the evidence it is obvious that prior to her injury of July 5, 2006, the Claimant had problems with her knees as well as her low back which she injured in her fall in the instant case.

Dr. Levy saw the Claimant for an IME on behalf of the Claimant's attorney, and the testimony in my opinion was very credible. Dr. Levy diagnosed lumbar strain, strains to both knees and found that the fall of July 5, 2006 would be the prevailing factor in increasing the permanent total disability to Claimant's knees and low back while recognizing the pre-existing disability. Dr. Levy was of the opinion that as a result of the July 5, 2006 injury the Claimant sustained 20 percent of the body as a whole relating to her back and 10 percent of each lower extremity at the knee.

Dr. Doll on behalf of the Employer felt that the Claimant did not sustain any permanent partial disability as a result of her July 5, 2006 injury. I find from all the evidence that Dr. Levy's testimony was more credible than Dr. Doll's.

RULINGS OF LAW

Claimant as a result of her injury on July 5, 2006, based upon competent substantial evidence sustained a permanent partial disability of 5 percent of each knee and 10 percent of the body as a whole referable to the back, which amounts to 56 weeks of permanent partial disability at the rate of \$376.55 for a total of \$21,086.80.

Date: _____

Made by: _____

Cornelius T. Lane
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation