

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

Injury No.: 01-165056

Employee: Terry L. Jenkins

Employer: Superior Bowen Asphalt Company

Insurer: ACIG Insurance Co. c/o RSKCO

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: 1984 through December 1, 2001

Place and County of Accident: Kansas City, Jackson County, Missouri and various job sites

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 June 2, 2005. The award and decision of Administrative Law Judge Mark S. Siedlik, issued June 2, 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 14th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Terry L. Jenkins

Injury No. 01-165056

Employer: Superior Bowen Asphalt Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: ACIG Insurance Co. c/o RSKCO
Hearing Date: May 4, 2005
Briefs Filed: May 20, 2005 Checked by: MSS/abj

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: 1984 through December 1, 2001.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri, and various job sites.
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 loaded, unloaded, and drove a truck carrying heavy construction equipment.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Bilateral knees, back, and body as whole.
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.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: N/A

COMPENSATION PAYABLE

Benefits Currently Due:

Medical Expenses

Medical Already Incurred. N/A

Less credit for expenses already paid N/A

Total Medical Owing N/A

Temporary Disability

59 4/7s weeks (10/28/1998 to 12/201999)N/A

Less credit for benefits already paid N/A

Total TTD Owing N/A

Ongoing Benefits

Medical Care Indeterminate

Temporary Disability from 12/01/2001 until employee reaches MM Indeterminate

Total Ongoing Benefits Indeterminate

Total Award Indeterminate

22. Second Injury Fund liability: N/A N/A

-0- weeks of permanent partial disability from Second Injury Fund N/A

Uninsured medical/death benefits:... N/A

Permanent total disability benefits from Second Injury Fund:..... N/A

-- weekly differential (--) payable by SIF for -- weeks beginning. N/A

-- and, thereafter, for Claimant's lifetime.... N/A

TOTAL: N/A

23. Future requirements awarded: N/A

Medical care for Employee's occupational disease of the knees, as recommended by Drs. Browne, Stuckmeyer, and Koprivica, to begin as of date of this Award.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Terry L. Jenkins Injury No. 01-165056

Employer: Superior Bowen Asphalt Company

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Insurer: ACIG Insurance Co. c/o RSKCO

Hearing Date: May 4, 2005

Briefs Filed: May 20, 2005 Checked by: MSS/abj

On May 4, 2005, the employee and employer appeared for a hardship hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Terry L. Jenkins, appeared in person and with counsel, Shelly E. Naughtin. The employer and insurer appeared through Paul D. Cowing. The Second Injury Fund did not appear. The issues the parties requested the Division to determine were whether or not Mr. Jenkins suffered an occupational disease, related to his knees, arising out of and in the course of his employment and, therefore, whether the employer/insurer was liable for medical treatment of that disease. For the reasons noted below, I find that Mr. Jenkins sustained a compensable occupational disease arising out of and in the course of his employment from 1984 through December 1, 2001, and, therefore, that the employer/insurer is liable for medical treatment.

STIPULATIONS

The parties stipulated that:

1. From 1984 through December 1, 2001, Superior Bowen Asphalt Company (Superior) was an employer working subject to Missouri's Workers' Compensation law with its liability fully insured by ACIG Insurance Company;
2. Mr. Jenkins was its employee working subject to the law in Kansas City, Jackson County, Missouri, and at various job sites; and
3. Mr. Jenkins notified Superior of his alleged occupational disease and filed his claim within the time allowed by law.

ISSUES

The parties requested the Division to determine:

1. Whether Mr. Jenkins sustained an occupational disease arising out of and in the course of his employment; and
2. whether he is entitled to medical treatment.

FINDINGS

Mr. Jenkins testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

Exhibit A	–	Rating report, April 7, 2004, Dr. Koprivica
Exhibit B	–	Rating report, May 8, 2004, Dr. Koprivica
Exhibit C	–	Rating report, Dr. Stuckmeyer
Exhibit D	–	Medical records, Orthopedic & Sports Medicine Clinic
Exhibit E	–	Medical records, Diagnostic Imaging Center
Exhibit F	–	Medical records, Midwest Radiology Consultants
Exhibit G	–	Medical records, Kansas City Bone & Joint (2/19/01 through 3/5/01)
Exhibit H	–	Medical records, Kansas City Bone & Joint (4/97 through 2/00)
Exhibit I	–	Medical records, Dr. Wiscombe
Exhibit J	–	Medical records, Morack Chiropractic Center
Exhibit K	–	Medical records, Open MRI of Kansas City
Exhibit L	–	Medical records, Research Belton Hospital
Exhibit M	–	Medical records, Surgicenter of Kansas City (7 pages)
Exhibit N	–	Medical records, Surgicenter of Kansas City (10 pages)
Exhibit O	–	Medical records, Cass County Physical Therapy
Exhibit P	–	MoKan Teamsters report of hours worked.

Superior presented the testimony of Danny Marks and the following exhibits, which were admitted into evidence:

Exhibit 1	–	Deposition of Dr. Thomas
Exhibit 2	–	Claim
Exhibit 3	–	8/16/02 letter from Mr. Jenkins to the employer
Exhibit 4	–	9/5/02 letter from the employer to Mr. Jenkins
Exhibit 5	–	1999 tax return
Exhibit 6	–	2000 tax return
Exhibit 7	–	2001 tax return
Exhibit 8	–	2002 tax return
Exhibit 9	–	Vocational evaluation report, Mary Titterington
Exhibit 10	–	Video, job duties
Exhibit 11	–	Yearly earnings summary for 2001
Exhibit 12	–	Video of Mr. Jenkins, 9/20/02
Exhibit 13	–	Video of Mr. Jenkins, 10/19/02
Exhibit 14	–	Video of Mr. Jenkins, 8/04
Exhibit 15	–	Video of Mr. Jenkins, 12/04.

Employee's objections as to relevance of Exhibits 5-9 and 12-15 were overruled.

Based on the above exhibits and the testimony of Mr. Jenkins and Mr. Marks, I make the following findings. Mr. Jenkins worked as a Teamster truck driver, or lowboy truck/trailer driver, for Superior from 1984 until December 1, 2001. His job duties included loading and unloading heavy construction equipment onto an 18-

wheel, tandem-axle trailer up to 20 times per day. In order to load and unload the equipment, Mr. Jenkins was required to maneuver 100-pound ramps to drive the equipment onto and off the trailer. He also had to secure the equipment in place for transport with a "boom ratchet." Loading and unloading the equipment required repeated climbing on and off the heavy equipment. It also required repeated bending at the knees, kneeling and squatting, while pushing and pulling weighted objects.

He drove the truck loaded and unloaded with equipment between Superior's headquarters in Kansas City, Jackson County, Missouri, and various job sites, primarily throughout the metropolitan area. Driving required repeated climbing in and out of the truck cab. While driving, particularly in city traffic, Mr. Jenkins was required to repeatedly shift, brake, use the clutch, and accelerate an 18-wheel truck.

Mr. Jenkins performed these job duties for Superior for more than 17 years. He generally worked between March and December due to weather. He averaged 50 hours per week and in some years averaged 60 to 70 hours per week. (Ex. P, 11).

Due to his bilateral knee complaints, Mr. Jenkins was referred to Dr. Browne, an orthopedic surgeon, in May 2002. Dr. Browne diagnosed Mr. Jenkins with degenerative joint disease of both knees. Dr. Browne recommended Synvisc injections; a series of three injections were given to each knee in June and July of 2002. Mr. Jenkins' complaints did not resolve and Dr. Browne recommended a total knee arthroplasty.

Mr. Jenkins was evaluated by Dr. Stuckmeyer, an orthopedic surgeon, on March 14, 2003, at the request of Mr. Jenkins' attorney. For his evaluation, Dr. Stuckmeyer interviewed Mr. Jenkins about his job duties, his pre-existing injuries and conditions, his complaints and treatment, and his current complaints (Ex. C). Dr. Stuckmeyer reviewed Mr. Jenkins' medical records and conducted a physical examination.

Dr. Stuckmeyer noted the following job duties for Mr. Jenkins: repetitive loading and unloading heavy equipment; jump off the trailer and get in and out of the truck numerous times; and moving 100-pound ramps. Dr. Stuckmeyer determined that as a result of those job duties at Superior, "Mr. Jenkins suffered significant repetitive trauma to both the right and left knee." (Ex. C, p. 4). It was Dr. Stuckmeyer's opinion that Mr. Jenkins' job duties "increased the mechanical stresses and strains on both the right and left knee." (Ex. C, p. 4). Dr. Stuckmeyer concluded that Mr. Jenkins' job duties "are a substantial contributing factor to his present requirement for bilateral total knee replacements." (Ex. C, p. 4).

Mr. Jenkins was also evaluated by Dr. Koprivica at his attorney's request. Dr. Koprivica is board certified in occupational medicine. Dr. Koprivica interviewed Mr. Jenkins about his job duties, treatment history, and current complaints regarding his knees, reviewed Mr. Jenkins' medical records and conducted a physical examination. Dr. Koprivica noted the following job duties for Mr. Jenkins: extensive climbing on and off heavy equipment; jumping on and off the trailer; exposure to whole-body vibration when driving the truck; handling 100-pound ramps with multiple bending, pulling, lifting, and carrying activities. Dr. Koprivica opined that those job duties were a substantial factor in his development of degenerative joint disease involving both knees and agreed with Drs. Browne and Stuckmeyer that Mr. Jenkins is a candidate for total knee arthroplasty. (Ex. A, p. 12).

At the request of the insurer, Dr. Thomas, who is a certified medical review officer, conducted a records-only evaluation of Mr. Jenkins' claim. He was provided some of Mr. Jenkins' medical records by counsel for the employer/insurer. (Ex. 1, p. 25). Dr. Thomas agreed that Mr. Jenkins does have osteoarthritis, or degenerative joint disease, in his knees and he deferred to Dr. Browne's determination that Mr. Jenkins needs knee replacement. (Ex. 1, p. 18).

Dr. Thomas testified that normally in dealing with a patient with problems like Mr. Jenkins, he would interview the patient, take a history, and conduct a physical exam. (Ex. 1, pp. 21-22). However, Dr. Thomas did not do any of those with Mr. Jenkins. (Ex. 1, p. 22).

Dr. Thomas was provided a job description and a 25-minute edited video from the insurer (Ex. 1, pp. 34-35). Dr. Thomas agreed that Mr. Jenkins' job duties could be a factor in his osteoarthritis and need for knee replacements, but his understanding of Mr. Jenkins' job duties differed from that of Drs. Stuckmeyer and Koprivica. (Ex. 1, pp. 32, 34, 45). In his report, Dr. Thomas described Mr. Jenkins' job duties as lifting or

maneuvering ramps, as few as two and as many as 12 times per day, and driving the truck. Dr. Thomas opined that those job duties did not cause his need for bilateral total knee arthroplasty. Rather, it was his opinion that Mr. Jenkins' body mass index (BMI) was the main cause of Mr. Jenkins' osteoarthritis. (Ex. 1, p. 31).

It appears that the video provided by the insurer was taped on April 25, 2005, almost four years after Mr. Jenkins last worked for Superior. The video does not show anyone driving. Mr. Jenkins testified that the job duties depicted in the video are similar to those he performed with the following differences. The video shows two people performing the job of lowboy truck/trailer driver together. Most of the time, Mr. Jenkins worked alone. The ramps used by the people in the video appear to be smaller and lighter than the ramps he used. And the mechanism used to secure the equipment in the video is operated standing upright, using the upper extremities. The "boom ratchet" that Mr. Jenkins used was operated by pulling, using more body weight and flexing the knees. Mr. Jenkins also testified that a lot of stress was placed on his knees during driving because of the nature of the truck and trailer, the weight of the heavy equipment, and driving in the city.

Danny Marks, Mr. Jenkins' supervisor for the last year of his employment, testified on behalf of the employer/insurer. Mr. Marks has never been a lowboy truck/trailer driver, though he has helped load and unload some of the heavy equipment. He never rode along with Mr. Jenkins as he performed his job duties. Mr. Marks agreed with the depiction of the job duties in the video and with the job duties as described in Dr. Thomas' report.

However, during cross-examination, Mr. Marks was asked about the description of Mr. Jenkins' job duties as set out in the reports of Drs. Stuckmeyer and Koprivica. Mr. Marks testified that Mr. Jenkins repeatedly climbed on and off heavy equipment and on and off the trailer. He agreed that Mr. Jenkins was exposed to whole-body vibration while driving the truck. He admitted that Mr. Jenkins handled 100-pound ramps and that Mr. Jenkins was required to repeatedly bend, pull, lift, and carry. Mr. Marks testified that Mr. Jenkins repeatedly loaded and unloaded heavy equipment and that some of his job duties required Mr. Jenkins' knees to be flexed and pulling against weighted objects.

Mr. Jenkins purchased a bar in 1996, which he sold in 2003. He testified that his father ran the bar, though he helped out when he was not working at Superior. Mr. Jenkins became much more involved in managing the bar in the fall of 2002 when his father became ill. However, Mr. Jenkins testified in deposition that he did not help out at the bar. Video surveillance of Mr. Jenkins in September and October 2002 shows him working at the bar, including tending the bar, taking out the trash, and grilling or smoking behind the bar.

In 2003 Mr. Jenkins received his real estate license. He has sold two properties in association with Century 21 since then. Mr. Jenkins was evaluated by a vocational consultant, Mary Titterington, on June 28, 2004. Ms. Titterington's report does not include the information regarding the bar or his real estate license. However, based on his test scores, she recommends that after his knee surgery he receive vocational rehabilitation and/or be re-evaluated to determine his employability. (Ex. 9, p. 9).

Video surveillance of Mr. Jenkins shows him playing golf in October 2002. In a deposition Mr. Jenkins denied playing any sports. At trial Mr. Jenkins explained that he played golf once in 2002 as part of a tournament for charity.

In none of the surveillance does Mr. Jenkins bend his knees, kneel, squat, or climb. He appears to walk stiff-kneed throughout the video. At the bar much of the time he is leaning on the bar or seated. Mr. Jenkins is shown taking one or two stairs at most; he uses ramps at a casino and at a Century 21 office.

RULINGS

All of the experts agree that Mr. Jenkins has bilateral degenerative joint disease in his knees and that he needs surgery. The issue before the Division is whether his work at Superior was a substantial factor in his development or aggravation of that condition. §287.020^[1] His work at Superior need not be the only substantial factor but "a" substantial factor. § 287.020 *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998). It need not even be the primary or most significant factor in causing his condition. *Tangblade v. Lear Corp.*, 58 S.W.3d 662, 669 (Mo.App. 2001), *citing Cahall* at

There is no evidence that the video surveillance, including his work at the bar, would change the opinions of Dr. Stuckmeyer or Dr. Koprivica that Mr. Jenkins' bilateral knee condition is work related. Nor was it Dr. Thomas' opinion that Mr. Jenkins' bar activities caused or aggravated his knee condition and need for surgery.

There is no evidence that the video of Mr. Jenkins' job duties would change the opinions of Dr. Stuckmeyer or Dr. Koprivica that Mr. Jenkins' bilateral knee condition is work related.

The only opinion that his work at Superior was not a substantial factor in his knee condition is that of Dr. Thomas. Dr. Thomas conducted a records-only review of Mr. Jenkins' case. He did not follow his own procedures when he failed to interview and examine Mr. Jenkins. Dr. Thomas relied solely on information from the insurer regarding Mr. Jenkins' job duties. Moreover, his description of Mr. Jenkins' job duties differs from that of Mr. Marks, the witness for the employer/insurer. Dr. Thomas acknowledged that his opinion regarding causation could change if his understanding of Mr. Jenkins' job duties was erroneous, and he admitted that Mr. Jenkins' work could be a factor in his knee condition and need for surgery.

Mr. Jenkins' testimony regarding his job duties was supported by the video depiction of those duties and the testimony of Mr. Marks, despite Mr. Jenkins' credibility issues regarding the nature and extent of his injuries, his limitations and activities. In cross-examination, Mr. Marks materially agreed with the description of Mr. Jenkins' job duties relied on by Drs. Stuckmeyer and Koprivica.

I find that the opinions of Dr. Stuckmeyer and Dr. Koprivica are more credible, particularly considering the testimony of Mr. Marks regarding Mr. Jenkins' job duties, and I afford them more weight than the opinion of Dr. Thomas. Therefore, I find that Mr. Jenkins' knee condition arose out of and in the course of his employment with Superior and award him medical treatment in accordance with the recommendations of Drs. Browne, Stuckmeyer, and Koprivica.

Date: _____ Made by: _____

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

A true copy: Attest:

 Patricia "Pat" Secret
Director
Division of Workers' Compensation

^[1] All statutory references are to RSMo 2000 unless otherwise noted.