

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

Injury No. 09-029659

Employee: Timothy Gladish
Employer: Enersys, Inc.
Insurer: Travelers Insurance Co. of America

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Medical causation

The administrative law judge found that the accident of April 24, 2009, was the prevailing factor causing employee to suffer a right knee injury. Employer challenges these findings on appeal. After a careful review of the expert medical opinion evidence on the issue, we ultimately agree with the administrative law judge's findings, however, we write separately because we wish to address the administrative law judge's findings regarding Dr. Dugan's testimony.

On page 11 of his award, the administrative law judge states that Dr. Dugan's testimony "is proof that nothing prior to April 24, 2009, caused the need for a total knee replacement on the right." We do not believe Dr. Dugan's testimony can be so interpreted.

Rather, Dr. Dugan testified that the "the prevailing factor for the changes...in his knee were degenerative" and that degenerative arthritis was the prevailing factor in the need for the total knee replacement. Dr. Dugan was apparently not aware of any accident or incident occurring at work. He later testified that the performance of employee's regular duties caused the need for the knee surgery he performed, though his later testimony on redirect seems to contradict this. While we believe Dr. Dugan is credible, we find his testimony is inadequately developed and does not address whether an accident was the prevailing factor causing a resulting condition or disability, or whether the criteria for compensability of future medical expense is met.

We are more persuaded by the testimony of Dr. Hopkins that the April 24, 2009, accident was the prevailing factor causing employee's condition. Dr. Hopkins testified that the accident was the prevailing cause because of "the lack of symptoms before, the type of work activity that he did with no prior treatment, no prior significant injuries, no prior disabilities and the fact that some people may have very profound arthritic changes without pain." To some extent, Dr. Dugan's testimony that "a traumatic event could have

Employee: Timothy Gladish

- 2 -

contributed to what is already a preexisting condition” corroborates Dr. Hopkin’s testimony. We find the April 24, 2009, accident was the prevailing factor causing employee’s condition.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued August 8, 2014, is attached and incorporated by this reference.

We approve and affirm 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 24th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Timothy Gladish

Injury No: 09-029659

Dependents: N/A

Employer: Enersys, Inc.

Insurer: Travelers Insurance Co. of America

Additional Party: N/A

Hearing Date: June 19, 2014

Checked by: MSS/drl

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: April 24, 2009
5. State location where accident occurred or occupational disease was contracted:
Warrensburg, Johnson 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: While in the scope and course of his employment the employee was pushing a tub of batteries down a conveyer belt when the tub got stuck in a curve in the belt causing the employee to hyper extend his right knee thereby sustaining an injury.

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 and low back.
14. Nature and extent of any permanent disability: As to the Employer: 30% permanent partial disability to the right knee and 5% to the low back.
15. Compensation paid to date \$595.00
16. Value necessary medical aid paid to date by employer/insurer? \$31, 428.03
17. Value necessary medical aid not furnished by employer/insurer? none
18. Employee's average weekly wages: \$694.17
19. Weekly compensation rate: \$462.78/404.66
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability: N/A

 By the employer: 68 weeks of compensation at \$404.66 per week total \$27,516.88
22. Future requirements awarded: N/A
23. Future Medical: Total knee replacement for the right knee.

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:

Jerry Kenter
Boyd Kenter Thomas & Parrish, LLC

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Timothy Gladish Injury No: 09-029659
Dependents: N/A
Employer: Enersys, Inc.
Insurer: Travelers Insurance Co. of America
Additional Party: N/A
Hearing Date: June 19, 2014 Checked by: MSS/drl

On June 19, 2014, the employee and the employer/ insurer appeared for a hearing for a permanent partial disability award. The case was tried with Injury Number 11-079239, which was for an accident of August 31, 2011, where in the employee seeks permanent partial disability payments and future medical benefits.

