

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

Injury No.: 04-145139

Employee: Darryl Hines
Employer: Fedex Freight East, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 17, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued November 17, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 18th day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Darryl Hines

Injury No. 04-145139

Dependents: None

Employer: Fedex Freight East, Inc.

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: 6/22/09, 7/14/09, 8/14/09

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

Checked by: GCG/ln

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: Alleged April 6, 2004
5. State location where accident occurred or occupational disease was contracted: St. Charles 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? No
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant alleges injury to right knee from repetitive activity.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged right knee
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

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- 17. Value necessary medical aid not furnished by employer/insurer? \$0
- 18. Employee's average weekly wages: \$1,000.00
- 19. Weekly compensation rate: \$662.55 TTD/\$347.05 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No None

TOTAL: None

23. Future requirements awarded: None

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:

Frank Niesen

Employee: Darryl Hines

Injury No. 04-145139

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Darryl Hines

Injury No: 04-145139

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Fedex Freight East, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party Second Injury Fund

Insurer: Self-Insured

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing in the above referenced case was held June 22, July 14 and August 14, 2009, in the St. Charles office of the Division of Workers' Compensation before the undersigned Administrative Law Judge. Claimant Darryl Hines (Claimant) was present and represented by attorney Frank Niesen. Employer Walgreens (Walgreens) and its Insurer American Manufacturers Mutual Insurance Company (Insurer) were represented by attorney Jennifer Yates-Weller. Employer FedEx Freight East, Inc. (FedEx), which is self insured, was represented by attorney Constance Warner. The Second Injury Fund (SIF) was represented by Assistant Attorney General Caroline Bean. The evidentiary hearing was held in conjunction with injury # 02-010878, in which Claimant is proceeding against Walgreens.

The parties entered into the following stipulations:

1. Claimant was an employee of Employer pursuant to Chapter 287 RSMo. on April 6, 2004.
2. Venue is proper in St. Charles County.
3. Claimant earned an average weekly wage of \$1,000.00 resulting in applicable rates of compensation of \$662.55 for total disability (TTD) benefits and \$347.05 for permanent partial disability (PPD) benefits.
4. Employer has not paid any benefits to date.

The following issues were presented for resolution in this hearing:

1. Notice.
2. Accident/occupational disease.
3. Arising out of and in the course of employment.

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4. Medical causation.
5. Employer liability for past medical care.
6. Employer liability for future medical care.
7. Is Claimant entitled to TTD benefits from April 1, 2005 to February 15, 2006?
8. Nature and extent of Claimant's disability.
9. Liability of the SIF.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

The following exhibits were offered by Claimant:

- Exhibit A - DePaul Health Center Records
- Exhibit B - Northland Orthopedic Records
- Exhibit C - HealthSouth Records
- Exhibit D - Bridgeton MRI and Imaging
- Exhibit E - St. Mary's Health Center Records
- Exhibit F - St. Mary's Health Center Billing
- Exhibit G - Signature Health, Mid County Records
- Exhibit H - Signature Health, Mid County Billing
- Exhibit I - City Point Surgical Records and Billing
- Exhibit J - St. John's Mercy Medical Center Records
- Exhibit K - St. John's Mercy Medical Center Billing
- Exhibit L - SSM Rehab Records
- Exhibit M - SSM Rehab Billing
- Exhibit N - Allied Behavioral Consultants Records
- Exhibit O - Christopher LaBonte, M.D. Records
- Exhibit P - Alan M. Jacobs, D.P.M. Records
- Exhibit Q - Massachusetts Hospital and ER Records
- Exhibit R - David T. Volarich, D.O. Deposition
- Exhibit S - Edwin D. Wolfgram, M.D. Deposition

Claimant's exhibits were received into evidence without objection.

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Walgreens offered the following exhibits:

- Exhibit 1 - Northland Orthopedic 03/26/02 Record
- Exhibit 2 - Wage/TTD documents
- Exhibit 3 - Dr. James Burke Deposition
- Exhibit 4 - Dr. Stacey Smith Deposition
- Exhibit 5 - DWC Notice of Commencement/Termination of Compensation
- Exhibit 6 - Wage Statement

Each of the exhibits, with the exception of Exhibit 2, was received into evidence without objection. Claimant made an objection to Exhibit 2, based on hearsay. The ruling on said objection was deferred until this Award. As Walgreens provided no further foundation for the admission of Exhibit 2, the objection is sustained, the admission of Walgreen's Exhibit 2 is denied.

FedEx offered the following exhibits:

- Exhibit 1 - Deposition of Dr. Michael Nogalski
- Exhibit 2 - Deposition of Dr. Stacey Smith
- Exhibit 3 - Deposition of Darryl Hines dated December 16, 2005
- Exhibit 4 - St. Mary's Hospital ER records
- Exhibit 6 - Claim for Compensation dated June 11, 2005
- Exhibit 7 - Statement of Darryl Hines
- Exhibit 8 - Injury Investigation Report
- Exhibit 9 - Missouri Division of Employment Security Tribunal
- Exhibit 12 - FedEx Freight Associate Handbook
- Exhibit 13 - Photos
- Exhibit 14 - DVD
- Exhibit 15 - Operations Comprehensive Assessment Results
- Exhibit 16 - Correspondence dated February 15, 2006
- Exhibit 17 - Photos
- Exhibit 18 - Deposition of Darryl Hines dated November 5, 2004

The exhibits offered by FedEx were received into evidence. All deposition transcripts were received subject to objections made at the time of the deposition. The exhibits offered by the Employers are marked with both the name of the Employer and the exhibit number.

The relevant evidence is summarized based on the above exhibits and the testimony of the witnesses. Mr. Hines testified that he is 6'3" tall and weighs 235 lbs. He has been with his companion, Sandra, for 25 years though they are not legally married. He has 5 children and 2 step-children, 3 of which live at home with him. He had 2 daughters who were killed in a motor vehicle accident in February 1997.

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Mr. Hines completed the 11th grade and has vocational training in retail sales and market merchandising. He was in the Army and received a dishonorable discharge after he was absent without leave. The Employee testified that he began working at Walgreens in September 2002 as an assistant manager in the training program. On February 17, 2002, he was stepping off of a ladder when he twisted his right knee.

Mr. Hines was initially seen at SSM DePaul Health Center on the date of the injury. He provided a history of twisting his right knee after stepping down off of a ladder at work. He denied any other injury. X-rays revealed mild degenerative changes with no evidence of fracture or dislocation and he was diagnosed with a sprained right knee. (Ex. A) Mr. Hines was referred to Dr. Crystal Knierim and seen on February 19, 2002. He provided a history of putting all of his weight on his right knee as he was coming down off of a ladder. Dr. Knierim diagnosed right knee effusion and recommended an MRI. (Ex. B)

The MRI was performed on February 21, 2002 and showed a tear of the medial meniscus and osteoarthritis. He underwent surgery on March 11, 2002 at North County Surgery Center. The procedure performed was a right knee arthroscopy with partial posterior horn meniscectomy and chondroplasty of the medial and lateral femoral condyles as well as the femoral trochlea. Dr. Knierim noted fairly significant chondromalacia changes in both the medial and lateral femoral condyles, Grade II and III with flaking of the cartilaginous surface. (Ex. B)

Mr. Hines was seen in follow up with Dr. Knierim and attended post-operative physical therapy at HealthSouth. He was last seen by Dr. Knierim on April 16, 2002 at which time his therapy was extended. (Ex. B) Mr. Hines' care was then transferred to Dr. James Burke. Dr. Burke first evaluated Mr. Hines on May 20, 2002. His examination and x-rays revealed findings consistent with his post-arthroscopy status in addition to signs of arthritis and chondromalacia, which is rough cartilage on the undersurface of the bone and is the early stages of arthritic change. He provided Mr. Hines with an injection to the knee and ordered continued physical therapy. (Walgreens Ex. 3)

Dr. Burke eventually recommended a functional capacity evaluation but Mr. Hines did not attend per the advice of his attorney. Dr. Burke last saw Mr. Hines on August 19, 2002, six months after the injury. Mr. Hines felt his knee had gotten to a point where he could deal with it at work, full duty. Physical examination revealed full extension and flexion, a negative McMurray's sign (which is a sign for torn cartilage), and no point tenderness on the medial or lateral joint line. Overall, Dr. Burke thought he looked good and provided him with a full duty work release indicating he had reached maximum medical improvement. On November 27, 2002, Dr. Burke issued a permanent partial disability rating of 10% of the right knee, 5% due to his preexisting chondromalacia and 5% due to the work injury on February 17, 2002. (Walgreens Ex. 3)

Claimant testified that during his course of treatment, he returned to work light duty around Memorial Day in May 2002. He worked light duty in the photo department and continued to work full time after his release by Dr. Burke for Walgreens until he voluntarily left in September 2002. Claimant began work with FedEx in September 2002 as a supervisor. He

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was in a six month training/leadership program. He performed yard checks that involved climbing in trailers and running the dock stand. He testified that he would climb onto and check 500 to 700 trucks a day.

Claimant testified that before April 6, 2004 he was not using a brace for his knee, had lost a lot of weight from walking around the yard at FedEx and had been doing pretty good. He was also not using a cane. He had not sought any treatment for his right knee between August 2002 and April 2004. On April 6, 2004, Claimant testified that he was getting out of a trailer to come to a meeting when his right knee popped, then his knee popped again when getting up from a chair, and again walking down steps while leaving a meeting, which caused him to fall onto co-workers. He testified that he told Glenn of the injury and went to St. Mary's emergency room after work. On cross exam, Mr. Hines testified he did not tell anybody about his injury because Glenn knew about the injury as Claimant had fallen onto Glenn while walking down the stairs. Claimant further testified on cross exam that he did not tell anybody because he was not trying to blame FedEx and did not want to lose his job. On June 14, 2005, Mr. Hines filed a subsequent Claim for Compensation for an alleged injury on April 6, 2004 bearing Injury Number 04-145139 against FedEx. Following this new alleged injury, Mr. Hines underwent two additional surgical procedures to his right knee in April 2004 and December 2004, performed by Dr. Irvine and Dr. Tessier respectively. He continued to work for FedEx until December 2005.

On January 2, 2006, Mr. Hines was evaluated by Dr. David Volarich. Dr. Volarich diagnosed a torn medial meniscus and aggravation of chondromalacia, status/post arthroscopic partial medial menisectomy with chondroplasty of the medial femoral condyle, lateral femoral condyle, and trochlea following the injury on February 17, 2002 at Walgreens. He provided a 30% PPD to the right knee as a result of this diagnosis. With respect to the April 6, 2004 injury at FedEx, Dr. Volarich diagnosed repetitive trauma causing aggravation of right knee chondromalacia and degenerative arthritis, status/post chondroplasty of the medial femoral condyle, lateral femoral condyle, and patella and persistent right knee pain due to chondromalacia of the patella, status/post Stedman pic chondroplasty of the medial femoral condyle. He provided a 40% PPD to the right knee following this injury at FedEx. Dr. Volarich diagnosed mild right knee strain syndrome and provided a 5% PPD rating to the right knee preexisting February 17, 2002. (Ex. R)

Dr. Volarich also addressed Claimant's other preexisting disabilities. He rated them as follows: 35% PPD of the left foot, 35% PPD of the right hand, 12.5% of the body referable to the cervical spine, and 12.5% of the body referable to the lumbar spine.

Mr. Hines was evaluated by Dr. Michael Nogalski on November 7, 2006 on behalf of FedEx. Dr. Nogalski opined that Claimant's current knee condition was not causally related to his employment at FedEx, nor was his employment at FedEx a substantial factor in the diagnoses and treatment provided by Dr. Irvine and Dr. Tessier. Dr. Nogalski attributes Claimant's knee condition and pain to pre-existing significant chondromalacia and degenerative changes. He gave a PPD rating of 12% due to pre-existing injuries or conditions. (FedEx 1)

Mr. Hines testified that following his injury on February 17, 2002, he did not seek any treatment for any other body parts except his right knee. Specifically, he did not seek any

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treatment for complaints of depression. He did not seek evaluation for complaints of depression until 2004, some two years after his injury at Walgreens, when he went to Allied Behavioral Consultants, Inc. in November 2004. The history includes his two daughters' deaths in 1996 from a motor vehicle accident, a son in jail for drugs, a stepson in jail for drugs/murder, a dishonorable discharge from the Army, and a history of drug abuse including cocaine with prior inpatient rehabilitation. His chief complaint was "the compound pressure of life." He was seen on two occasions. (Ex. N)

At the request of his attorney, Mr. Hines was evaluated by Dr. Edwin Wolfgram on July 5, 2006. Dr. Wolfgram diagnosed pain disorder associated with both psychological factors and a general medical condition, noting Mr. Hines has been in a continuous state of pain since 2004 and major depressive disorder, single episode, severe, without psychotic features. Pre-existing February 17, 2002, he diagnosed right knee strain syndrome, chronic cervical syndrome and chronic lumbar syndrome. Since February 17, 2002, he diagnosed multiple pathologies of the right knee, with partial recovery from August 2002 until April 2004 and multiple pain management medications currently in use. He concluded that Mr. Hines was totally and permanently disabled from a psychiatric standpoint alone and assigned 20% permanent partial psychiatric disability pre-existing February 17, 2002, 45% PPD following the injury at Walgreens, and 35% secondary to the injuries at FedEx. (Ex. S)

At the request of FedEx, Mr. Hines was examined and evaluated by Dr. Stacey Smith on November 2, 2006. She opined he had no mood diagnosis, a few low grade depressive symptoms that resolved; probable physiologic opioid dependence, by history; cocaine dependence, by history; marijuana abuse, by history; and conduct disorder, by history. She also diagnosed narcissistic and antisocial traits. She found no evidence of a significant psychiatric illness, did not recommend any psychiatric treatment and stated there was no evidence of any PPD. Dr. Smith issued a supplemental report dated June 29, 2008 and an addendum indicating she found no evidence that Mr. Hines sustained any psychiatric injury secondary from his knee injury at Walgreens and noting he had no PPD. (Walgreens Ex. 4, FedEx 2)

Mr. Hines is currently employed selling jewelry and as manager of a jewelry store in Chesterfield Mall in a full time capacity.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, the testimony of other witnesses, my personal observations, the expert medical testimony, and all other exhibits received into evidence, I find:

Section 287 RSMo. underwent significant changes through legislative amendments which took effect August 28, 2005. Therefore, it must be determined which law applies to injuries sustained prior to August 28, 2005. **Article I, §13 of the Missouri Constitution** provides: That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be enacted.

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There are two exceptions to the rule that a statute shall not be applied retrospectively. First, where the statute is only procedural and does not affect any substantive right of the parties and, second, where the legislature manifests a clear intent for retrospective application. **Gershman Investment Corp. v. Duckett Creek Sewer Dist., 851 S.W.2d 765 (Mo.App.1993).** Section 287, as amended, does not contain a manifestation of legislative intent for retroactive application. Therefore, for any provision of §287 to apply retroactively, it must only be procedural in scope, as the retroactive application of statutory provisions which affects substantive rights violates the constitution. **Fletcher v. Second Injury Fund, 922 S.W.2d 402, 406 (Mo.App.1996).**

The distinction between substantive and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used to effect the suit. **Wilkes v. Missouri Highway and Transp. Com'n, 762 S.W.2d 27, (Mo. banc 1988).** Substantive statutes take away or impair vested rights acquired under existing law, or create a new obligation or impose a new duty. **Brennecka v. Director of Revenue, 855 S.W.2d 509, 511 (Mo.App.1993).** As the issues presented herein regard matters of substantive law, the law as it existed at the time of the alleged injury shall apply.

In every workers' compensation case, the claimant has the burden of proof on all essential elements of the claim, including medical causation between the accident and the injury of which the employee complains. **Groce v Pyle, 315 S.W. 2d 482 (Mo. App. W.D. 1958); Goleman v MCI Transporters, 844 S.W. 2d 463 (Mo. App. W.D. 1992).**¹ Speculation, conjecture or personal opinion cannot form a basis for an award of compensation in any area of required proof. **Toole v. Bechtel Corp., 291 S.W.2d 874 (Mo. 1986).** Proof that work is one of a number of possible causes for the injury and disability is not sufficient to form the basis for an award of compensation. **Russell v Southwest Grease and Oil Co., 509 S.W.2d 776 (Mo. App. W. D. 1974).** The claimant must prove that the accident was a substantial factor in causing the disability. See, **Cahall v. Cahall, 963 S.W.2d 368 (Mo. App. E.D. 1998).**

Notice

Claimant's testimony regarding notice is not credible. Claimant concedes he did not give written notice on April 6, 2004, the date of the alleged injury. Between his testimony on direct and cross exam during the hearing, his previous deposition testimony, his written statements, and the information contained in medical records, there are several different versions of how the accident occurred and how notice, if any, was given. The different versions of accident include his knee popping while stepping out of a trailer, getting up out of a chair after a meeting, and walking down the steps after the meeting. Some versions include all three alleged incidents. Ultimately, the theory presented at the hearing, supported by the opinion of Dr. Volarich, was that his duties at FedEx aggravated his degenerative knee condition causing the need for the two surgeries.

¹ This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

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Claimant testified at different points that he told Glenn, his supervisor, that his knee popped, but Claimant declined immediate medical treatment. He also testified that he fell on Glenn and other employees while leaving a meeting, so he did not need to tell them, because they already knew. He also testified he did not tell anyone because he did not want to put his job in jeopardy or he felt it was related to the prior injury. However, despite these allegations of both accident and notice, Claimant ultimately changed his theory of recovery to conform to the medical opinion of Dr. Volarich, which was that the repetitive nature of his work duties caused aggravation of an underlying degenerative condition in his knee. Claimant testified at trial that Dr. Tessier first informed him of this in April of 2005. Dr. Tessier's records do not indicate that was his opinion or that he informed Claimant of such. In any event, the first written notice was the Claim filed on June 14, 2005.

If Mr. Hines' testimony regarding oral notice to Glenn, or constructive notice by falling on other FedEx employees is believed over the testimony that he did not give notice, which is inconsistent with his legal theory, and the medical opinion of Dr. Volarich which does not indicate a single traumatic injury, Claimant still concedes he did not request treatment or benefits of any kind, and applied for short term disability. Claimant has failed to meet his burden of proof that he gave adequate notice to FedEx, nor did he present any evidence that FedEx was not prejudiced by the failure to give notice.

Medical Causation

Causation is established by medical testimony. **Elliott v. Kansas City, Mo., School Dist.**, 71 S.W.3d 652, 657- 58 (Mo.App.2002). 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 Inc.**, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); **Hutchinson v. Tri-State Motor Transit Co.**, 721 S.W.2d 158, 163 (Mo. App. 1986).

Regardless of whether he gave adequate notice, Claimant failed to prove his knee condition or the two surgeries performed in 2004 are causally related to his employment with FedEx. Specifically, the opinion of Dr. Nogalski is more credible than the opinion of Dr. Volarich.

Dr. Volarich's rated Claimant's PPD to the right knee regarding his employment at FedEx at 40%. Dr. Volarich indicated "the rating accounts for this injury's contribution to pain, lost motion, weakness, crepitus, and atrophy in the right lower extremity." This is identical to what he accounts for the rating for the February 17, 2002 injury at Walgreens, which he rated at 30% PPD. In other words, Claimant already had an aggravation of chondromalacia and degenerative arthritis with pain, lost motion, weakness, crepitus, and atrophy before he was employed at FedEx. This fact is confirmed by the observations of Dr. Knierim in March, 2002. This is not a case of an asymptomatic degenerative condition becoming symptomatic due to a work injury. Claimant testified that at the time he left Walgreens, he had pain and swelling, he couldn't play basketball anymore, couldn't play with his grandchildren, he couldn't do any

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twisting and turning, he was limited and had to be careful where he stepped. At the time he left Walgreens he also stated he couldn't climb a ladder; wore a knee brace daily; sometimes used a cane; and was taking Vioxx, Celebrex, Vicodin, and Ibuprofen 800. Dr. Volarich's opinion that Claimant suffered an injury due to his duties at FedEx is not persuasive.

Dr. Nogalski on the other hand is a board certified orthopedic surgeon, and credibly explained how the pre-existing degenerative condition in Claimant's knee would cause pain. He further explained that this condition preexisted the alleged injury of April 6, 2004. Claimant has failed to prove that his employment at FedEx or the alleged injury of April 6, 2004 is a substantial factor in his need for medical treatment, including the two surgeries performed in 2004, or that he suffered any injury, or needs any future medical treatment causally related to his employment at FedEx.

Regarding the alleged psychiatric injury, the opinion of Dr. Smith is more credible than the opinion of Dr. Wolfgram. Dr. Wolfgram opined Claimant was permanently and totally disabled from a psychiatric standpoint, yet Claimant has continued to work full time for over 3 years, and testified he plans to work for another year. The credibility of Dr. Wolfgram's opinion is further weakened by the fact that Claimant has had very little past treatment for depression, and is not currently receiving any treatment for depression. Claimant has failed to prove it is reasonably certain that he received a psychiatric injury as a result of the alleged April 6, 2004 work injury or his employment at FedEx.

CONCLUSION

Claimant has failed to meet his burden of proof regarding notice and medical causation of the alleged injury of April 6, 2004 or his employment duties at FedEx. The Claim for compensation is denied. The Claim against the Second Injury Fund is denied. All other issues presented for determination are moot.

Made by: / s/ Grant C. Gorman
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 17th day of November 2009.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation