

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

Injury No.: 05-120748

Employee: Leonard Froehlich
Employer: Dupuis Redi-Mix Concrete
Insurer: Builders' Association Self-Insurer's Fund
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (open)

Date of Accident: October 26, 2005

Place and County of Accident: Greenwood, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 22, 2007. The award and decision of Administrative Law Judge Carl Mueller, issued March 22, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 19th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

FINAL AWARD

Employee: Leonard Froehlich Injury No: 05-120748
Dependents: N/A
Employer: Dupuis Redi-Mix Concrete

Additional Party: State Treasurer as Custodian of the Second Injury Fund
(Fund Issues reserved to a separate future hearing)

Insurer: Builders' Association Self-Insurers' Fund

Hearing Date: March 13, 2007

Checked by: RCM/rcm

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: October 26, 2005
5. State location where accident occurred or occupational disease was contracted: Greenwood, Jackson 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: Employee was getting out of the cab of a cement truck when he slipped and injured his right hip.
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 lower extremity at the 207-week level.
14. Nature and extent of any permanent disability: Fifty percent (50%) – Right Lower Extremity at the 207-week level
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,444.53
17. Value necessary medical aid not furnished by employer/insurer? \$11,779.53
18. Employee's average weekly wages: \$770.04
19. Weekly compensation rate: \$513.36 for temporary total and \$365.08 for permanent partial disability compensation.
20. Method wages computation: By agreement.
21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred.....	\$65,044.06
Less credit for expenses already paid.....	(\$2,444.53)
Less adjustment for private health insurance carrier.....	(\$50,820.00)
Total Medical Owning.....	<u>\$11,779.53</u>

Temporary Disability

Six Weeks (05/08/2006 to 06/19/2006).....	\$3,080.16
Less credit for benefits already paid.....	(\$0.00)
Total TTD Owning.....	<u>\$3,080.16</u>

Permanent Partial Disability

50% Right Lower Extremity at 207-Week Level..... \$37,785.78^[1]

Total Award:..... **\$52,645.47**

22. Second Injury Fund liability: Not addressed at this hearing

23. Future requirements awarded: Open medical (see Award)

Said payments to begin as of date of this 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 twenty-four percent (24%) lien in favor of Keith V. Yarwood, Attorney, for reasonable and necessary attorney’s fees pursuant to MO.REV.STAT. §287.260.1. See body of Award for more detailed computations.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Leonard Froehlich Injury No: 05-120748
Dependents: N/A
Employer: Dupuis Redi-Mix Concrete
Additional Party: State Treasurer as Custodian of the Second Injury Fund
(Fund Issues reserved to a separate future hearing)
Insurer: Builders’ Association Self-Insurers’ Fund
Hearing Date: March 13, 2007 Checked by: RCM/rcm

On March 13, 2007, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Leonard Froehlich, appeared in person and with counsel, Keith V. Yarwood. The employer appeared through Jeff Stigall. The proceeding against the employer and the Second Injury Fund was bifurcated by agreement. The primary issues the parties requested the Division to determine were whether the accident at issue caused disability and need for treatment that the employee claimed; whether Mr. Froehlich is entitled to temporary total disability benefits from May 8, 2006 through June 19, 2006 representing six (6) weeks of compensation totaling \$3,080.16; whether Dupuis Redi-Mix must reimburse the employee for medical expenses totaling \$11,779.53; whether Dupuis Redi-Mix must provide the employee with additional medical care; and whether Mr. Froehlich suffered any disability and, if so, the nature and extent of Mr. Froehlich’s disability.

For the reasons noted below, I find that Mr. Froehlich: sustained a compensable injury on October 26, 2005 that resulted in 50% permanent partial disability to his right lower extremity at the 207-week level; was temporarily and totally disabled from May 8, 2006 through June 19, 2006; must be reimbursed for medical expenses totaling \$11,779.53; and receive continuing medical care as a result of his October 26, 2005 injury.

STIPULATIONS

The parties stipulated that:

1. On or about October 26, 2005 (“the injury date”), Dupuis Redi-Mix (“Dupuis”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully self-insured through Builders’ Association Self-Insurers’ Fund;
2. Mr. Froehlich was an employee of Dupuis working subject to the law in Greenwood,

Jackson County, Missouri;

3. Mr. Froehlich sustained an accident arising out of and in the course of his employment on October 26, 2005
4. Mr. Froehlich both notified Dupuis of the accident as required by law and filed his Claim within the time allowed by law;
5. Mr. Froehlich earned a \$770.04 average weekly wage resulting in a weekly \$513.36 temporary total disability compensation ("TTD") rate, and the maximum \$365.08 weekly permanent partial disability ("PPD") rate;
6. Dupuis has not paid Mr. Froehlich any TTD;
7. Dupuis provided Mr. Froehlich with medical care costing \$2,444.53. Mr. Froehlich incurred an additional \$11,779.53 in medical expenses for which he seeks reimbursement.

ISSUES

The parties requested the Division to determine:

1. Whether the accident caused the disability and need for treatment that Mr. Froehlich claims?
2. Whether Mr. Froehlich is entitled to TTD from May 8, 2006 through June 19, 2006 representing six (6) weeks for compensation totaling \$3,080.16?
3. Whether Dupuis must reimburse Mr. Froehlich's additional medical expenses totaling \$11,779.53?
4. Whether Dupuis must provide Mr. Froehlich with additional medical care? And,
5. Whether Mr. Froehlich suffered any disability and, if so, the nature and extent of his disability?

FINDINGS

Mr. Froehlich testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Letter dated April 11, 2006 from Scott M. Cook, M.D.
- Exhibit B – Medical Bill – Shawnee Mission Medical Center
- Exhibit C – Letter dated April 14, 2006 from Yarwood to Stigall
- Exhibit D – Medical Bill – Orthopaedic and Sports Medicine Consultants
- Exhibit E – Affidavit – Kathy Hogan, March 9, 2007
- Exhibit F – Medical Report, James A. Stuckmeyer, M.D., August 11, 2006

Although Dupuis did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1 – Medical Report, Roger W. Hood, M.D., December 20, 2005
- Exhibit 2 – Medical Report, Roger W. Hood, M.D., January 12, 2006
- Exhibit 3 – Medical Report, Roger W. Hood, M.D., October 2, 2006

- Exhibit 4 – Letter dated February 8, 2007 from Mary Buhr, R.M.C.T.
- Exhibit 5 – Letter dated February 14, 2007 from Stigall to Yarwood
- Exhibit 6 – Deposition, Leonard Froehlich, June 13, 2006

Based on the above exhibits and the testimony of Mr. Froehlich, I make the following findings. Mr. Froehlich is a married, 66-year old male, who lives with his wife in Lee's Summit, Missouri. At the time of the accident, Mr. Froehlich had worked for Dupuis Redi-Mix for two (2) years and had taken the job to procure medical insurance to cover his wife's medical needs due to her diabetic condition. It is his hope to continue working for as long as possible.

On October 26, 2005, Mr. Froehlich worked for Dupuis Redi-Mix as a cement truck driver. Among his responsibilities were to transfer unused cement from his truck to another truck. On October 26, 2005 he backed his truck into position to transfer the rest of his load of concrete. In doing so, Mr. Froehlich backed the back end of his truck up a hill while leaving the front portion of the truck on the flat surface. In doing so, the truck formed a triangle with the ground with the cab of the truck directly over the widest angle of the triangle thereby lifting the cab an additional one and a half to two feet off the ground. To exit the vehicle, Mr. Froehlich backed out of the cab placing his right foot on the top of two steps and attempted to place his left foot on the lower of two steps. Mr. Froehlich's left foot slipped off the lower step causing him to fall and placing all of his 195 pound weight on his right leg. By the time Mr. Froehlich's right foot broke lose of the top step his right foot was at approximately the level of his right shoulder with the sole of his foot facing away from him. Mr. Froehlich both felt and heard a "pop" at that point and momentarily felt excruciating pain in his right hip. However, that pain quickly dissipated and was overwhelmed by the pain he felt from a gash he suffered to his foot.

Mr. Froehlich experienced the pain primarily in his right hip, groin and buttocks. He did not immediately report the incident to his employers since he hoped he had merely strained his right hip and that the pain would eventually fade away. However, instead of fading away the pain grew progressively worse until he could barely stand. Mr. Froehlich then reported the incident to his supervisor approximately seven days after the accident.

Mr. Froehlich was referred to Corporate Care on November 11, 2005. He reported discomfort in his hip and groin area. X-rays of the right hip did not reveal any acute boney abnormalities; however, the examining physician commented that there were some arthritic changes in the right hip joint. The Corporate Care physician concluded that Mr. Froehlich had suffered a right hip and groin strain. After subsequent evaluations the Corporate Care physician referred Mr. Froehlich to orthopedic surgeon, Dr. Roger Hood. On December 20, 2005 Dr. Hood stated that an MRI ordered by Corporate Care revealed increased uptake in the head and that it looked more degenerative than traumatic. Dr. Hood then ordered an MRI of Mr. Froehlich's back. Mr. Froehlich told Dr. Hood that it would show that he had an old back injury. Mr. Froehlich informed Dr. Hood that he had periodic pain due to his back radiating down the back of his right thigh. However, the pain he had experienced since October 26, 2005 was completely different in that it was localized in the hip area, right buttocks and groin.

The MRI scan did show degenerative disc disease and bulging of the disc at L3-4 and L4-5 with some central and mild bilateral recess stenosis. On January 12, 2006 Dr. Hood opined that Mr. Froehlich's leg pain was a result of his back problems and not due to an injury sustained on October 26, 2005. At his own expense, Mr. Froehlich sought another opinion from orthopedic specialist Dr. Scott Cook on February 7, 2006. On April 11, 2006 Dr. Cook issued an opinion to Mr. Froehlich's attorney stating that Mr. Froehlich's hip pain was "contemporary with the incident occurring at work on October 26, 2005. The fact that Mr. Froehlich did not have pain prior to the incident and rapid nature of his x-ray finding regarding the degenerative disease of the right hip lend support to this pain being a result of this injury." See, Claimant's Exhibit A at 1. Dr. Cook observed after comparing Mr. Froehlich's November 15, 2005 x-rays with his February 2, 2006 x-rays that his "articular space in the right hip had decreased significantly during the interval between these x-rays." *Id.* Dr. Cook opined that this rapid degeneration over only 84 days resulted from Mr. Froehlich's October 26, 2005 injury and that he required a right total hip arthroplasty. *Id.* at 2. Dr. Cook also stated that Mr. Froehlich would require continued medical treatment with yearly follow-ups following his surgery. Finally, Dr. Cook opined that Mr. Froehlich's degenerative disc disease was not the prevailing cause of the right hip pain. *Id.*

Mr. Froehlich underwent the total right hip arthroplasty at Shawnee Mission Medical Center. Dr. Cook performed the operation. Shawnee Mission Medical Center charged a total of \$53,599.53 for its services. Mr.

Froehlich's health insurance subsequently paid \$8,063.06 of that bill. Shawnee Mission adjusted the bill downward an additional \$43,435.66 and Medicare paid the remaining \$2,100.81. See, Claimant's Exhibit B.

Dr. Cook charged an additional \$9,000.00 for his services. Mr. Froehlich's health insurer, United Health Care, paid \$1,292.53 of the bill. Dr. Cook made a contractual reduction of \$7,384.34. Medicare paid the remaining \$323.13. See, Claimant's Exhibit D.

On August 8, 2006 orthopedic surgeon, Dr. James A. Stuckmeyer, performed an evaluation of Mr. Froehlich and concluded that within a reasonable degree of medical certainty the right hip injury Mr. Froehlich sustained on October 26, 2005 was the prevailing factor causing the development of an aggressive degenerative condition in Mr. Froehlich's right hip. He concurred with Dr. Cook that Mr. Froehlich sustained an injury to the femoral head leading to the degeneration of the right hip necessitating the total hip replacement. Dr. Stuckmeyer *disagreed* with Dr. Hood that Mr. Froehlich's preexisting lumbar condition caused pain to Mr. Froehlich's groin since the total hip replacement had offered significant relief to Mr. Froehlich's post injury complaints. See, Claimant's Exhibit F at 6. Dr. Stuckmeyer further concluded that the treatment Mr. Froehlich underwent as a result of his injury on October 26, 2005 at the direction of Dr. Cook was appropriate and indicated by the accident. Dr. Stuckmeyer placed restrictions on Mr. Froehlich including no prolonged standing, no prolonged walking, and avoidance of any activity which would potentially cause dislocation of Mr. Froehlich's right hip prosthesis. *Id.* at 6-7.