The Division had jurisdiction to hear this case pursuant to Sec. 287.110 R.S.Mo. The employee, Tim Gladish, appeared in person and with counsel, Jerry Kenter. The employer/insurer appeared with counsel, Samantha Benjamin-House.

For the reasons noted below, I find that the claimant is entitled to an Award of 30% permanent partial disability to the right knee and 5% permanent partial disability to the low back and a total knee replacement for the right knee.

STIPULATED FACTS

The parties stipulated that:

1. On or about April 24, 2009, the parties were operating subject to the Missouri Workers' Compensation Law.
2. The employee had an average weekly wage of \$694.17 resulting in a temporary total disability rate of \$462.78 and a permanent partial disability rate of \$404.66.

ISSUES PRESENTED

The parties requested the Division determine:

1. Whether the employee sustained an accident arising out of and in the course of his employment with the employer on April 24, 2009.
2. The nature and extent of any permanent partial disability sustained by the claimant.

3. Whether the accident of April 24, 2009 caused an injury to the right knee and low back.
4. Whether the employer is responsible for future medical treatment to the right knee.

FINDINGS OF FACT & RULINGS OF LAW

Claimant testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection. The objections within the deposition testimony are deemed overruled unless specifically addressed:

Exhibit No. A - Various Medical Records¹

Exhibit No. B - Internal Report of Injury for the accident of April 24, 2009

Exhibit No. C - Official state Report of Injury for the accident of April 24, 2009.

Exhibit No. D - Work restrictions from James Zarr, M.D.

Exhibit No. E - Deposition of William Hopkins, M.D. taken on March 30, 2012.²

The employer offered the following exhibits all of which were admitted without objection.

Exhibit No. 1 - Deposition of Gerald Dugan, M.D., taken on August 14, 2012.

Exhibit No. 2 - Deposition of James Zarr, M.D. taken on March 19, 2013.

FACTUAL BACKGROUND

Tim Gladish was present at the hearing and his testimony was credible. He was born on September 29, 1960 and was 53 years of age, at the time of the hearing. He stands about 5' 11 inches tall and weighs about 270 lbs.

He has a high school diploma with no post high school vocational training.

From 1980 to 1999, he worked for the Wal-Mart store in Warrensburg. He started out in the receiving area and then shifted to maintenance as a supervisor, in about 1993. He was on his feet about 50% of the time. His general maintenance duties included use of a floor scrubber and polisher in general floor maintenance and cleaning windows and vacuuming mats. He testified that during this employment he had no major problems with his knees and missed no time due to knee problems.

¹ The Employer/Insurer objected to causation opinions contained in the treatment records. That objection is discussed below.

² While stipulating to the doctor's qualifications as a physician, counsel for Employer/Insurer later after cross-examining the doctor, moved to strike his testimony because the doctor was not holding a current Missouri license to practice medicine. A strict construction of §287.120 makes no requirement that a doctor have current Missouri licensure to be able to render opinions. Employer's objection is overruled.

While working at Wal-Mart, he had a second job from about 1994 to about 2004 selling cell phones from his home for Mid Missouri Cellular. He had about 2,000 customers. This was a sedentary job. When he left Wal-Mart this became his principal occupation until Mid Missouri Cellular sold out to Verizon. He then started working for Enersys in July of 2004.

Enersys makes batteries ranging from small ones to huge ones for the U.S. Army used in Tanks and Humvee vehicles. Claimant took a physical with Enersys when he started in 2004, and passed it.

He has had related but varied jobs with Enersys. He started in the formation department where he worked for about fourteen months. He would have to push carts of batteries weighing from fourteen to one hundred and sixteen pounds down a conveyer belt and slide them toward a machine. While he had at least one other job with the company prior to the accident of April 2009, all the jobs he had were similar, and described by him as strenuous.

After the knee injury of April 24, 2009, the employer has accommodated him with sit down jobs. After the knee injury, he worked on the "CVA line" welding together battery parts with a reduction in pay of about 93 cents an hour. He held this job until he was bumped off of it, when an employee with more seniority came back to work and was then shifted to the "Valued Added Center" and "Direct Ship Area" with another pay reduction. He described this job as the lowest paying job in the plant.

On August 31, 2011 claimant testified that he injured his right knee a second time when he caught his right foot in a small gap underneath the lower conveyor mechanism when he got up from a sitting position because his leg fell asleep. That injury was filed under injury number 11-079239.

COURSE OF MEDICAL TREATMENT

On May 1, 2009, the employer referred claimant to Corporate Care where he saw Kenneth Reynolds, D.O. He was complaining of throbbing in the right leg. (Ex A p14) Claimant testified that his right leg, from his knee to his foot, was numb and he had some back pain as he had twisted his back at the time of the injury. Dr. Reynolds returned claimant to work with restricted duty of sitting work only with no bending, stooping, kneeling, or squatting. (Ex A p17) He believed that the problem in the right lower extremity was caused by the work activities. (Ex A p17) He prescribed medication. (Ex A p18)

Dr. Reynolds eventually referred the patient to Gerald Dugan, M.D., an orthopaedic surgeon.

Dr. Dugan eventually ordered an MRI of the right knee. Claimant testified that this was the first time he had an MRI of the right knee. On June 3, 2009, Dr. Dugan injected the right knee. (Ex A p44) On September 16, 2009 Dr. Dugan performed arthroscopic surgery on the right knee at the Surgicenter in Kansas City. (Ex A p90) Claimant testified that he was on crutches for about two weeks which aggravated the initial pain in his back.

On October 23,2009, claimant told Dr. Dugan that the surgery did not help. (Ex A p64) Claimant was then referred to James Zarr, M.D., a physical medicine specialist. Dr. Zarr ordered an EMG which was performed on 05/25/2010 and was said to be normal. (Ex A p228-230) Dr. Zarr then referred claimant to Dr. Eubanks for a series of three epidural injections in the low back which claimant testified did not help him. (Ex A p249-262) Claimant saw Dr. Zarr for the last time on August 6, 2010, and was prescribed Darvocet and Naprosyn which claimant testified he still takes at about four to five a month. He now also takes about four Tylenol a day for pain and two to three ibuprofen tablets a day for knee and leg pain.

ISSUES TO BE RESOLVED

I. WHETHER THE EMPLOYEE SUSTAINED AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE EMPLOYER ON APRIL 24, 2009

Claimant introduced exhibits B and C into evidence without objection. Exhibit B is a two-page internal incident report for the accident of April 24, 2009. In it, claimant in his own handwriting, describes how the accident occurred. His description is essentially the same as was his testimony at the hearing, which was not impeached. Page two of Exhibit B is the response of one of Claimant's supervisors as to how the accident occurred. Claimant's version is not challenged. Exhibit C is the Report of Injury filed with the Division by the employer/insurer. Again the description of the accident is virtually the same as Claimant's testimony at the hearing, and it is not challenged by the qualifying word "alleged."

Employer/Insurer offered no witness impeaching Claimant's version of the accident. Where the Report of Injury is entered into evidence and its truthfulness or accuracy is never questioned by the Employer and Insurer and where it is never objected to by the Employer/Insurer as here say or incompetent in some matter, it operates as a binding admission like a pleading in a civil case. Tralle v Chevrolet Motor Co., 92 SW2d 966, 970-971 (Mo.App.E.D. 1936)

Accordingly I find that Claimant did sustain an accident arising out of and in the course of his employment, as he described it, on April 24, 2009.

II. THE NATURE AND EXTENT OF ANY PERMANENT PARTIAL DISABILITY SUSTAINED BY THE CLAIMANT

Among the factors to establish a percentage of disability in a claimant are:

The review of medical restrictions and expert opinions - Ball-Sawyers v Blue Springs School District et al, 286 SW3d 247 (Mo.App.W.D. 2009).

Whether the injury impairs the claimant's efficiency in the ordinary pursuits of life - Smith v Donco Construction Co., 182 SW2d 693 (Mo.App.S.D.2006).

Whether the injury limits the earning capacity of the claimant, i.e. limits his ability to perform certain work-Feltrop v Eskens Drywall and Insulation, 957 SW2d 408 (Mo.App.W.D.1997).

Lay testimony can constitute substantial evidence of the nature, cause, and extent of disability, especially when taken in connect with or where supported by some medical evidence - Treasurer v Steck, 341 SW3d 869 (Mo.App.W.D.2011).

Before the knee surgery on September 16, 2009, Dr. Dugan placed the patient on a restriction of sit down duty as much as possible. (Exhibit A p 51, 54, 57) On November 25, 2009, Dr. Dugan placed the patient on restrictions of sit down duty only and no forklift driving. (Exhibit A p 72) These restrictions were kept in place until March 3, 2010. (Exhibit A p 82) In his final restrictions issued on April 15, 2010, Dr. Dugan restricted claimant to sit down duty only. (Exhibit A p 89)

On September 12, 2011, Dr. Carper, claimant's personal physician in Warrensburg, placed restrictions on him of sit down duty with a 15 pound weight restriction while sitting and no lifting while standing. (Exhibit A p 337, 340-341)

Dr. James Zarr, a physical medicine specialist, was an additional treating doctor selected by the employer/insurer. On May 12, 2010, Dr. Zarr released the patient to return to work full time, but to remain at sedentary work "until further notice." (Ex D) On August 6, 2010, Dr. Zarr issued permanent restrictions of no lifting over 25 lbs and only "occasional" walking, stair climbing, stooping, kneeling & crouching, with "occasional" being defined as up to 1/3 of the time. (Ex D; Ex A p 115) Dr. Zarr rated the claimant at 5% of the right knee, all attributable to the accident of April 24, 2009. (Ex A p 115)

Dr. William O. Hopkins, claimant's examining physician, rated claimant's knee injury at 30% of the knee. (Exhibit A p 329)

Did the knee injury impair the claimant's efficiency in the ordinary pursuits of life? Claimant testified that he lives about one block from the Enersys plant and walked to work. He can no longer do so and drives to work. Enersys has provided him with a parking space in front of the door. He testified he can stand for 10-15 minutes and can walk about 200 yards. He can no longer walk his dog. He admitted to mowing his lawn on a riding mower. He drove to the hearing in Kansas City from Odessa, Missouri, where his wife works, stopping one time. He does make at least two trips a day up or down stairs in his home, which number about eleven. He does not shovel snow. He rolled up his pants leg on the right to show a bowed leg at the knee. Enersys has kept him on sit down jobs since the accident.

Claimant underwent a functional capacity evaluation at Select Physical Therapy in Warrensburg, on July 26, 2010. The summary was as follows:

The results of this evaluation indicate that Timothy Gladish did not demonstrate

the ability to meet the heavy physical demand requirements of a Prismatic Quality Assurance End of Line Tender for EnerSys based upon the job description provided by the employer. Timothy Gladish demonstrated the ability to function in the Medium Physical Demand Category, according to the U.S. Department of Labor.

Deficits identified during testing include Mr. Gladish's ability to bear weight and decreased standing tolerance upon the right lower extremity with accompanying pain reports and pain behaviors associated with his right knee and right hip area. He also presented with decreased active range of motion and decreased muscular strength of the right knee during the musculoskeletal screen. (Ex A p 303)

Did the injury limit the earning capacity of the claimant? Claimant testified that despite the sit down job provided by Enersys he has worked overtime since the accident. However, he has been demoted twice (by his testimony to the lowest paying job in the plant) and has suffered two reductions in pay ranging from 80-90 cents an hour each. I therefore find that claimant's earning capacity has been substantially reduced.

Therefore based on all the above factors I find that in regard to the right knee the rating of Dr. Hopkins is more credible than the rating from Dr. Zarr, and I find a 30% permanent partial disability to the right knee.

III. DID THE ACCIDENT OF APRIL 24, 2009 CAUSE AN INJURY TO THE RIGHT KNEE AND LOW BACK?

Prior to April 24, 2009 claimant reported to Dr. Brad Carper, his personal physician on July 22, 2008 with knee pain on the left. This was attributed to his weight. (Ex A p 347) On September 11, 2008, Dr. Carper reported that his patient, "is still having problems with his knees." "He has definite laxity of his left knee." Dr. Carper referred claimant to Dr. Bliss, an orthopaedic surgeon in Warrensburg. (Ex A p 347) Claimant testified that he never made it in to Dr. Bliss, that he missed no work because of knee problems prior to April 24, 2009; that no doctor recommended surgery at that time, and that no doctor ordered an MRI at that time.

In his office note of June 3, 2009, Dr. Dugan, the authorized treating physician, stated:

He has had one episode of knee problems in the past. He was treated for an effusion. His problems resolved. He specifically states the symptoms he has now are unlike the knee pain he had in the right knee in the past.....

He (claimant) has no significant history of pre-existing injuries to his knee. (Ex A p 43)

In his initial evaluation of May 12, 2010, Dr. Zarr, an authorized treating physician, makes no mention of prior problems with the right knee and obviously was not provided any records dealing with prior knee problems. (Ex A p 109-112) At his deposition, Dr. Zarr

admitted that he was provided no records indicating lost time from work prior to April 24, 2009, because of an injury to the right knee. He also testified that he saw no record indicating treatment to the right knee prior to April 24, 2009. (Ex 2 p 20 L 11-24)

Dr. Hopkins stated in his report that although claimant had a history of degenerative osteoarthritis in the knee by x-ray, he saw no records to indicate that from 2004 to 2009 any knee disability, complaints, or treatment. (Ex A p 328) He admitted in his deposition testimony that he had not seen the above referenced knee complaints to Dr. Carper but that did not change any of his opinions. (Exhibit E p 43-48)

We, therefore, have three doctors (Drs. Dugan, Zarr, and Hopkins) who all opine that the prior knee problems did not figure into any of their opinions as to disability, treatment, or causation and the claimant who testified that prior to the accident of April 24, 2009, he missed no work due to an injury to his right knee, had not undergone an MRI, and that no doctor had recommended surgery. There is also no evidence in the record to indicate any restrictions placed on claimant due to a right knee injury prior to April 24, 2009. A finding as to a cause of an injury need be based only on reasonable probability, but a finding as to permanency of injuries must be based upon evidence which produces a reasonable certainty. Davis v Brezner, 380 SW2d 523, 528 (Mo.App.S.D.1964)

I find that the above evidence shows that it is reasonably probable that the accident of April 24, 2009 was the prevailing factor in causing the injury and the need for treatment to the right knee.

There are also the issues of disability and causation for any injury to the low back from the April 24, 2009 accident. Claimant admitted to prior back problems in 2002 in his direct testimony. He was clear that this prior injury occurred at home but not clear exactly how it happened. The medical records show that he was admitted to the Western Missouri Medical Center on 6/5/2002 with acute back pain. A diffuse bulge with a herniated disk was found at the L5-S1 level with impingements of the nerve roots bilaterally. (Ex A p 146-148) Both the testimony of claimant and the office notes of Dr. Carper indicate that he also received a series of epidural injections. (Ex A p 152)

An MRI taken on June 10, 2002, showed a disc protrusion at L4-5 causing impingement on the left L5 nerve root and a disc bulge and a herniated disc at L5-S1 causing impingement on the L5 nerve roots bilaterally and the left S1 nerve root. (Ex A p 154) An MRI taken after the accident of April 24, 2009 on March 31, 2010, showed a left foraminal bulge at L4-5 touching the left aspect of the thecal sac and left neural foramen and a disk protrusion with no definite neuroforaminal compromise at L5-S1. (Exhibit A p 156-157)

The June 17, 2002 letter, in Dr. Carper's file, indicates left sided radicular pain. (Ex A p 152) So does his office note of June 4, 2002. (Ex A p 126) Since the radicular complaints claimant had from the April 2009 accident were all on the right side, Dr. Dugan compared the two MRI's. Dr. Dugan indicated that there was no direct correlation between the two MRI's. He could not explain the origin of the current symptoms in the right lower extremity. (Ex A p 88) Of importance is what he did not say i.e., that the two MRI's showed a continuation of the same

pathology from 2002 to 2010. Dr. Zarr was concerned enough about the right sided radicular pain to order an EMG which was performed on May 25, 2010 by Dr. Killman. (Ex A p 228-230) The EMG showed no evidence of right sided lumbosacral radiculopathy, peripheral polyneuropathy, or myopathy. Dr. Killman was asked specifically by the nurse case manager whether claimant's current complaints were related to his pre existing 2002 left-sided radiculopathy. Dr. Killman could not comment on this because he found no evidence of radiculopathy existing on his exam or by patient history and because the patient's current complaints followed no known nerve distribution pattern. (Ex A p 230)

Like the other doctors, Dr. Hopkins was not clear on the relationship between the prior left sided radicular complaints and the current right-sided radicular complaints. Nevertheless, he rated the claimant at a 22.5% disability to the low back from the April 2009 accident. (Ex A p 329)

The most significant facts to be considered in trying to sort out any disability to the low back caused by the April 2009 accident are: first; that claimant testified that he missed no work due to back or lower extremity radicular pain after he got out of the hospital in 2002 until the April 2009 accident and second; that his back pain was severe enough in 2002 to require hospitalization and epidural injections.

Because of these two facts and the fact that no physician placed restrictions on the claimant after the 2002 back injury, I find that he sustained a 5% body as a whole injury to the low back as a result of the April 2009 injury and had a pre-existing 17.5% body as a whole disability to the low back from the 2002 injury.

IV. IS THE EMPLOYER/INSURER RESPONSIBLE FOR FUTURE MEDICAL TREATMENT TO THE RIGHT KNEE?

For the claimant to be awarded future medical benefits, he must first prove that he sustained a compensable accident. Tillotson v St. Joseph Medical Center, 347 SW3d 511 (Mo.App.W.D. 2011); Armstrong v Tetra Pak, Inc., 391 SW3d 466 (Mo.App.S.D.2012) As discussed above, I have held that the injury of April 24, 2009 is compensable.

I then must determine if the need for future medical treatment (in the form of a total knee replacement) flows from the work injury. Tillotson, *infra*. In any situation involving a claimant of advanced or quasi advanced age, there will be arthritic changes in the knee. However, this does not mean that each such individual is disabled merely because arthritic changes are present.

- Q. (To Dr. Zarr) And would you agree with me that there are a lot of people walking around out there with degenerative osteoarthritic conditions in the knee who are still working?
- A. Agreed (Exhibit 2 p 21 L 22-25 to p 22 L 1)

- Q. And would you agree with me that disability attaches to that condition when it either impedes the individual's ability to work or the individual can no longer work?
- A. I would agree. (Exhibit 2 p 22 L 15-19)
- Q. Okay. For example, someone who had a terribly-terrible degeneration in the knee joint, well, either of the meniscus, or bone on bone, or whatever, and was still working would not be disabled, would he?
- A. Correct (Exhibit 2 p 22 L 20-25)
- Q. Okay, but at the point in time when that condition, from whatever cause, caused him to change occupations, or change his way of working, or stop working, then he would become disabled; fair statement?
- A. I understand what you're saying. A fair statement. (Exhibit 2 p 23 L 1-7)

If there is no disability, there is no medical benefit because the disability must cause the need for the medical treatment. Despite whatever arthritic condition claimant had prior to April 24, 2009, he was not disabled. After that date, he became disabled having to work in sit down jobs only up to the time of the hearing.

Dr. Dugan testified that he found nothing in the records indicating there was previous trauma to the right knee before April 24, 2009. (Ex 1 p 25 L 18-23) He saw no treatment records to the right knee prior to April 24, 2009 (Ex 1 p 26 L 15-17) He agreed that in a medical sense claimant was not disabled, prior to April 24, 2009. (Ex 1 p 28 L 23-25; Ex 1 p 29 L 1-3) Dr. Dugan did not know that claimant had missed no work due to a right knee condition prior to April 24, 2009. (Exhibit 1 p 31 L 6-8) His testimony therefore is proof that nothing prior to April 24, 2009 caused the need for a total knee replacement on the right.

Dr. Hopkins said it best:

He (claimant) did have a transient episode of pain and then he returns to work for years at what seems to be a very strenuous job, a very physically demanding job on his feet all the time. I think certainly people can have abnormalities structurally in their knee and still function on a day to day basis in the work situation and provide a living for themselves. So if I take a person who's functioning every day, in spite of a past history for some years, and then has another injury, I believe that, that injury is causative. (Ex E p 58 L14-25; p 59 L 1)

I don't think that he (claimant) had a significant pre-existing disability. He had a pre-existing structural abnormality in his knee, **but obviously it did not appear to be disabling.** (emp.sup.) (Exhibit E p 59 L 5-9)

Dr. Hopkins testimony is the most relevant. Claimant's ability to earn a living, i.e. his earning capacity, was not affected until the accident of April 24, 2009. No physician, prior to that date, recommended a total knee replacement or even surgery of any kind. The record is silent on any traumatic event to the knee prior to April 24, 2009.

Therefore, the need for the total knee could have "flowed from" nothing other than the accident of April 24, 2009.

I find that the claimant reasonably requires a total knee replacement to cure and relieve him from the effects of the injury he sustained on April 24, 2009.

Employer/insurer objected to any portion of the medical treatment records entered into evidence as Exhibit A expressing an opinion as to what caused the need for a total knee replacement. I assume this does not include the opinion of Dr. Dugan, who issued a separate opinion letter/report dated September 6, 2011 (copy attached to Dr. Dugan's deposition, which is Exhibit 1); Dr. Zarr and Dr. Hopkins, all of who were retained by one side, or the other, and were not neutral treaters.

This leaves the objection to the testimony of Dr. Carper and Dr. Bliss who were neutral treaters. On January 27, 2011, Dr. Carper stated in his note that, "He had an injury, had surgery in September of 2009. He is going to need a total knee." (Ex A p 342) Dr. Carper here expresses no opinion as to causation. On July 14, 2010, Dr. Carper stated:

His major problem really is his right knee. It was injured at work. He said the orthopedist at Work Comp told him they are done with him, but he needs a knee replacement. I told him that this makes no sense. If he didn't have this problem prior to the injury, and now he has ongoing pain and needs a replacement, that needs to be completely dealt with. (Ex A p 344)

These comments fall far below a clear and direct opinion that the need for a total knee replacement was due to an accident at work, which Dr. Carper never describes, and fall more into an indication of a mystery in Dr. Carper's mind as to why work comp is "done with" the claimant. The objection is overruled but I will ignore the entry anyway as being without any probative value to any issue in the case.

Finally, Dr. Bliss commented on January 4, 2012 that, "He (claimant) understands that Dr. Dugan told him his only other treatment option was a total knee arthroplasty." (Exhibit A p 456) There follows a discussion about the risks, benefits, and limitations of a total knee replacement, versus repeated injections. Dr. Bliss does not express any opinion as to causation. The objection is overruled.

V. CONCLUSION

I award the claimant 30% permanent partial disability to the right knee and 5% permanent partial disability to the body as a whole referencing the low back.

I order the employer to provide total knee replacement surgery to claimant as a result of the accident of April 24, 2009.

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation