

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

Injury No.: 99-166891

Employee: Joseph Heuer
Employer: Sunrise R-9 School District
Insurer: Missouri United School Insurance c/o Gallagher Bassett
Date of Accident: December 20, 1999
Place and County of Accident: Jefferson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 17, 2005. The award and decision of Administrative Law Judge Koren M. Mueller, issued March 17, 2005, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: John J. Hickey, Member

Secretary

AWARD

Dependents: N/A

Employer: Sunrise R-9 School District

Additional Party:N/A

Insurer: Missouri United School Insurance c/o Gallagher Bassett

Hearing Date: September 27, 2004 and November 11, 2004

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: KMM/bfb

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: December 20, 1999
5. State location where accident occurred or occupational disease was contracted: Jefferson County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was involved in a motor vehicle accident
12. Did accident or occupational disease cause death? No Date of death? ----
13. Part(s) of body injured by accident or occupational disease: Right knee and low back
14. Nature and extent of any permanent disability: 25% of the right knee, and 20% body as a whole referable to the low back
15. Compensation paid to-date for temporary disability: \$1,081.76
16. Value necessary medical aid paid to date by employer/insurer? \$33,840.73
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$272.88
19. Weekly compensation rate: \$181.92 TTD and PPD
20. Method wages computation: See Award

COMPENSATION PAYABLE

21. Amount of compensation payable: -----

Unpaid medical expenses: N/A

weeks of temporary total disability (or temporary partial disability) underpayment of \$217.67 due from employer

120 weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

22. Second Injury Fund liability: Yes No X Open

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund: weekly differential () payable by SIF for weeks beginning and, thereafter, for Claimant's lifetime

TOTAL: \$22,048.07

23. Future requirements awarded: None

Said payments to begin as of the date of this Award and to be payable and be subject to modification and review as provided by law.

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

Ray A. Gerritzen

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joseph Heuer

Injury No: 99-166891

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Sunrise R-9 School District

Additional Party N/A

Insurer: Missouri United School Insurance c/o Gallagher Bassett

Checked by: KMM/bfb

PRELIMINARIES

The above-referenced claim was heard by the undersigned Administrative Law Judge on September 27, 2004 and on November 17, 2004 at Jefferson Memorial Hospital in Jefferson County, Missouri. The claim was heard against only the Employer/Insurer; the Second Injury Fund was not applicable. Post-hearing briefs were initially due December 17, 2004 and the parties by agreement requested an extension of time and briefs were received and the claim was formally submitted on December 21, 2004. Joseph Heuer, (hereinafter "Claimant"), was represented by Ray A. Gerritzen. Sunrise R-9 School District, (hereinafter "Employer"), was insured by MUSIC Self-Insured, care of Gallagher Basset Services, and represented by Karen A. Mulroy. Joseph Heuer, Sandra Heuer, Timothy J. LaBruyere and Kathryn Heimos testified live at the hearing. Mr. Gerritzen requested a fee of 25% of Claimant's award.

The parties stipulated that on or about December 20, 1999, the Claimant while in the employment of Employer sustained an injury by accident in Jefferson County, Missouri. The parties further stipulated that the Employer had notice of the injury and a claim for compensation was filed within the time prescribed by law. Claimant was paid compensation in the amount of \$1081.76 at a temporary total disability rate of \$145.61. Those payments represented 7 1/7 weeks of benefits covering a period from December 21, 1999 through January 11, 2000; from May 2, 2001 through May 28, 2001 and from January 3, 2002 through January 4, 2002. Medical aid was provided in the amount of \$33, 840.73.

The parties agreed and stipulated that the issues for disposition in this case are:

1. Medical Causation
2. Future Medical Care
3. Rate
4. Nature and Extent of Permanent Partial Disability

EXHIBITS

Claimant offered the following exhibits which were admitted into evidence without objection:

Claimant's A: Ronald E. Hoffman, M.D. deposition taken May 10, 2004

Claimant's B: Jefferson Memorial Hospital medical records

Claimant's C: Frank A. Krewet, M.D. medical records

Claimant's D: Jefferson Memorial Hospital Rehabilitation Center medical records

Claimant's E: Kirkwood MRI Center medical records

Claimant's F: Frank A. Krewet, M.D. medical records

Claimant's G: ProRehab medical records

Claimant's H: David A. Mullen, D.O. deposition taken August 6, 2004

Claimant's I: Operative report dated May 2, 2001

Claimant's J: Judgment dated July 28, 2004

Claimant's K: Letter dated July 26, 2004

Claimant's L: Letter dated July 21, 2004

Claimant's P: School District's response page 4

Claimant's Q: School District's response page 4

Claimant offered the following exhibits which were admitted into evidence after Employer withdrew objection:

Claimant's M: Photograph

Claimant's N: Photograph

Claimant's O: W-2 Wage and Tax Statement 1999

Employer offered the following exhibits which were admitted into evidence without objection:

Employer/Insurer's 1: John D. Graham, M.D. deposition taken April 7, 2004

Employer/Insurer's 2: John R. Wagner, M.D. deposition taken May 7, 2004

Employer/Insurer's 3: Orthopedic and Sports Medicine medical records

Employer/Insurer's 4: The Occupational Medicine Specialty Center medical records

Employer/Insurer's 5: Michael F. Boland, M.D. medical report

Employer offered the following exhibits which were admitted into evidence over the objection of Claimant:

Employer/Insurer's 6: Sunrise R-9 School District payroll records

Employer/Insurer's 8: David O. Mullen, D.O. medical report

Employer offered the following exhibit which was not admitted into evidence after Claimant's objection was sustained:

Employer/Insurer's 7: John D. Graham, M.D. June 16, 2004 report

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was 55 years old at the time of the hearing held in this matter. Claimant obtained an Associates Degree in Business and Auto Tech. in 1970. He was honorably discharged from the United States Army in 1972. Claimant, prior to the accident involved in this claim was a school bus driver for Employer. Claimant was hired by Employer in 1994. He normally drove five days per week and was unsure of the hours. Claimant testified he worked less than twenty hours each week for Employer explaining that he did not qualify for retirement benefits, which required at least twenty hours of work each week. He was paid a yearly salary for elementary school routes and received additional pay for high school and field trip routes. Claimant testified his "W-2" wages were \$10,634.76 for the year 1999. Claimant continues to work for Employer through the dates of hearing.

Claimant testified there were drivers that worked more hours than he did prior to the accident because some drivers qualified for retirement benefits. Claimant testified that the wage information provided by the Employer was inaccurate noting that field trips were not in chronological order. However, Claimant could not specify additional dates of field trips nor increased hours during the applicable time period. Claimant did not know if he worked more hours than the documents reported. Claimant appeared confused by the reports, however he testified that knew he was paid fairly by reviewing the "sheets" given to him by Employer. Claimant did not dispute the 1999 wage form (EE's Exh. O) and in fact used the 1999 W-2 form to prepare his taxes. He does not recall the number of 1999 field trips he drove for Employer. If wages were inaccurate Claimant would notify the Employer's bookkeeper. Claimant testified on cross-examination that errors in wages were not routine.

Claimant was returning a school bus to the garage on December 20, 1999 when a work van ran a stop and hit

the back of the front tire area of the bus behind the driver. Claimant's head hit the bus window, and the steering column jammed the inside of his right knee. Claimant's wife took Claimant to Jefferson Memorial Hospital. Claimant had a knot on his head, redness in his right eye, hand contusions, shoulder pain, a lump in the right knee and back pain. Dr. Krewet's diagnoses were multiple contusions with contusion of the head, right knee, right and left hands, right shoulder and low back strain (Claimant's Exh. C). Claimant was treated at JMH with ice packs, pain relievers, eye drops and antibiotics. He testified he was off work for twenty-one days. After his initial treatment Claimant had ongoing problems with his right knee and low back.

Claimant was treated by Dr. Wayne who diagnosed right knee contusion/strain, lumbar strain and right knee degenerative changes. Claimant received a knee injection and lumbar epidural steroid injections. Dr. Wagner performed a right knee arthroscopy on May 2, 2001 with post operative diagnoses of chondromalacia of the lateral tibial plateau and patella. The medial meniscus was intact according to Dr. Wagner. Dr. Wagner shaved the chondromalacia. Claimant testified his knee was better for several months and then progressively worse. Claimant testified he was off work one month after his right knee surgery. Dr. Wagner testified Claimant reached maximum medical improvement on March 14, 2002 and he issued a rating of 7.5% permanent partial disability (hereinafter PPD) body as a whole referable to the lumbar spine and 10% PPD to the right knee (ER/I's Exh. 2, pg. 37). Dr. Wagner testified he ordered a lumbar myelogram on January 23, 2003 because Claimant continued to complain of back symptoms. Dr. Wagner compared this myelogram to a prior myelogram dated January 3, 2002. He testified that the myelograms were essentially the same; stenosis of the lumbar spine and a small herniated disc at L4-5, left sided, which was the opposite side of Claimant's symptoms. Dr. Wagner opined that this herniated disc was not related to the December 20, 1999 injury (Id. at 42). Dr. Wagner testified that as of February 20, 2003 Claimant was at maximum medical improvement and no surgery was indicated. He felt Claimant was capable of controlling pain with over-the-counter medications (Id. at 43).

Dr. Graham testified that he was treating Claimant with Celebrex, Ultram and Doxepin for low back pain related to degenerative disc disease and mild spinal stenosis. Dr. Graham felt Claimant had suffered a lumbar strain from the bus accident and that Claimant's current complaints are not the result of that accident. Dr. Graham testified Claimant's current complaints concerning his back are related to his farming activities (ER/I's Exh. 1, pgs. 16-18). Claimant was evaluated by Dr. Hoffman at Claimant's request on June 12, 2003. Dr. Hoffman testified that Claimant has 35% permanent partial disability of the lumbar spine; 35% permanent partial disability of the right knee and 25% permanent partial disability to the body as a whole attributable to generalized osteoporosis (EE's Exh. A, pgs. 56-57).

Claimant testified that prior to the accident he worked on his 300-acre farm from "dark to dark" daily tending over 100 head of cattle. He put up fencing with a post driver and wire stretchers. He completed building maintenance and repairs to barns and completed all equipment repairs as needed. He planted and harvested crops.

After the accident Claimant could no longer square bale because he could not lift and twist his back without pain. He has had low back pain since the accident. He has fed cattle with his tractor, using round bales since the accident. Fence repairs are now done by his wife and two children because Claimant cannot drive a fence post. Claimant cannot stand still, cannot plant with a disc on the tractor. Now he plants with the fertilizer buggy that he rents. Claimant cannot clear land since the accident and has stopped all improvements to his farm since the accident.

Claimant still drives a school bus for Employer. On cross-examination Claimant admitted that his hours driving a school bus have increased since the accident and he now qualifies for retirement benefits. He has not missed time from bus driving due to his injuries since reaching maximum medical improvement. He has knee stiffness in the morning and if it is rainy and cold the knee bothers him all day. His knee is sore on his best day and pops. He has trouble walking on his farm. He no longer uses ladders. He has trouble climbing stairs at home and therefore moved his bedroom downstairs. The few times he went upstairs in the last five years he had to crawl back down the stairs. He cannot kneel, unless his knee is padded. Claimant testified he currently takes Celebrex, Ultram and Doxepin prescribed by Dr. Graham. His sleep pattern has changed and Doxepin helps with pain and sleep. Claimant testified that Dr. Graham is hostile and confrontational and Claimant is not happy with Dr. Graham.

Claimant testified that he had no treatment to his back or right knee prior to the accident. Claimant testified he

tried to use a weed-eater at home after the accident and his low back hurt and he quit. Claimant testified he cannot lift, twist, bend nor stand still. He cannot fix equipment and cannot complete work with a chain saw. Everything he does now is in slow speed. He cannot wait in line, cannot walk across hills. He takes Ultram forty-five minutes before any exercise program and to bale hay. His family activities have changed and he has stopped gardening. He cannot squat because he cannot get back up.

Claimant admitted on cross-examination that he has not sold any acreage, nor decreased the total number of cattle since the accident. Claimant also uses his tractor daily since the accident to check the cattle. He turns and monitors the hay baler. He has not hired anyone to help with the farm since the accident. Claimant admitted on cross-examination that he contacted Dr. Mullen after planting a field in October 2002 and had increased back pain.

Claimant's wife, Sandra Heuer, testified on behalf of Claimant. She testified she feeds calves, completes building maintenance and hangs electric fence currently. She sees that Claimant is in pain and his knee swells.

Timothy J. LaBruyere, Superintendent of Schools for Employer, testified on behalf of Employer. He was not Superintendent at the time of the accident. He stated all bus drivers are part-time currently. Kathryn Heimos, Finance Director for Employer, testified on behalf of Employer. She has been Finance Director for one year and three months. She testified that there were two page fours on ER/l's Exh. 6.

Issues relating to Medical Causation and Future Medical Care

Claimant seeks an award of future medical care relating to his back and knee conditions. Section 287.020.2 RSMo provides, in part, that "An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition." The parties stipulated that Claimant sustained an injury by accident on December 20, 1999. The disagreement revolves around the nature of the injury and the need for future medical care concerning Claimant's current condition. Dr. Hoffman testified that Claimant damaged his disc in the accident and that Claimant will probably suffer arthritis over time (EE's Exh. A, pg. 8). Dr. Hoffman also testified that Claimant's pre-existing chondromalacia was possibly pre-existing and was aggravated by the accident (Id. at 13). Dr. Hoffman testified that since the accident Claimant was unable to exercise and farm and therefore Claimant would be subject to developing osteoporosis or more osteoporosis (Id. at 15). Dr. Hoffman testified Claimant may need additional arthroscopic surgery for his knee and may need a total knee replacement in another ten years (Id. at 22). He testified that future care for the back ranges from anti-inflammatory medications, back supports, physical therapy, exercise programs to surgery (Id. at 23). Dr. Hoffman admitted on cross-examination that Claimant might never progress to the point of requiring lumbar disc surgery (Id. at 61), nor knee replacement surgery (Id. at 67).

Dr. Wagner testified that Claimant's knee injury was a sprain injury or contusion with no ligamentous or meniscal injury. At arthroscopy he trimmed the friable cartilage in Claimant's knee (ER/l's Exh. 2, pg. 53). Dr. Wagner testified that Claimant needs no further diagnostic testing or any further treatment for his knee. He testified that Claimant does not need a total knee replacement because of the accident involved in this hearing (Id.). Dr. Wagner testified that Claimant had a sprain injury to the lumbar spine; no complaints of a herniated disc and that the herniated disc is an incidental finding on myelogram (Id. at 87). Dr. Wagner testified that Claimant's symptoms are on the basis of degenerative disease in the lumbar spine (Id. at 50) and that Claimant is not a surgical candidate regarding his lumbar spine (Id. at 51). Dr. Wagner testified the Claimant's continuing need for pain medication is related to degenerative changes (Id. at 52). Dr. Wagner testified that there is no relationship between Claimant's injury and osteoporosis (Id. at 57).

Dr. Graham testified that at the time of his deposition he was treating complaints related to Claimant's degenerative changes and ongoing farming activities (ER/l's Exh. 1, pg. 16). Dr. Graham testified that Claimant is performing heavy labor and farming and that records have indicated that Claimant has had back pain when performing heavy farming activities. (Id. at 16-17). David A. Mullen, D.O. testified on behalf of Claimant that Claimant's wife called his office for a prescription for Claimant after he suffered increased back pain after planting a field in October 2002 (EE's Exh. H, pg. 21). Michael F. Boland, M.D. in his report of February 4, 2002 recommended against any surgery and opined that Claimant had chronic low back pain related to a facet joint strain and an asymptomatic disc abnormality seen on myelogram (ER/l's Exh. 5).

Claimant bears the burden to prove an entitlement to future medical benefits. Rana v. Landstar, 46 S.W.3d 614,622 (Mo.App. 2001). An employee must show something more than a possibility that he will need future medical care and treatment. Id. The finding of a need for future medical care and treatment must be shown to be reasonably probable and founded upon reason and experience. Id. None of the doctors involved in this case have indicated that Claimant is in need of surgery on his knee or back at this time. Claimant has not met his burden proving an entitlement to future back or knee surgery is reasonably probable. I find Drs. Wagner and Graham credible with regard to the need for future surgery. Drs. Wagner and Graham are persuasive when they attribute the need for prescription medications and the various non-surgical treatments discussed by Dr. Hoffman to pre-existing degenerative conditions and aggravations suffered since the accident. Therefore, I find that Claimant failed to meet his burden to prove that future medical care is medically causally related to the accident of December 20, 1999.

Issues relating to Rate

The parties did not agree on the rates for temporary total and permanent partial disability and therefore documents were provided by Employer concerning Claimant's weekly wages (ER/I's Exh 6). Claimant submitted his W-2 Wage and Tax Statement for 1999 (EE's Exh. O) and Employer's response to requests for wage information (EE's Exh. P and Q). I have reviewed these documents as well as the testimony at hearing and in accordance with Section 287.250(4) I find wages for the thirteen weeks preceding the accident (beginning September 21, 1999) to total \$3547.43. This computes to an average weekly wage of \$272.88 and applicable temporary total and permanent partial disability rates of \$181.92. The parties stipulated that Claimant was paid temporary total disability (hereinafter TTD) at a stipulated rate of \$145.61 for 7 1/7 weeks for a total of \$1081.76. Therefore, using the TTD rate of \$181.92 the total TTD paid should have been \$1299.43; Claimant is awarded an additional \$217.67 in TTD compensation. Claimant testified that he worked less than twenty hours each week prior to the accident. Claimant offered Exh. O as evidence of his wages, which would result in a lower rate than either rate, calculated above. Claimant did not offer evidence of wages greater than those contained in the exhibits concerning wage rate.

Claimant argues he is entitled to the maximum rate allowable, but does not offer evidence to support that argument. Claimant testified that he relied on the Employer's reports to file his taxes and for the accuracy of his paychecks. He further testified that errors in his pay were not common. I find that Claimant, by his own testimony, was a permanent part-time employee who worked no more than twenty hours each week. Therefore, I find that the applicable permanent partial disability rate based on the above calculations is \$181.92.

Permanent Partial Disability of Employer

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. Phelps v. Jeff Wolk Construction Co., 803 S.W2d 641, 646 (Mo.App.1991). Section 287.190.6, RSMo 2000, defines permanent partial disability as "disability that is permanent in nature and partial in degree." As a result of the December 20, 1999 accident the physicians involved in this case have disagreed with regard to the diagnoses involving Claimant's right knee and low back. Dr. Wagner found chondromalacia at the time of Claimant's right knee arthroscopy and rated Claimant's right knee at 10% permanent partial disability. Dr. Hoffman testified that Claimant's chondromalacia may have pre-existed the accident, but was aggravated by the accident (EE's Exh. A pg. 13). Dr. Hoffman assigned 35% permanent partial disability to Claimant's right knee. Dr. Wagner diagnosed a lumbar strain as a result of the December 20, 1999 accident.

Dr. Wagner and Dr. Graham did not relate the disc protrusion at L4-5 noted on MRI and myelograms to the accident. Dr. Wagner diagnosed spinal stenosis, but believed that the stenosis pre-existed the accident. Dr. Wagner assigned permanent partial disability of 10% body as a whole referable to the lumbar spine. Dr. Hoffman assigned 35% permanent partial disability of the lumbar spine and 25% body as a whole secondary to generalized osteoporosis due to the accident. Dr. Wagner vigorously disagreed with Dr. Hoffman regarding the osteoporosis and testified that there is no relationship between the accident and osteoporosis (ER/I's Exh. 2, pg.57).

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo.App. 1983). After reviewing the evidence submitted including Claimant's complaints regarding the nature and extent of disability in his right knee, I find that Claimant sustained permanent partial disability of 25% of his right knee for which Employer is liable. I find that Claimant sustained permanent partial disability of 20% to the body as a whole referable to the low back. I find Dr. Wagner's opinion regarding osteoporosis credible and therefore award no permanent partial disability based on osteoporosis or the possibility of developing osteoporosis. At the PPD rate calculated above of \$181.92 per week, the amount due is 40 weeks for the right knee plus 80 weeks for the body as a whole referable to the low back, which equals 120 weeks of disability for a total of \$21,830.40 due from Employer.

This award is subject to a lien in favor of Ray A. Gerritzen, Attorney at Law, in the amount of 25 percent thereof for necessary legal services rendered.

CONCLUSION

In summary, Claimant is awarded 25% PPD of his right knee and 20% PPD of the body as a whole, referable to the low back at a rate of \$181.92, for a total of \$21,830.40 and an underpay of TTD compensation of \$217.67. The total awarded to Claimant is \$22,048.07 from Employer. This award is subject to the attorney lien referenced above.

This award is subject to interest as provided by law.

Date: March 17, 2005

Made by: /s/ KOREN M. MUELLER
KOREN M. MUELLER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation