

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

Injury No.: 02-145763

Employee: Gary Gill  
Employer: Rockwood Holdings, Inc.  
Insurer: Lumbermen's Mutual Casualty Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged March 1, 2002  
Place and County of Accident: Alleged St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 October 13, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued October 13, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21<sup>st</sup> day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Dependents: N/A  
Employer: Rockwood Holdings, Inc.  
Additional Party: Second Injury Fund  
Insurer: Lumbermen's Mutual Casualty Company  
Hearing Date: July 14, 2004

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

Checked by: MDL:tr

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: March 1, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Allegedly walking and going up and down steps.
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: N/A
14. Nature and extent of any permanent disability: -0-
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Gary Gill Injury No.: 02-145763

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$1,100.00
19. Weekly compensation rate: \$628.90/\$329.42
20. Method wages computation: Agreement

### COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL:

-0-

23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Gary Gill	Injury No.:	02-145763
Dependents:	N/A		Before the
Employer:	Rockwood Holdings, Inc.		<b>Division of Workers'</b>
Additional Party:	Second Injury Fund		<b>Compensation</b>
			Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Lumbermen's Mutual Casualty Company	Checked by:	MDL:tr

### **PRELIMINARIES**

A hearing was held on July 14, 2004, at the Division of Workers' Compensation in the City of St. Louis. Gary Gill ("Claimant") was represented by Mr. Tom Fagan. Rockwood Holdings, Inc. ("Employer") and its Insurer, Lumbermen's Mutual Casualty Company, were represented by Ms. Betsy Levitt.

The parties stipulated that on or about March 1, 2002, Claimant was an employee of Employer; Claimant was earning an average weekly wage of \$1,100.00 resulting in applicable compensation rates of \$628.90 for temporary total disability and \$329.42 for permanent partial disability benefits; and Employer has paid no benefits.

The issues to be resolved by way of hearing are: Did Claimant sustain an accident or occupational disease arising out of and in the course of employment; did Claimant provide Employer the requisite notice; is Claimant entitled to past temporary total disability benefits for 20 1/7 weeks; were Claimant's complaints medically causally related to the alleged March 1, 2002, injury; liability of Employer for past medical benefits; liability of Employer for future medical benefits; and nature and extent of permanent partial disability sustained by Claimant.

## FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

Claimant began working for Employer, a production plant, in November 1982 and ended his employment December 31, 2002. Claimant filed a Claim for Compensation with the Division of Workers' Compensation on or about February 3, 2003. While working for Employer he was a process control coordinator. He performed chemical lab tests on products. In 1997 his supervisor was John Unterreiner, and Joe Moramarco became his supervisor after him. Claimant worked 40 to 60 hours per week. The 1,500 square foot lab was on the second floor of the building.

Claimant spent most of his time at work in the lab. The lab is set up with four mulling tables that support a heavy machine. The metal steps to the second floor were in three tiers. Claimant testified that on the average he went up the steps two to four times per shift, and occasionally as much as five or six times per shift.

Claimant testified that 75 to 80% of his time was spent standing. The lab had carpets and mats installed in the 1990s. There were pads at each workstation that were about an inch thick and carpet was elsewhere. Employer purchased a high stool for him. When he entered information into the computer he was able to sit. Claimant told John Unterreiner his legs hurt carrying liquid nitrogen. Claimant testified he also told Karl Schneider that his knees hurt beginning in 1997. Before March 2002, Claimant had no medical treatment for his right knee.

Claimant testified that in March 2002, he hit his right knee on a mulling machine. Claimant stated he was by himself at the time and did not tell anyone at Employer about the alleged accident. He did not fill out a Report of Injury, and did not ask for medical treatment from Employer. Claimant went to his family doctor, Dr. Mammen, on March 5, 2002, who suggested an MRI, and referred Claimant to Dr. Dusek on March 18, 2002.

When Claimant saw Dr. Dusek on March 18, 2002, he told him that he twisted his right knee getting out of a rental car that his daughter had. He testified he lied to Dr. Dusek because he did not want to file a workers' compensation claim against Employer. He testified that he was a salaried employee and did not know of anyone who had filed a claim, although he was aware of union employees who had filed claims.

Although Claimant testified the history given to Dr. Dusek was a lie, he admitted on cross-examination that he did have a rental car in March 2002 because his daughter was in a car accident. He testified he told Dr. Dusek he injured his right knee getting out of a rental car, because that was the first thing that popped into his head. Claimant testified that he also had another incident to his right knee about the same time he had his first arthroscopic surgery.

Claimant testified during safety meetings workers' compensation was openly discussed. There were bonuses given for no lost time injuries every three months with a \$10.00 gift card from Wal-Mart. If an employee went an entire year he could get a \$100.00 gift card. Claimant testified at trial that before March 3, 2002, he had complaints to his right knee, although he denied he had any problems with his right knee in his pre-trial deposition.

The first surgery to his right knee occurred in April 2002 in Dr. Dusek's office. Claimant was off work for about a month and was paid his full salary by Employer. Claimant had a second arthroscopic surgery to his right knee on August 12, 2002, and he was off for about a month to a month and one-half. After his second surgery his right knee did not get any better. Eventually, Dr. Dusek recommended a total right knee replacement, which was performed at St. Anthony's Hospital on August 21, 2003. Claimant was told that he might eventually need another total knee replacement.

The right total knee replacement has helped. Claimant does not have the constant pain he used to have, although he does have soreness in his knee, numbness on the right side, leg cramps and restless legs. On a good day he feels he has 60 to 65% use of the right leg and on a bad day 35%. Claimant does not have a torn meniscus on the left knee.

In January 2003, Claimant got a job working as a courier for Zipp Express, but he didn't last long because he had trouble getting in and out of the car. Claimant cannot play golf anymore and has not done any fishing. He walks with a limp now, and in 1987 he had a left hip replacement and people told him that he walked with a slight limp thereafter.

Karl Schneider testified by deposition. He worked for Employer since November 1997 as a process control coordinator. He did not work the same shift as Claimant. He worked 40 hours a week with 20 to 30 hours overtime a month. Ninety percent of his time was spent standing. They had rubber mats to stand on. Claimant did mention to him that his knees were aching, but he never correlated those complaints with his work activities at Employer.

John Unterreiner also testified by deposition. He was Claimant's supervisor from 1998 to 2002. He worked days and Claimant was in the rotating shift. Mr. Unterreiner testified that Claimant would sit 20% of the day, stand 60% of the day, and walk 20% of the day. He testified that the number of times Claimant went up the steps varied from none to once or twice a day. Claimant mentioned several times to Mr. Unterreiner that he had problems with his knees. No other employees complained to him of knee problems and it never crossed his mind that the problem Claimant was having was a result of work duties.

Fred Glasstetter also testified by deposition. He is a safety and environmental engineer for Employer and is

responsible for the environmental condition of the facilities, personnel safety, as well as workers' compensation claims. Employer has 15 to 20 work comp claims a year. Other than Claimant, no one has ever filed a workers' compensation claim alleging repetitive trauma during the four or five years he has been handling claims. Claimant made some comments to Mr. Glasstetter that he was having problems with his knees walking down some steps prior to his leaving the employment in 2002. He did not take them as complaints, just general comments about himself.

When Claimant first saw Dr. Dusek on March 18, 2002, he gave a history of getting out of a rental car and twisting his right knee. Dr. Dusek's initial impression was right knee meniscal tears as well as some osteoarthritis. He recommended arthroscopic surgery to the right knee. The first arthroscopic surgery was performed on March 22, 2002, at his office. The post-operative diagnosis was right knee torn medial meniscus with early degenerative arthritis medial joint line.

Due to continued complaints, Dr. Dusek performed a second arthroscopic surgery on August 12, 2002. The post-operative diagnosis was right knee torn medial meniscus chondromalacia medial femoral condyle. After his second surgery Claimant continued to have problems with his right knee. On August 21, 2003, Claimant had a total knee replacement. The post-operative diagnosis was right knee osteoarthritis.

Dr. Dusek, a board certified orthopedic surgeon, testified on behalf of Claimant. Dr. Dusek testified that Claimant's work for Employer which required him to stand on hard concrete floors and go up and down stairs was a substantial contributory factor in causing his medical condition. Dr. Dusek did not believe that the alternative histories given by Claimant of bumping his knee on a mulling table or of twisting it getting out of a rental car were significant enough to be substantial contributing factors to his medical condition. Dr. Dusek testified that when males stand they put 80% of their weight on the inside of the knee and only 20% on the outside of the knee. Dr. Dusek testified that the mechanism of sustaining a meniscal tear would be consistent with getting out of a rental car and twisting his right knee. Dr. Dusek testified that Claimant had osteoarthritis in the right knee, which is a wear and tear process that occurs in normal everyday life activities.

Employer sent Claimant to Dr. James Burke, who is a board certified orthopedic surgeon. Dr. Burke reviewed the MRI films dated March 12, 2002, and August 5, 2002, and took x-rays in his office on December 15, 2003. His impression was right knee pain status post knee arthroscopy times two for a partial medial meniscectomy with subsequent worsening of arthritic change and conversion to a total knee replacement. Dr. Burke testified that the mechanism of injury – of striking his knee against a table is inconsistent with a meniscal tear. The mechanism of twisting a knee getting out of a rental car is consistent with a torn meniscus. Based upon the three descriptions of injury, one, hitting Claimant's knee on a mulling table causing right knee pain, two, getting out of a rental car and twisting his right knee, or three, repetitive standing, walking and going up and down steps, Dr. Burke is of the opinion that getting out of the rental car twisting Claimant's right knee is the substantial factor in causing the torn medial meniscus in the right knee and the need to undergo two arthroscopic surgeries on March 22, 2002, and August 12, 2002, and then a total knee replacement on August 21, 2003. He opined: "Torn cartilages almost universally - - and when I say torn cartilage, I say that in laymen's terms - - meniscal tears generally come from a significant twisting injury. The history of twisting your knee getting out of the car is not an uncommon history we see in our office with respects to generation of medial meniscal tears. Actually, it's not a surprising history at all. That, of the three potential histories given in this situation, was the only one in my opinion that was at all plausible to generate a meniscal tear. Cartilages don't tear from direct blows to the knee, which is one of the other reported possible etiologies of his knee pain. And cartilages don't tear to the extent that his did with simple walking in everyday life or we would all have meniscal tears, and that's clearly not the case. The most plausible reason for his meniscal tear, in my opinion, was his described rental car history which is present in the medical records."

Dr. Burke was of the opinion that the second arthroscopic surgery and the right total knee replacement all came from the first arthroscopic surgery and that it accelerated Claimant's arthritis over the year and one-half to the point that the claimant needed a right total knee replacement.

Dr. Burke testified that, "There isn't a repetitive job in the world that will cause rapidly progressive arthritis in a 57-year-old male over a year and a half time without an intervening factor. The intervening factor in this case was a torn meniscus. Yes, work-related repetitive stuff can cause arthritis to progress, but it will be slow and it will be ongoing and it will take many years, five to ten years at the earliest. This man's arthritis progressed from mild narrowing to bone on bone in a year and a half".

## RULINGS OF LAW

Based upon my comprehensive review of the evidence, including my observation of Claimant at hearing, the review of the medical evidence, and the application of Missouri Workers' Compensation law, I find:

Claimant has the burden of proving that he was injured as a result of an accident which arose out of and in the course of his employment (Section 287.120.1) or that he sustained an occupational disease (Section 287.067 Mo. Rev. Stat. (2000)). I find Claimant did not sustain an accident or occupational disease arising out of and in the course of his employment. I do not find Claimant hit his right knee on a mulling table.

Claimant alleges the reason he told Dr. Dusek that he twisted his right knee getting out of a rental car was because he was a salaried employee and did not want to file a workers' compensation claim against Employer. Claimant's testimony lacks credibility and is refuted by the weight of the evidence.

Contrary to Claimant's allegation that the history he gave Dr. Dusek was a lie, I find credibility in the history given in this record. It is important to remember that Claimant, not Employer, chose Dr. Dusek. When a person seeks medical attention there is every reason to believe that a person will disclose the truth to the doctor who is treating him so he can be treated appropriately.

When Claimant was asked at trial why he told Dr. Dusek the history of getting out of a rental car and twisting his right knee, when Claimant could have given a history of slipping and falling at the mall, etc., Claimant answered that it was the first thing that popped into his head. The reason it was the first thing that popped into Claimant's head was because it was the truth.

Claimant admitted that he had a rental car in March 2002 because his daughter was in a motor vehicle accident. He also admitted that he used the rental car and got in and out of it. The only part of the history that Claimant is alleging is untrue is the part about twisting his right knee getting out of the rental car. It is suspicious that the only part of the history given to Dr. Dusek which, according to Claimant, is not true, is the most damaging to his case.

Claimant has the burden of proving all essential elements of the claim and must establish medical causation. Claimant must prove that the injury arose out of and in the course of his employment. Claimant must present substantial and competent evidence that he has contracted an occupationally induced disease rather than an ordinary disease of life. Claimant must prove a direct causal connection between the conditions under which work is performed and the occupational disease. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo. App. 1991).

In this case, there are two equally qualified physicians who differ on the cause of Claimant's arthritis. Dr. Dusek testified that Claimant's work, which caused him to be on his feet and climbing stairs all day was a substantial factor in causing Claimant's medical condition.

I find Dr. Burke's opinion to be more persuasive than Dr. Dusek's. Dr. Burke's opinion, that the alleged work history of standing and climbing stairs at work is not the type of physical force that can cause a torn meniscus leading to two arthroscopic surgeries and a right total knee replacement, is more consistent with the evidence in this case. There is no direct causal connection between Claimant's job duties and his right knee condition for which he had his surgeries. I find Dr. Burke's opinion that Claimant had arthritis, which progressed rapidly over a year and one-half following a torn meniscus to be more consistent with all of the evidence in this case. Dr. Burke testified that the meniscal tear was most consistent with a twisting injury such as getting out of a car as opposed to a job involving repetitive activity.

## CONCLUSION

Since Claimant did not prove accident or occupational disease or medical causation, the remaining issues are moot.

The Claim for Compensation is denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Margaret D. Landolt  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Reneé T. Slusher  
*Director*  
*Division of Workers' Compensation*