

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

Injury No.: 02-152905

Employee: Wentfred Helvey
Employer: Universal Printing Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Denied)
Date of Accident: Alleged December 31, 2002
Place and County of Accident: Alleged St. Louis City

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 August 3, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued August 3, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents: N/A
Employer: Universal Printing Company
Additional Party: Second Injury Company (denied)
Insurer: Self-insured
Hearing Date: May 1 & 11, 2006

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

Checked by: JHP

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: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
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? 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:
N/A
12. Did accident or occupational disease cause death? N/A 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: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Wentfred Helvey

Injury No. 02-152905

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$984.66
19. Weekly compensation rate: \$649.32/\$340.12
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

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

TOTAL:

None

23. Future requirements awarded: None

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Wentfred Helvey	Injury No. 02-152905
Dependents:	N/A	Before the
Employer:	Universal Printing Company	Division of Workers'
		Compensation
Additional Party:	Second Injury Fund (denied)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-insured	Checked by: JHP

A hearing in this proceeding was held on May 1, 2006. Therecord was left open for the submission of additional evidence which was filed on May 11, 2006. Both parties submitted proposed awards on June 2, 2006.

STIPULATIONS

The parties stipulated that on or about December 31, 2002:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;
3. the employee's average weekly wage was \$984.66;^[1]
4. the rate of compensation for temporary total disability was \$649.32 and the rate of compensation for permanent partial disability was \$340.12.^[2]

The parties further stipulated that:

1. the employer had notice of the repetitive trauma injury/occupational disease and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer has not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant was exposed prior to December 31, 2002 to an occupational disease due to repetitive trauma affecting his knees, which arose out of and in the course of claimant's employment;
2. whether claimant developed bilateral degenerative joint disease as a result of the occupational exposure or that condition was aggravated by such occupational exposure;
3. if the employee sustained a compensable injury, whether she is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to compensation for temporary total disability for any periods of time subsequent to December 31,

- 2002; and
4. if the employee sustained a compensable injury, whether and to what extent employee sustained any permanent partial disability which would entitle her to an award of compensation.

OCCUPATIONAL DISEASE

Wentfred Helvey, employee herein, claims that the degenerative joint disease in his knees was either caused or aggravated by repetitive lifting and loading of hundreds of pounds of paper into printing machines on a daily basis and by repetitive kneeling and squatting over 31 years as a bookbinder for Universal Printing Company. Employer denies that employee's work activities caused or aggravated his bilateral degenerative joint disease.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It defines occupational disease as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability."^[3]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance. In repetitive motion cases,^[4] as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally induced diseases also sometimes occur in the public at large, the courts have focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater

than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (2000). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

The work-related aggravation of a preexisting disease or infirmity caused by repetitive trauma is compensable as either an accident or as an occupational disease. Smith v. Climate Engineering, 939 S.W.2d 429, 433-35 (Mo. App. 1996); Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 49 (Mo App. 1999).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Work Activities

Wentfred Helvey worked for Universal Printing Company as a bookbinder from 1971 to December 11, 2002. Claimant frequently worked 11-12 hour shifts. He attained the classification of journeyman book binder, the highest achievable certification in the field.

Mr. Helvey's job duties consisted almost exclusively of operating printing machines. Claimant operated the folding, stitching and cutting machines. Most of the time he operated the folder machine. While operating the folder machine, he was required to walk to different sections of the machine to load or remove product and to bend and stoop to set up this machine. He also occasionally squatted to pick up paper from the floor or scrap off the machine. During his shift he lifted and loaded several tons of paper into the folder machine. He performed similar activities when operating the stitching and cutting machines.

While operating the folder machine, claimant picked up hundreds of pieces of paper at a time and loaded them into the machine. He lifted more than 100 bundles of paper before finishing a stack. He bent his knees between 50 and 100 times per skid of paper and loaded ten to twelve skids per shift. ^[5]

Claimant squatted up to 12 times in setting up a particular machine. Each squat lasted two to three minutes. He also bent his knees when removing scrap paper. He removed scrap paper ten times per hour, or eighty times per shift.

Claimant also had to adjust the folder machine three to four times a day. The machine jammed at least three to four times a shift. During a jam claimant bent over or squatted down to “un-jam” the rollers. This required about 5 minutes. He bent over to pick up finished product at the end of the machine about sixteen times a shift.

Each time employee made a cut with the cutter machine, he used either his left or right foot to depress a hydraulic clamp. He had to bend the knee to operate the machine work. He performed a cutting procedure every six to seven minutes and it took four minutes to finish a cut.

During the late 1990’s, claimant began to experience difficulties with his knees. They became swollen and puffy and painful to the touch. His flexibility began to decrease substantially. During 2001 claimant’s wife had to help him get in and out of his motor vehicle at the end of his shifts due to knee pain and immobility. After completion of his shifts, his symptoms gradually resolved but they returned again after another day at work. Claimant reported his symptoms to his supervisors at Universal Printing Company. As a result of claimant’s knee complaints, employer made workplace accommodations for claimant shortly before December of 2002. Employer allowed claimant to use additional assistants to help move heavy loads and machinery. Employer also allowed claimant to sit down while performing certain machine operating functions.

Prior Injuries to and Treatment for the Knees

On September 30, 1985 Mr. Helvey underwent arthroscopic surgery on his left knee for a degenerative tear of the medial meniscus and early degenerative arthritis. Dr. Gary Farley performed a partial medial meniscectomy and excision of a medial synovial plica. Employee was released from treatment two months later. He returned to Dr. Farley in February of 1988 with left knee complaints. When he returned to Dr. Farley on March 13, 1990 for treatment of his left heel, employee indicated that he had no complaints regarding the left knee. ^[6]

On July 13, 1990 employee slipped on some paper at Universal Printing Company and fell to the ground landing on both knees. He was examined at the St. Louis University Hospital. X-rays taken of his left knee revealed bony spurs of the femur and joint space narrowing of the medial compartment. He was referred to a Dr. Tayod for treatment. By February of 1991 Mr. Helvey was experiencing bilateral knee pain. His left knee was injected with Depro-Medrol in March of 1991. An MRI scan of employee’s left knee on June 28, 1991 showed fraying of the residual portions of the medial meniscus and periarticular sclerosis and thinning of the articular cartilages on the medial side. Employee was treated with Naprosyn. ^[7]

Mr. Helvey was eventually referred to Dr. Robert C. Lander, an orthopedic surgeon, who examined him on June 29, 1992. X-rays taken of the left knee revealed marked narrowing of the medial compartment with spur formation and loss of joint space and calcification of the medial collateral ligament. X-rays taken of the right knee showed degenerative changes involving the medial compartment with early loss of the joint space. ^[8] Dr. Steven Nester, claimant’s internist, prescribed anti-inflammatories. ^[9]

Claimant returned to Dr. Lander on August 27, 1993. Hereported a significant worsening of symptoms in his left knee and also problems in his right knee. X-rays taken of the left knee showed complete collapse of the medial compartment with some degree of patellofemoral degenerative arthritis. X-rays of the right knee revealed some degenerative changes involving the medial compartment with early loss of the joint space. In comparing the prior x-rays of claimant’s left knee Dr. Lander indicated that the 1985 films showed very minor spur formation along the medial aspect of the joint and excellent maintenance of the joint space. The 1990 x-rays showed significant collapse of the medial compartment and increased spur formation, but maintenance of the joint space. The most recent films revealed complete loss of the joint space, significant increase in spur formation and the beginnings of patellofemoral disease. He recommended either a total left knee replacement or a high tibial osteotomy followed in 5 to 7 years by a total knee replacement. He indicated that the right knee would probably eventually need the same surgeries. (Claimant’s Exhibit D, Page 60) While Dr. Lander felt that the accident

did not cause claimant's preexisting degenerative arthritis, he opined that it exacerbated that condition. ^[10]

Employer asked another orthopedic surgeon, Dr. Robert S. Kramer, to evaluate claimant. He examined Mr. Helvey on October 5, 1993. Dr. Kramer reviewed the x-rays taken on August 27, 1993 and noted that they showed bone on bone contact in the medial compartment of the left knee and spurring off the anterior and medial tibial plateau and the superior aspect of the patella. The films of the right knee demonstrated some narrowing of the medial compartment and some mild osteophyte formation off the medial tibial plateau. Overall alignment of the left knee was approximately 5 degrees of varus and of the right knee was 2 degrees of varus. Dr. Kramer diagnosed claimant with progressive degenerative arthritis in his left knee. He felt that the July 13, 1990 injury might have aggravated the preexisting condition in his left knee and accelerated the preexisting degenerative changes. He recommended a left proximal tibial osteotomy to realign the left knee out of its varus alignment and to shift the weightbearing over the left compartment. He recommended against a total knee replacement due to the heavy lifting and repetitive bending and squatting which claimant was doing at work. (Claimant's Exhibit D, Pages 65 & 71-74)

Dr. Lander reexamined claimant on February 8, 1994. He recommended bilateral high tibial osteotomies. On March 7, 1994 Dr. Lander performed a left high tibial osteotomy (i.e. removal of a wedge of bone from the outer aspect of the tibia) with internal fixation for medial compartment degenerative joint disease of the left knee. He performed the same procedure on the right knee on August 15, 1994. ^[11]

In a letter dated April 12, 1995 to employee's attorney, Dr. Lander opined that in 5 to 7 years claimant would develop enough degenerative arthritis to require bilateral total knee replacements. He opined that "the accident on July 13, 1990 was a substantial factor in causing the condition that [would] eventually lead to knee replacement surgery." (Claimant's Exhibit D, Page 52)

On September 10, 1995 Dr. Lander noted that claimant had occasional stiffness with prolonged sitting and that his pain was 80% relieved. He reexamined claimant on March 29, 1996. Employee complained of a significant amount of discomfort in both knees. X-rays taken of the left knee revealed significant degenerative changes with complete loss of the medial compartment and patellofemoral changes. On February 13, 1997 Dr. Lander noted that claimant had pain with squatting and was unable to squat, especially when lifting any weight. Employee also complained of pain in both knees with lifting, climbing ladders or steps, dancing, and driving for any length of time. X-rays of both knees revealed moderate to severe degenerative changes in both knees. Dr. Lander advised him that he would need bilateral total knee replacement in the future. ^[12] Dr. Lander opined that the total knee replacements would be performed to cure claimant's preexisting degenerative arthritis, a condition which he acknowledged was not caused by the July 13, 1990 accident. ^[13]

Dr. Kramer reexamined claimant on November 28, 1995. Claimant described symptoms similar to those given to Dr. Lander. He reported that the discomfort in both knees was 60% better subsequent to the high tibial osteotomies. X-rays taken at the time of the examination showed alignment of the left knee was 6 degrees of valgus and alignment of the right knee was 5 degrees of valgus. Dr. Kramer noted that claimant's range of motion of both knees was functional (i.e. the range for the performance of most daily activities). He opined that claimant had a progressive condition in both knees and that squatting could aggravate his condition by increasing stress across the joint. ^[14] Dr. Kramer further opined that the July 13, 1990 accident did not cause the condition which would eventually require total knee replacements. ^[15]

Dr. Mark Lichtenfeld examined claimant on December 9, 1997 for the purpose of rating all of his various disabilities. Claimant told Dr. Lichtenfeld that his knees hurt all the time, that he could not squat, that he had pain with going up or down steps, that they ached all the time and got worse after working all day. He reported that he had pain with squatting, twisting and bending and severe pain with lifting over 25 pounds. Walking 10 to 15 feet or standing over thirty minutes increased his pain. Employee felt that his knees were getting worse every year and that he would need a total knee replacement in three or four years. (Claimant's Exhibit D, Pages 33-34) Dr. Lichtenfeld diagnosed claimant with incitation and acceleration of preexisting changes in the left knee and post traumatic degenerative joint disease of the right knee due to the July 13, 1990 injury. He opined that claimant would undoubtedly require a total knee arthroplasty bilaterally as a direct result of the July 13, 1990 accident. (Claimant's Exhibit D, Pages 33-36)

Medical Treatment for the Primary Injury

Mr. Helvey returned to Dr. Lauder on March 11, 2002. He reported developing severe pain in his left knee during the previous three weeks. X-rays taken of the left knee showed that claimant had developed severe arthritis of the patellofemoral

joint with some posterior osteophytes. He still had severe medial compartment arthritis and had developed chondrocalcinosis (i.e. calcium deposits within the meniscal cartilage) on the lateral side. Dr. Lander recommended a total knee replacement. He noted that claimant's job required a lot of heavy lifting and squatting. Dr. Lander prescribed Celebrex while claimant decided whether to undergo surgery. (Claimant's Exhibit B, Pages 43-44) Claimant returned to Dr. Lander on March 25, 2002. He indicated that the Celebrex had not helped and that his right knee was also giving him problems. X-rays taken of the right knee showed significant patellofemoral disease and complete loss of the medial compartment. They talked about surgery. He prescribed Bextra. (Claimant's Exhibit B, Pages 41-42)

Claimant returned to Dr. Lander on November 25, 2002. Employee indicated that he wanted to undergo surgery. Dr. Lander wrote a letter that same day in which he opined that claimant had developed severe degenerative arthritis of both knees, that those conditions were not work related, and that he would undergo bilateral knee replacements. (Claimant's Exhibit B, Pages 39-40)

On December 13, 2002 Dr. Lander removed the plate and screw from the prior surgery and then performed a total knee replacement of Mr. Helvey's left knee. During the procedure he noted that there was quite severe degenerative changes in all three compartments. (Claimant's Exhibit B, Pages 35-36) Employee began physical therapy at HealthSouth on January 13, 2003. (Claimant's Exhibit B, Page 26)

On February 27, 2003 Dr. Lander removed the plate and screw from the prior surgery and then performed a total knee replacement of Mr. Helvey's right knee. During the procedure he noted that there was quite severe degenerative changes in the medial and lateral compartments. He indicated that the patella looked quite good. (Claimant's Exhibit B, Pages 16-18) Employee began physical therapy at HealthSouth on March 21, 2003. (Claimant's Exhibit B, Page 13)

Claimant returned to Dr. Lander on May 6, 2003 and complained that he was having difficulty getting in and out of chairs. Dr. Lander suggested that claimant undergo a manipulation. (Claimant's Exhibit B, Page 8) On May 15 employee's right knee was manipulated under anesthesia. After a loud pop the knee was manipulated easily to 130 degrees. Claimant received additional physical therapy for the right knee. He returned to Dr. Lander on May 20. He had only 95 degrees of flexion. Though employee was return in one month for a range of motion check, he failed to do so. (Claimant's Exhibit B, Pages 2-6)

Medical Opinions

Dr. Robert Poetz testified by deposition on behalf of claimant on April 24, 2006. He examined Mr. Helvey on May 12, 2005. Employee told him that he was a bookbinder for thirty-one years and that his job required extensive and repetitive heavy lifting of several tons of paper per day to run the machines. He described lifting stacks of paper and loading them into the machines. He also described standing for long periods of time on concrete, crawling under machines to fix them, and loading heavy plates. (Claimant's Exhibit A, Pages 8) Dr. Poetz reviewed Dr. Lander's treatment records from 2002 and 2003. He was aware that claimant fell on his knees at work in 1990 and that he underwent bilateral high tibial osteotomies in 1994 for bilateral medial compartment degenerative joint disease. He does not appear to have been advised about the 1985 partial medial meniscectomy to the left knee. (Claimant's Exhibit A, Pages 9-12)

Dr. Poetz diagnosed claimant with bilateral medial compartment degenerative joint disease treated in 1994 with bilateral high tibial osteotomies and bilateral knee sprains with exacerbation of degenerative joint disease in December of 2002 treated with bilateral total knee replacements. (Claimant's Exhibit A, Page 14)

On cross examination Dr. Poetz indicated that the December 2002 injury referred to the termination of the work-related injuring-causing activities. There was not specific incident. (Claimant's Exhibit A, Page 22)

On cross examination Dr. Poetz agreed that Mr. Helvey had long-standing problems with degenerative arthritis in both of his knees. (Claimant's Exhibit A, Page 22) He opined that claimant's need for bilateral knee replacements was due to the prolonged process of his degenerative joint disease, the 1990 injury to both knees and the 1994 surgeries, and his morbid obesity. (Claimant's Exhibit A, Pages 23-24 & 33-34) At the time of Dr. Poetz' previous examination on September 10, 2002, Mr. Helvey was 5'10" and weighed 233 pounds. He opined that his morbid obesity was having a significant impact on his knees. (Claimant's Exhibit A, depo ex A, pp 2-3)

On cross examination Dr. Poetz opined that the 1994 bilateral high tibial osteotomies were performed on Mr. Helvey because of long-standing degenerative joint disease from the kind of work which he performed and the 1990 slip and fall on both knees. He indicated that the 1994 surgeries may have been performed to postpone the day when total knee replacements would be performed. (Claimant's Exhibit A, Pages 27-28)

Dr. Lander testified by deposition on behalf of employer on April 7, 2006. He testified that he performed high tibial osteotomies in 1994 rather than total knee replacements because claimant wanted to continue working and the tibial osteotomies would have enabled Mr. Helvey to resume normal activities for 5 to 7 years with relative relief of his pain, whereas total knee replacements would not have held up to the frequent squatting and climbing which claimant's job required. However, the osteotomies were not a permanent cure for his degenerative joint disease. Dr. Lander explained that the medial compartments of employee's knees were worn out while the lateral compartments and patellas were normal. Dr. Lander removed a wedge of bone from the outer aspect of claimant's tibias in order to transfer weight from the medial compartments to the lateral compartments. (Employer's Exhibit 1, Pages 6-7 & 19-20 and Claimant's Exhibit D, Page 60)

On redirect examination Dr. Lander further explained that claimant told him that his job required him to climb up and down ladders, squat, and lift objects weighing 50 to 60 pounds. Dr. Lander told him that if the high tibial osteotomy were successful, it would allow employee to continue in his present occupation. Dr. Lander also recommended against total knee replacements because claimant was in his 40's and those procedures lasted only 15 years. His single compartment disease (i.e. the medial compartment) also favored the high tibial osteotomy. (Employer's Exhibit 1, Pages 37-38)

Dr. Lander testified that in March of 2002 x-rays of claimant's left knee showed severe arthritis with posterior osteophytes in the patellofemoral joint, severe arthritis in the medial compartment and chondrocalcinosis in the lateral compartment. He opined that these conditions were the result of the natural course of employee's osteoarthritis and not the result of any trauma. (Employer's Exhibit 1, Page 8) During the left knee replacement Dr. Lander noted severe changes in all three compartments. (Employer's Exhibit 1, Page 28)

Dr. Lander further opined that the conditions of Mr. Helvey's knees which he treated were not work related. (Employer's Exhibit 1, Page 17)

On cross examination Dr. Lander testified that he did not believe that the 1994 tibial osteotomies were for a work-related condition. (Employer's Exhibit 1, Page 20) Dr. Lander stated that he did not know whether claimant's heavy lifting and squatting at work had an impact or caused the need for him to have the total knee replacements. He explained that there is a natural progression of osteoarthritis whether one is doing heavy work or light work. He stated that he did not know whether the natural progression could be worsened by heavy lifting, squatting, constant kneeling and walking around on concrete floors. He explained that high tibial osteotomies are performed as a stop-gap measure which allow people to engage in activities, such as playing tennis, for 5 to 7 years, maybe 10 years, at best, that would not be possible with total knee replacements. However, the tibial osteotomy does not change the progression of arthritis; it only relieves pain for a period of time. He indicated that patients in sedentary occupations progress following high tibial osteotomies to total knee replacements. On the other hand, he agreed that the kind of heavy lifting and squatting which claimant performed at work "could [have] cause[d]" Mr. Helvey's knee condition to worsen and increase the degeneration to the point that he would have required total knee replacements. (Employer's Exhibit 1, Pages 22-24) He subsequently emphasized that he only stated that employee's work activities "could" have increased the degeneration, not that they had increased the degeneration. (Employer's Exhibit 2, Pages 33-34)

On further cross examination Dr. Lander stated that some of the degeneration which he found in claimant's knees was related to the condition that gave rise to the need for the tibial osteotomies. (Employer's Exhibit 1, Page 33)

Additional Findings

I previously found that medical treatment for a degenerative tear and arthritis in claimant's left knee began in 1985. In September of 1985 he underwent a partial medial meniscectomy and excision of a medial synovial plica. He continued to complain of pain in his left knee through early 1988. He appears to have been relatively pain free from some time after February of 1988 through July of 1990. In July of 1990 claimant fell on both knees at work. X-rays taken of his left knee in the emergency room revealed bony spurs of the femur and joint space narrowing of the medial compartment. By February of 1991 employee was experiencing pain in both knees. Claimant's arthritis continued to worsen through August of 1993 when x-rays of the left knee showed complete collapse of the medial compartment with some degenerative arthritis in the patellofemoral compartment. X-rays of the right knee revealed degenerative changes in the medial compartment with early loss of the joint space.

I previously found that upon review of the August of 1993 x-rays of the left knee, Dr. Lander recommended either a total knee replacement or a high tibial osteotomy followed in 5 to 7 years by a total knee replacement. Upon review of the x-rays of the right knee, Dr. Lander predicted that claimant would require similar treatment for the right knee. As claimant wanted to continue working and total knee replacements would not have held up to the repetitive climbing and squatting

which Mr. Helvey's job entailed. Dr. Lander recommended high tibial osteotomies which were expected to last about 5 to 7 years, at which time claimant would then require total knee replacements. Dr. Kramer also recommended high tibial osteotomies for the same reasons. While both experts agreed that the July of 1990 slip and fall did not cause claimant's preexisting degenerative arthritis, they opined that the accident exacerbated claimant's preexisting degenerative arthritis. The high tibial osteotomies were performed in 1994, not to cure employee's underlying degenerative arthritis, but to shift his weightbearing to the relatively healthy, lateral compartment of each knee and thereby allow claimant to continue working for another 5 to 7 years before he would require career-ending total knee replacements.

I previously found that, as expected by both Drs. Lander and Kramer, claimant's degenerative arthritis progressed in both knees, affecting all three compartments of the left knee and the medial and lateral compartments of the right knee, until he underwent a left total knee replacement on December 13, 2002 at which time he stopped working as a book binder. He underwent a right total knee replacement a few months later.

On April 12, 2005 Dr. Lander opined that the July 13, 1990 accident would be a substantial factor in causing the condition that would eventually lead to knee replacement surgery.^[16] Yet in his prior deposition Dr. Lander opined that the total knee replacements would be performed to cure claimant's preexisting degenerative arthritis, a condition which he acknowledged was not caused by the July 13, 1990 accident. Since Dr. Lander's deposition was not in evidence, it is not possible to resolve this apparent contradiction without resort to speculation. In any event Dr. Lander testified on April 7, 2006 that the conditions which claimant developed in his knees subsequent to the 1994 surgeries were the result of the natural course of employee's osteoarthritis and not the result of any trauma. He further opined that the conditions which he treated were not work-related. On cross examination Dr. Lander stated that he did not know whether claimant's heavy lifting and squatting at work had an impact or caused the need for him to have the total knee replacements.^[17]

Dr. Lander's opinions clearly support employer's contention that claimant's degenerative joint disease was not work-related.

While Dr. Poetz clearly stated that the 1994 high tibial osteotomies were performed because of long-standing degenerative joint disease from the kind of work which he performed and the 1990 slip and fall on both knees, he did not make such a clear statement with respect to the total knee replacements. He diagnosed claimant with bilateral knee sprains with exacerbation of degenerative joint disease in December of 2002. On direct examination he did not explain the cause for the conditions which he diagnosed. On cross examination he referred to the December 2002 injury as the termination of the work-related injury-causing activities. Thus a reading together all of those statements could lead to the conclusion that Dr. Poetz would probably state, if directly asked, that claimant's long-standing degenerative joint disease was aggravated by the work which employee performed through December of 2002. The trier of fact is not required to draw such an inference. It is up to claimant's medical expert to express a direct opinion of the matter either in his medical report or on direct examination.

Even if it is assumed that Dr. Poetz, who is not an orthopedic surgeon, opined that claimant's work through December of 2002 caused bilateral knee strains and aggravated his underlying osteoarthritis, there was no explanation of how those conditions occurred and or any description of the nature of the aggravation. There was no opinion from Dr. Poetz explaining how claimant's work activities aggravated his arthritis. There was no opinion from Dr. Poetz that claimant's work activities accelerated the need for total knee replacements. The need for the surgery occurred after the predicted life expectancy of high tibial osteotomies. There was no evidence, either from epidemiological studies or expert opinion, that book binders and similar workers who operate printing presses are at a higher risk for the development of osteoarthritis of the knees than workers in other professions or the nonwork force.

In comparing the expertise of Dr. Lander with that of Dr. Poetz, I find that, if Dr. Lander, who knows far more about orthopedics than does Dr. Poetz, does not know whether or not claimant's work activities caused claimant's knee conditions to worsen or to accelerate, Dr. Poetz opinion, which cited no epidemiological studies or medical treatises in its support, is based on nothing but his personal speculation. "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990); see Gilley Raskas Dairy, 903 S.W.2d 656, 657 (Mo. App. 1995). Accordingly, I find Dr. Poetz' opinions on the relationship between claimant's work activities and his osteoarthritis are not credible. I further find the opinions of Dr. Lander are credible.

Based on all the evidence, I find that claimant's degenerative joint disease in both knees is not an occupational disease. I also find that as the bilateral knee replacements were performed for the purpose of curing the osteoarthritis in his knees, the joint replacement surgeries were not caused by claimant's work activities at Universal Printing Company. I further

find that if there was any acceleration of claimant's need for total knee replacements, it occurred as a result of the July 13, 1990 accident ^[18] and not as the result of claimant's work activities at University Printing Company. Lastly, I find that claimant's work activities as a book binder did not aggravate or accelerate the degenerative joint disease in his knees. ^[19]

For the foregoing reasons the claim for compensation against Universal Printing Company is denied.

SECOND INJURY FUND LIABILITY

Employee is also seeking an award of permanent total disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that section where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself ^[20] and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617-18 (Mo. App. 1995); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

As I have previously found that claimant failed to prove a compensable injury against the employer, the claim against the Second Injury Fund is denied.

Date: _____

Made by: _____

JOHN HOWARD PERCY

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secrest

Director

Division of Workers' Compensation

^[1]

See Court's Exhibit 1.

^[2]

See Court's Exhibit 1.

^[3]

Subsection 2 of Section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

^[4]

The 1993 addition of section 287.067.7, which modifies the last exposure rule with respect to occupational diseases due to repetitive motion, could be construed as a legislative recognition that injuries caused by repetitive activities may be viewed as due to an occupational disease.

^[5]

Though employee testified that he squatted several 1000 times per shift, I find that claim hard to believe as it would have required him to squat 2 to 4 times per minute, leaving little time for anything else.

^[6]

Dr. Farley's medical records were not in evidence. However, the surgery was described in the findings of an Award in Injury No 90-100060 (Claimant's Exhibit D, Page 9) and a medical report dated December 12, 1997 by Dr. Mark A. Lichtenfeld. (Claimant's Exhibit D, Page 32)

^[7]

Dr. Tayob's medical records were not in evidence. However, they were summaries in a medical report dated October 5, 1993 by Dr. Robert S. Kramer. (Claimant's Exhibit D, Pages 72-73)

^[8]

Dr. Landers' 1992 medical records were not in evidence. However, they were summarized in a medical report dated December 12, 1997 by Dr. Mark A. Lichtenfeld. (Claimant's Exhibit D, Pages 29-30)

^[9]

Dr. Nester's medical records were not in evidence. However, they were summarized in a medical report dated October 5, 1993 by Dr. Robert

S. Kramer. (Claimant's Exhibit D, Page 65)

[10]

Dr. Lander's prior deposition testimony was not in evidence. However, these opinions were summarized in the findings of an Award in Injury No 90-100060. (Claimant's Exhibit D, Page 10)

[11]

Dr. Landers' 1994 medical records were not in evidence. However, they were summarized in a medical report dated December 12, 1997 by Dr. Mark A. Lichtenfeld. (Claimant's Exhibit D, Pages 30-31)

[12]

Dr. Landers' 1995-97 medical records were not in evidence. However, they were summarized in a medical report dated December 12, 1997 by Dr. Mark A. Lichtenfeld. (Claimant's Exhibit D, Pages 31-32)

[13]

Dr. Lander's prior deposition testimony was not in evidence. However, this opinion was summarized in the findings of an Award in Injury No 90-100060. (Claimant's Exhibit D, Page 14)

[14]

Dr. Kramer's report of the November 28, 1995 evaluation was not in evidence. However, it was summarized in the findings of an Award in Injury No 90-100060. (Claimant's Exhibit D, Pages 15-16)

[15]

Dr. Kramer's 1995 deposition testimony was not in evidence. However, this opinion was summarized in the findings of an Award in Injury No 90-100060. (Claimant's Exhibit D, Page 14)

[16]

Dr. Lichtenfeld opined on December 7, 1997 that claimant would undoubtedly require a total knee arthroplasty bilaterally as a direct result of the July 13, 1990 accident. (Claimant's Exhibit D, Page 36)

[17]

On further cross examination Dr. Lander stated that the kind of heavy lifting and squatting which claimant performed at work "could [have] cause[d]" the condition of Mr. Helvey's knees to worsen and increase the degeneration to the point that he would have required total knee replacements. However, he added that he did not know whether that aggravation had occurred because patients who undergo high tibial osteotomies nevertheless subsequently undergo knee replacements despite sedentary employment. This opinion amounts to nothing more than stating that it was medically possible that claimant's work activities could have aggravated his preexisting arthritis. It is not substantial evidence that it did occur. Carter v. Jones Truck Line, Inc., 913 S.W.2d 821, 826 (Mo. App. 1997); White v. Henderson Implement Co., 879 S.W.2d 575, (Mo. App. 1994); Wiedmaier v. Robert A. McNeil Corp., 718 S.W.2d 174, 176-77 (Mo. App. 1986).

[18]

There was substantial opinion evidence in the Award in Injury No 90-100060 that the July 13, 1990 accident was a substantial factor in causing the need for future knee replacements. See findings on Pages 9 to 10 supra.

[19]

Even if I had found some small aggravation of claimant's degenerative joint disease by his work activities at Universal Printing Company, I would have found that claimant suffered no permanent disability as a result such aggravation for the reason that any pre-surgery additional disability due to the aggravation would have been cured by the total knee replacements. After the knee replacements claimant was left with same disability that he would have had from the natural progression of his osteoarthritis regardless of any acceleration of the need for such surgeries by work-related activities. There was no evidence that claimant's post-surgery disability was in any way augmented by any pre-surgery work-related aggravation.

[20]

The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).