While Dr. Stuckmeyer was hopeful that Mr. Froehlich's current hip prosthesis would last him the rest of his life he did state that if Mr. Froehlich did need to undergo another hip arthroplasty, it would be as a result of his work-related injury on October 26, 2005. Dr. Stuckmeyer rendered a 50% permanent partial disability to the right hip causally related to the accident on October 26, 2005. *Id.* at 7.

On October 2, 2006 Dr. Hood wrote the insurance company adjustor and back-peddled from his January 12, 2006 opinion that Mr. Froehlich's pain resulted from foraminal stenosis and not a hip injury. See, Employer's Exhibit 2. Instead, Dr. Hood now opined that if Mr. Froehlich's x-rays had "changed significantly" . . . "then this may be all workers [sic] comp." See, Employer's Exhibit 3.

Mr. Froehlich returned to full time work driving a concrete truck for Dupuis on June 19, 2006 - just six weeks after his May 8, 2006 hip replacement surgery. Five weeks after the surgery Mr. Froehlich reported a marked decrease in pain. See, Employer's Exhibit 6 at 37:20-25. Mr. Froehlich was anxious to return to work as he was not receiving TTD. Before his injury Mr. Froehlich could haul up to six loads of concrete per day; now he is able to haul only four per day. Mr. Froehlich also has difficulty climbing ladders and stairs. In addition, he no longer can run, squat, kneel or play golf. Mr. Froehlich noted that he barely had fifty percent use of his right hip. In addition, he walks with a limp which alters his gait which now causes Mr. Froehlich to have low back pain.

RULINGS

Given that Dr. Hood equivocated on his original opinion that Mr. Froehlich's pain resulted from spinal stenosis, coupled with the fact Dr. Hood did not examine the x-rays relied on by Dr. Cook, I find that Dr. Cook's opinions are more persuasive in this case. While I laud Dr. Hood for reconsidering his initial January 12, 2006 opinion, that necessarily makes his original opinion that much less authoritative. Dr. Cook reviewed the objective medical evidence available in this case more completely than Dr. Hood. I adopt Dr. Cook's opinions.

I conclude that Mr. Froehlich's October 26, 2005 work-related accident was the prevailing factor in causing his need for a total right hip arthroplasty and any subsequent treatment to the right hip. I further find that the \$11,779.53 in medical expenses Mr. Froehlich incurred as a result of treatment for his injuries from October 26, 2005 are fair and reasonable and therefore order the employer/insurer to reimburse Mr. Froehlich \$11,779.53 for those medical expenses.

I further find that as a result of Mr. Froehlich's injuries in this case, he was unable to work from May 8, 2006 through June 19, 2006. I find that Mr. Froehlich's injury became permanent on June 19, 2006 upon his return to work. I award him TTD payments of \$513.36 per week from May 8, 2006 through June 19, 2006 for accrued TTD benefits totaling \$3,080.16. I therefore order Dupuis to pay Mr. Froehlich \$3,080.16 for this past due TTD.

While the treatment that Mr. Froehlich has undergone has substantially reduced the amount of pain and difficulty he has with his right hip, he still has experienced a significant loss of productivity and continues to experience pain in his right hip, buttocks, groin and now his low back due to his altered gait. Before his injury Mr. Froehlich could haul up to six loads of concrete per day; now he is able to haul only four per day. But, this thirty-three percent decline in his work productivity is not the only loss he has sustained; he no longer can run, squat, kneel or play golf. Mr. Froehlich noted that he barely had fifty percent use of his right hip. In addition, Dr.

Stuckmeyer opined that Mr. Froehlich sustained fifty percent disability of his hip. [2] I find Dr. Stuckmeyer's opinion credible and find that Mr. Froehlich, in fact, has suffered fifty percent (50%) permanent partial disability to the right lower extremity at the 207-week level. Thus, I award Mr. Froehlich one hundred three and one-half (103 ½) weeks of permanent partial disability benefits. Since Mr. Froehlich's period of temporary disability ended on June 19, 2006, his condition also became permanent at that time. Therefore, thirty eight and one-seventh's weeks of PPD have accrued from that date through the March 13, 2007 hearing date. Thus, \$13,925.19 in PPD is immediately due [3]; Dupuis may pay him the entire PPD award in one lump sum (totaling \$37,785.78 for the 103.5 week period), or simply pay him the \$12,925.19 in PPD due through March 13, 2007 with the remaining PPD due on a weekly basis of \$365.08 through June 14, 2008.

Finally, I find that as a result of his October 26, 2005 injury Mr. Froehlich will need to undergo ongoing evaluation and treatment by Dr. Scott Cook with the possibility of a future total right hip arthroplasty redo. Therefore, I also award Mr. Froehlich ongoing medical treatment with Dr. Scott Cook at Dupuis' expense. Mr. Froehlich's attorney advised Dupuis' counsel by letter dated April 14, 2006 that Mr. Froehlich's need for treatment was due to his work injury and demanded treatment from Dupuis before proceeding with his surgery. See, Claimant's Exhibit C. Dupuis declined to provide the treatment. Dupuis waived its right to select the medical provider by failing or neglecting to provide necessary and demanded medical care. Herring v. Yellow Freight System, Inc., 914 SW2d. 816 (Mo.App. 1995). Where an employer with notice of an injury refuses or neglects to provide necessary medical care, the Claimant may make his own selection and have the cost assessed against the Employer. *Id.* at 822. Also see Feltrop v. Eskins Drywall and Insulation, 957 SW2d. 408 at 415 (Mo.App. 1997). I order Dupuis to pay for any additional treatment that Dr. Scott Cook believes is necessary to treat Mr. Froehlich's right hip condition as a result of his October 26, 2005 work-injury. And, Dupuis shall pay for all treatment rendered and recommended by Dr. Cook without negotiation upon submission of the bills for payment with certification that the treatment rendered was for treatment provided as a result of Mr. Froehlich's work-related injury on October 26, 2005.

Mr. Froehlich's attorney requested a fee equal to twenty four percent (24%) of all amounts awarded. I find such request to be fair and reasonable and order a lien on this award until his fee is paid in full. The following benefits are immediately due: \$3,080.16 in TTD; \$11,779.53 accrued medical expenses; and, \$13,925.19 in PPD. Together these amounts total \$28,784.88. Mr. Yarwood's lien totals \$6,908.27 of this amount. If Dupuis chooses to pay these amounts together with the unaccrued PPD, the award would total \$52,645.47 and Mr. Yarwood's lien would total \$12,634.91. If Dupuis pays Mr. Froehlich's unaccrued PPD on a weekly basis, the weekly benefit shall be subject to a lien for Mr. Yarwood totaling \$87.62 of each payment. The Claim against the State Treasurer as Custodian of the Second Injury Fund shall remain open on the Division's Open Docket to be set upon request.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director

Division of Workers' Compensation

[1] Of this amount, \$13,925.19 in PPD is immediately due. However, Dupuis may pay Mr. Froehlich the entire PPD award in one lump sum (totaling \$37,785.78 for the 103.5 week period), or simply pay him the \$12,925.19 in PPD due through March 13, 2007 with the remaining PPD due on a weekly basis of \$365.08 through June 14, 2008. See body of Award for more detailed computations.

[2] Dr. Stuckmeyer's rating was the only one presented at hearing as Dupuis did not offer a rating report.

[3] 267 days have elapsed from June 19, 2006 through March 13, 2007. 267 days equals 38 and 1/7s weeks. 38 and 1/7 weeks x \$365.08/week = \$13,925.19