

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

Injury No.: 06-010724

Employee: Joseph A. Leal

Employer: City Wide Transportation, Inc.

Insurer: Missouri Employers Mutual

Date of Accident: February 1, 2006

Place and County of Accident: Kansas City, Jackson 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 May 1, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued May 1, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of December 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

While cleaning employer's motor coach on the morning of February 1, 2006, employee slipped, lost his balance,

and his left kneecap landed on the stair of the motor coach. Employee immediately felt severe pain. I will refer to this slip and strike incident as simply a fall.

Employee had the meniscus removed from his left knee in the early 1970s. Employee sustained a twisting incident of his knee in 2002. The medical experts agree that employee had preexisting bone on bone degenerative joint disease of his left knee. The medical experts agree that employee's fall of February 1, 2006, elevated employee's knee pain to the point that a total knee replacement is indicated.

The issues to be decided in this case are whether employee sustained an injury by accident and, if so, whether the injury arises out of and in the course of his employment. The administrative law judge's recitation of the arising out of issue highlights his erroneous reading of the 2005 Amendments to the Workers' Compensation Act. I re-print his statement of the issue here for context.

2. Whether Employee's work-related slip and fall on February 1, 2006, was the "prevailing factor" causing the resulting left knee medical condition and disability – that is, was it the [sic] "the primary factor" in relation to the other factors including the longstanding and preexisting arthritic condition of the left knee?

Before discussing the administrative law judge's erroneous reading of the amendments, a general discussion is in order.

2005 Amendments to the Workers' Compensation Act

Section 287.800.1 RSMo (2005)^[1] provides that, "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

Section 287.020.10 RSMo provides that, "[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases."

"The language in section 287.020.10...serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020...[I]t appears from the plain language of the statute, the legislature ...intended to clarify its intent to amend the definitions and apply those definitions prospectively." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo.App. 2007).

Blank Slate

As to the phrases appearing in §287.020.10, the legislature created a blank slate effective August 28, 2005.

The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. § 1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction.

Abrams v. Ohio Pacific Express, 819 S.W.2d 338 (Mo. banc 1991)(citations omitted).

In light of the directives of §287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Workers' Compensation Act giving the words and phrases their ordinary and usual meaning. The administrative law judge and majority have failed to do so.

Compensability

Section 287.120.1 RSMo provides:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Employer is liable to employee for workers' compensation benefits if 1) employee sustained personal injury 2) by accident 3) arising out of and in the course of his employment. The legislature enacted a two-part test for determining if an injury arises out of and in the course of employment. §287.020.3 RSMo.

Before we can analyze §287.020.3(2), we must know the definitions of "injury" and "accident." Both "injury" and "accident" are defined in §287.020. The definition of each was modified by the 2005 changes to the Workers' Compensation Act. ^[2]

Accident

Section 287.020.2 RSMo defines "accident:"

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

"unexpected traumatic event" There can be little doubt that the event during which the employee fell and struck his knee was both unexpected and traumatic.

"identifiable by time and place of occurrence" and "caused by a specific event during a single work shift" The traumatic event occurred February 1, 2006, at approximately 5:30 a.m., in employer's motor coach in front of employee's house in Kansas City, Missouri.

"producing at the time objective symptoms of an injury" Employee felt immediate pain so severe that he nearly passed out.

Employee has established each element of "accident" as defined by §287.020.2.

Injury

Section 287.020.3 RSMo defines "injury" and sets forth a two-part test for determining when an injury arises out of and in the course of employment.

(1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) 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.

Arising Out of and in the Course of Employment -- §287.020.3(2)

Section 287.020.3(2) (a) -- Prevailing Factor Test

The legislature defined the prevailing factor for us. "The prevailing factor" means, "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." §287.020.3(1) RSMo.

"Primary" means, "first in rank or importance."^[3] "Factor" means, "something (as an element, circumstance, or ^[4]

influence) that contributes to the production of a result.” Substituting the above dictionary definitions into the statutory definition, *the prevailing factor is the most important influence, in relation to any other influence, in causing both the resulting medical condition and disability.*

The definition clearly requires a comparison of the strength of causative influences giving rise to employee’s injury. Before embarking on such a comparison, I must first determine if employee’s fall contributed to causing employee’s resulting medical condition and disability. If it did not, there is no need to proceed.

Returning to the dictionary we find: “Cause,” the verb, means, “to serve as cause or occasion of: bring into existence.”^[5] “Cause,” the noun means, “a person, thing, fact, or condition that brings about an effect or that produces or calls forth a resultant action or state.”^[6] “Result” means, “to proceed, spring or rise as a consequence, effect or conclusion: come out or have an issue: TERMINATE, END – used with *from* or *in* <an injury ~ing from a fall>”^[7] “Condition” means, “the physical status of the body as a whole <good ~><poor ~> or of one of its parts – usu. Used to indicate abnormality <a serious ~><a disturbed mental ~>.”^[8]

The administrative law judge’s conclusion that the resulting medical condition is the underlying bone on bone disease is erroneous. It is clear from the testimony of the medical experts that the bone on bone disease already existed as of the date of the accident. The experts variously described the physical status of employee’s knee before the injury as having a “bone on bone disease process,” “advanced degenerative arthritis,” or “degenerative changes.” The experts agree that this condition pre-existed the work accident and that the degenerative condition was not changed by the blunt trauma of the fall. That is, employee had bone on bone arthritis before the accident and employee had that same bone on bone arthritis after the accident. The degenerative joint disease is not the “resulting medical condition.”^[9]

So, what physical status arose as a consequence of the fall? Employee’s knee progressed from manageably painful to extremely painful as a consequence of striking his knee on February 1, 2006. Employee’s body progressed from not needing a total knee replacement to needing a total knee replacement as a consequence of the increase in pain resultant from the impact of the fall. The medical experts agree that the fall contributed to bringing into existence employee’s resulting condition of needing a knee replacement. Dr. Stuckmeyer said, “[t]he indication for a total knee replacement is not degenerative arthritis of the knee. The indication for a total knee replacement is painful degenerative arthritis of a knee recalcitrant to conservative modalities.” (Tr. 196) Dr. Jones’ testimony is somewhat inconsistent. At first, he testified that employee’s need for knee surgery predated the accident. But Dr. Jones conceded that the accident brought on pain that employee did not have before the accident. Ultimately Dr. Jones made clear that he “would not recommend knee replacement unless somebody is having pain.” He reiterated by stating that, “[i]f he has arthritis alone and no pain, we would not tell him to proceed to knee replacement, but he has both.” The uncontradicted medical evidence establishes that arthritis, in and of itself, is not an indication for a total knee replacement. Arthritis with pain is an indication for a total knee replacement. Employee’s accident contributed to causing employee’s need for a total knee replacement.

Next, I must determine if the fall contributed to employee’s disability.

“Disability” is defined as “inability to do something”; “deprivation or lack of esp. of physical, intellectual, or emotional capacity or fitness”; “the inability to pursue an occupation or perform services for wages because of physical or mental impairment”; “a physical or mental illness, injury, or condition that incapacitates in any way.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1976).

Loven v. Greene County, 63 S.W.3d 278, 284 (Mo.App. 2001).

Employee testified that before the fall he had occasional pain but that he had no restrictions on what he could do. After the fall, employee’s knee would give out when he walked. As a result of the fall, employee has severe pain. Before the fall, employee could work full time. As a result of the fall, employee is unable to work. Dr. Stuckmeyer testified that before the fall, employee was capable of all his functioning. After the fall, employee is unable to work – at least until he gets a knee replacement. Dr. Jones imposed the significant restriction of sedentary work. The fall contributed to employee’s inability to work; that is, his disability.

The fall contributed to causing employee's resulting medical condition and disability. I must next consider whether the fall was the prevailing factor in causing employee's resulting medical condition and disability. Contrary to the express language of §287.800 that he strictly construe the language of the statute, the administrative law judge resorted to his belief regarding the legislature's intent in enacting the prevailing factor standard.

The prevailing factor standard of compensability constitutes a substantive change in the law that is intended to narrow the category of work-related injuries by accident for which an employee is eligible to receive workers [sic] compensation benefits.

...

Clearly, "the prevailing factor" is a more rigorous standard for compensability than the prior "substantial factor" test.

Award p. 8.

"Legislative intent can only be derived from the words of the statute itself." *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo.banc 1998). *State v. Rowe*, 63 S.W.3d 647, 650 (Mo.banc 2002). Nowhere in the 2005 amendments does the legislature state that the prevailing factor test was enacted to narrow the category of eligible injured workers. Nowhere in the 2005 amendments does the legislature state that the prevailing factor test was enacted to be more rigorous than the old substantial factor test. I do not know what source the administrative law judge consulted when forming his beliefs regarding the legislature's intent in enacting the prevailing factor standard, but it was not the statute itself and it was not the evidence presented at the trial of this matter.

After impermissibly deriving legislative intent from other than the words of the statute, the administrative law judge went on to misstate the definition of "prevailing factor" as "the primary factor in relation to the other factors..." Because the administrative law judge failed to strictly construe the words of the statute as directed by the legislature, the award cannot stand.

Essentially, the administrative law judge shortened the statutory definition of "the prevailing factor" to "the primary factor...causing both the resulting medical condition and disability," thus rendering superfluous the words "in relation to any other factor." "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 252 (Mo.banc 2003), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

I will review the evidence to determine if the accident was the primary factor in relation to any other factor causing both the resulting medical condition and disability.

Dr. Stuckmeyer identified multiple factors contributing to causing employee's need for a knee replacement including: employee's 1970s meniscectomy; employee's degenerative joint disease; employee's repetitious stepping up and down the stairs of the motor coach; employee's weight; and employee's genetic makeup. Nonetheless, Dr. Stuckmeyer testified that the fall was the prevailing factor in causing employee's pain and his need for his knee replacement surgery (medical condition). Explaining further, Dr. Stuckmeyer believed that the fall is the major reason employee needs a knee replacement. Dr. Jones' testimony that if employee had arthritis alone and no pain, Dr. Jones would not tell him to proceed to knee replacement is consistent with Dr. Stuckmeyer's opinion that the accident is the major factor causing employee's need for a total knee replacement.

In light of the uncontradicted medical testimony that arthritis, in and of itself, is not an indication for a total knee replacement, the administrative law judge's conclusion that the arthritis is the primary factor in causing employee's resulting medical condition – his need for a total knee replacement – is against the overwhelming weight of the evidence and should not stand.

As to employee's inability to work, it is employee's pain that is prohibiting him from working. Clearly, the sequela of the work accident – employee's severe pain – is the prevailing factor causing his inability to work.

Employee has established the first prong (subparagraph (a)) of the 'arising out of and in the course of employment test.'

Before I leave the discussion of the first prong of the “arising out of and in the course of employment” test, I direct the reader to another conclusion of the administrative law judge that lends insight into the mindset leading to his erroneous rulings.

Although as of the present date, no reported appellate decision of this state has construed the new “prevailing factor” test, it is clear that in the present case the February 1, 2006 fall was nothing more than a substantial factor in Claimant’s present medical condition and resulting disability, and not the prevailing factor.

Award p. 8.

Quite simply, the administrative law judge is comparing apples and oranges. As I discuss in more detail below, under the prior version of §287.020.3, an injury was compensable only if the employment was the substantial factor in causing the injury. Now, an injury is compensable only if the accident was the prevailing factor in causing it. Because both the injury source (employment vs. accident) and the source impact (substantial vs. prevailing) have changed, no good purpose is served by interchanging the sources and impacts.

Section 287.020.3(2)(b) – The Hazard Test

Next, I consider subparagraph (b) of the test. Employee’s injury is compensable so long as it did 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.” As always, definitions are in order:

- “Hazard” means “a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty.”^[10]
- “Risk” means, “someone or something that creates or suggests a hazard or adverse change: a dangerous element or factor.”^[11]
- “Equally” means, “to an equal degree.”^[12]
- “Exposed” means, “so situated as to invite or make likely an attack, injury, or other adverse development.”^[13]

Upon analyzing §287.020.3(2) (b) in light of the dictionary definitions, I find it provides for four categories of hazards:

1. Hazards or risks related to employment with an equal degree of exposure^[14]
2. Hazards or risks related to employment with an unequal degree of exposure
3. Hazards or risks unrelated to employment with an equal degree of exposure
4. Hazards or risks unrelated to employment with an unequal degree of exposure

Only injuries resultant from #3 – a hazard or risk unrelated to employment to which workers have equal exposure in nonemployment life – are denied compensability based upon the second prong of the ‘arising out of and in the course of employment test.’

How do we define the hazard? The legislature gave us no direction in this regard. In the instant case, any of the following phrases describe a possible source of danger or difficulty faced by employee: slipping, slipping down a step; slipping down a step and forcefully striking the patella on a metal plate. I conclude that the hazard employee faced was slipping down a step and forcefully striking the patella on a metal plate.

Employee proved that that his injury came from a hazard or risk related to employment. Such injuries are never denied compensability under subparagraph (b). Of course, by proving that his injury came from a hazard or risk related to employment, employee necessarily proved that his injury did not come from a hazard or risk unrelated to employment. Employee has satisfied his burden under each prong of §287.020.3(2). His injury must be judged to

^[15]

have arisen out of and in the course of employment.

Employee's Knee Injury is Compensable under 287.120.1 RSMo.
Section 287.120.1 RSMo provides:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Based upon the foregoing, I conclude that employee has established that he suffered a personal injury by accident arising out of and in the course of employment. Section 287.120.1 dictates that employer is liable to employee for workers' compensation benefits, including treatment of his knee injury and other temporary benefits and I would issue a temporary award of same.

John J. Hickey, Member

AWARD

Employee: Joseph A. Leal

Injury No: 06-010724

Dependents: N/A

Employer: City Wide Transportation, Inc.

Additional Party: N/A

Insurer: Missouri Employers Mutual

Hearing Date: March 16, 2007

Proposed Awards Filed: On or before April 2, 2007

Checked by: MSS/cg

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: February 1, 2006.
5. State location where accident occurred or occupational disease was contracted: Kansas Missouri City Jackson 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? 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. Employee was removing his personal belongings and trash from his assigned bus when he slipped on a step on the stairwell. His left knee struck the end of the top of the bus stairs.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body allegedly injured by accident or occupational disease? Left knee.
14. Nature and extent of any permanent impairment: No work-related permanent impairment.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$1,115.08
17. Value necessary medical aid not furnished by employer/insurer? \$4,522.83 - Truman Medical Center;\$297.00 - University Physicians Associates.
18. Employee's average weekly wages: \$500.00
19. Weekly compensation rate: \$333.33
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

None.

21. Second Injury Fund liability: N/A.
22. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joseph A. Leal

Injury No: 06-010724

Dependents: N/A

Employer: City Wide Transportation, Inc.

Additional Party: N/A

Insurer: Missouri Employers Mutual

Hearing Date: March 16, 2007

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Checked by: MSS/cg

On March 16, 2007, the Employee and Employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to RSMo. 287.110. The employee, Joseph A. Leal, appeared in person and with counsel, Keith V. Yarwood. The employer, City Wide Transportation, Inc., appeared through counsel, Eric T. Lanham. The Second Injury Fund was not a party to the case. The primary issue the parties requested the Division to determine was whether or not Claimant's injury by accident on February 1, 2006 is compensable pursuant to RSMo. 287.020.3(1)(2005 Supp.) as the prevailing factor in causing both resulting medical condition and disability.

STIPULATIONS

The parties stipulated that:

1. On or about February 1, 2006 ("the injury date", City Wide Transportation, Inc. (hereinafter referred to as ("City Wide")) was an Employer operating subject to Missouri's Workers Compensation law with its liability fully insured by Missouri Employers Mutual;
2. Joseph Leal was the Employee of City Wide working on February 1, 2006 in Kansas City, Jackson County, Missouri, subject to the Missouri Workers Compensation Act;
3. Joseph Leal's fall on February 1, 2006 arose out of and in the course of his employment with City Wide;
4. Leal notified City Wide of his alleged injury and filed his claim within the time allowed by law;
5. City Wide provided Leal with medical care costing \$1,115.08.

ISSUES

The parties requested the Division to determine:

1. Whether Employee sustained a compensable "injury" or "injury by accident," as defined in RSMo. 287.020.3(1) (2005 Supp.)?
2. Whether Employee's work-related slip and fall on February 1, 2006 was the "prevailing factor" causing the resulting left knee medical condition and disability - that is, was it the "the primary factor" in relation to the other factors including the longstanding and preexisting arthritic condition of the left knee?

FINDINGS

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

- Exhibit A - Curriculum vitae of James Stuckmeyer, M.D., August 11, 2006 letter report of examination by Dr. James Stuckmeyer; Employee's medical records - formerly marked as Stuckmeyer Deposition Exhibit No. 3.
- Exhibit B - Transcript of deposition of Dr. James Stuckmeyer, M.D. (October 16, 2006)

Although the Employer did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1 - Excerpts from transcript of Preliminary Hearing in Joseph Leal v. City Wide Transportation, Kansas Division of Workers Compensation, Docket No. 1,029,415 (October 18, 2006) which includes portions of testimony of Jeff Frankenfield, supervisor for City Wide.
- Exhibit 2 - Transcript of deposition of Dr. Lowry Jones, Jr. M.D. (June 19, 2006)
- Exhibit 3 - Transcript of deposition of Joseph A. Leal (April 12, 2006)

Also admitted into evidence without objection was Health Provider's Exhibit 1 - March 16, 2007 letter and applications for direct payment of Truman Medical Centers and University Physicians Associates.

Based on the above exhibits and the testimony of Leal, I make the following findings:

Claimant is a five-foot eleven-inch, 265-pound male who, on the date of accident - February 1, 2006 - was 55 years old and had worked as a driver for Employer City Wide for approximately 7 years. (Deposition of Leal, pp. 46). For

approximately 6 years of his employment with City Wide, Leal drove a van and then for little less than a year he drove a 15 passenger motor coach. His principal job duties were to pick up and transport elderly persons and school children to the Jewish Community Center in Johnson County, Kansas. The Jewish Community Center assignment for Claimant ended on the afternoon of January 31, 2006 when supervisor Jeff Frankenfield advised Leal that starting the next day he would be transferred to a position driving a van on a route located north of the river in Missouri. (Deposition of Leal, pp. 7-8, 12, 17-18).

Early morning on February 1, 2006 (around 5:30 or 6:00 a.m.), Leal started his work day at his home in Kansas City, Jackson County, Missouri where he regularly parked the City Wide motor bus overnight. In anticipation of driving to the City Wide facility to turn in the motor bus and to receive his new assignment driving a van, Leal removed personal belongings and trash from the bus - from under the seats and in the aisle between the seats. (Deposition of Leal, pp. 21-24). "So I was getting all my personal belongings out of it and everything and making sure that there was nothing on the floor, that it was clean when I turned it in and I got everything out of it. I was backing out, I slipped on a step on the stairwell." Claimant came down on his left knee which hit the edge of the top of the stairs, and also hit his shoulder against the seat. Claimant then drove himself to Truman Medical Center where his left knee was examined. He was fitted with a knee brace, given pain medication, and scheduled for a physical therapy program. (Deposition of Leal, pp. 21, 25).

It is uncontroverted that Claimant suffered from longstanding and preexisting left knee arthritis and related left knee pain. Leal himself testified that in approximately 1970, he underwent surgery to remove the meniscus in his left knee and that he had previously twisted the left knee while working for City Wide and had received certain medical treatment from a Dr. Williamson. (Deposition of Leal, pp. 28-31). He further stated that prior to February 1, 2006 heregularly experienced left knee pain and that his co-employees at City Wide noticed it "and asked me why, you know, I was hobbling around sometimes; you know, it would hurt." (Deposition of Leal, p. 28). "It didn't really hurt me a lot, unless I had to jump in and out of the van, you know, constantly." (Deposition of Leal, p. 30). It became Claimant's practice to exit his assigned van on his right leg "because my left leg was hurting." (Deposition of Leal, p. 31).

Leal's pre-accident left knee symptoms were confirmed by his supervisor, Jeff Frankenfield, who testified of his personal knowledge of Claimant's left knee problems prior to February 1, 2006. Those problems were a regular topic of conversation between Claimant and Frankenfield, between Claimant and the elderly persons that he transported, and between Claimant and the other City Wide drivers. Leal had told Frankenfield about his prior left knee surgery in the 1970s and had stated that he suffered from constant knee pain. Moreover, Frankenfield observed that Claimant would hobble on a regular basis and grab his knee while walking, and would rub his knee when sitting. (Employer's Exhibit 1 - Transcript of Preliminary

Hearing in Kansas Workers Compensation Proceeding, Docket No. 1,029,415, pp. 41, 45-46, 54).

The expert medical testimony confirmed preexisting and advanced arthritic disease in Claimant's left knee. Dr. Lowry Jones, Jr., a practicing orthopedic surgeon with a specialty in knees, examined Claimant on March 7, 2006 fora primary complaint of left knee pain. (Deposition of Jones, pp. 3, 5). Dr. Jones' examination disclosed a scar from Leal's 1970 surgery for removal of the meniscus. Leal demonstrated medial instability based on a varus knee. The meniscus surgery had resulted in bony collapse and development of ligamentous instability, leading to extreme bowleggedness. Dr. Jones concluded that the February 1, 2006 fall had not caused any new ligament instability. Moreover, x-rays showed very advanced arthritic disease of the knee, with complete bone on bone changes on the inner or medial side of the knee, as well as severe bone on bone disease underneath the kneecap. (Deposition of Jones, pp. 7-8).

It is uncontroverted that the meniscus removal, cartilage disappearance, bone collapse, and severe arthritis were preexisting conditions unrelated to the February 1, 2006 accident. (Deposition of Jones, p. 9). Dr. Jones diagnosed advanced arthritic disease of the left knee and advanced degenerative arthritis (bone on bone disease process) for which the only beneficial treatment would be a knee replacement. (Deposition of Jones, pp. 10-11). Dr. Jones opined that the February 1, 2006 slip and fall was not the prevailing factor in causing the need for a knee replacement, but instead the preexisting arthritis constituted such prevailing factor. (Deposition of Jones, pp. 11-12, 27). The meniscus surgery had removed "cushion cartilage" and over the intervening years arthritic changes worsened to the point where a knee replacement became necessary once pain became intolerable. (Deposition of Jones, pp. 14, 16-17).

Claimant's arthritis was not accelerated by the February 1, 2006 incident nor did that fall advance the bone on bone disease process. The fall simply resulted in increased pain which could have been precipitated by any ordinary minimal activity of daily living such as getting up out of a chair. (Deposition of Jones, pp. 19-20, 29-30). The only effective treatment for the increased pain experienced by Claimant after February 1, 2006 is to treat the underlying arthritic problem through a total knee replacement. (Deposition of Jones, p. 31).

In sum, according to Dr. Jones, the February 1, 2006 fall may have precipitated increased and intolerable pain, but it was the preexisting bone on bone disease that was the prevailing factor in creating the necessity for knee replacement and it was to address that disease process for which treatment was prescribed.

Claimant's retained expert, Dr. James Stuckmeyer, has not treated patients since 1996 and for the past 7 years his work has been limited to performing medical examinations in contested litigation, with 95 per cent of his work in workers compensation cases being for injured employees. (Deposition of Stuckmeyer, pp. 4-6). Dr. Stuckmeyer examined Leal on August 8, 2006 for about one hour and reviewed certain medical records. However, he did not review the deposition testimony of the Claimant or of Dr. Jones. (Deposition of Stuckmeyer, p. 7).

Dr. Stuckmeyer described his examination of Claimant as a "complicated orthopedic evaluation." (August 11, 2006 letter report - Employee's Exhibit A, and deposition of Stuckmeyer, p. 8). He concurred with Dr. Jones that Leal is in need of a knee replacement because of a "painful degenerative knee" and that Leal suffers from bone-on-bone arthritic disease and a varus deformity (bowleggedness) that long predated the accident at issue. (Deposition of Stuckmeyer, pp. 89, 29-30). He also testified similarly to Dr. Jones that the only significant change in Claimant's condition after the February 1, 2006 fall was increased pain. Dr. Stuckmeyer characterized the change of condition as going from asymptomatic to symptomatic, although this is not consistent with the sworn testimony of Leal and his supervisor Frankenfield regarding regular pain, discomfort, and difficulty walking that had existed long before the slip and fall at issue in this proceeding. (Deposition of Stuckmeyer, pp. 10-11).

While Dr. Stuckmeyer acknowledged that factors causing Leal's present left knee condition and the need for knee replacement surgery included the longstanding degenerative condition and the February 1, 2006 incident, he opined that "the prevailing reason for proceeding with a total knee replacement is pain." (Deposition of Stuckmeyer, pp. 13-15). A degenerative arthritic condition was a necessary but not sufficient condition for his recommendation of knee replacement surgery. "So both of them have to be in play. There's no question about that. But the primary reason for proceeding with a total joint replacement is pain." (Deposition of Stuckmeyer, pp. 17-18, 27, 29). The February 1, 2006 incident was the straw that broke the camel's back in terms of preexisting arthritic disease leading to the necessity of a knee replacement. Finally, Dr. Stuckmeyer acknowledged that Claimant's obesity might be another factor in the worsening of his degenerative arthritis. (Deposition of Stuckmeyer, pp. 19, 33).

RULINGS OF LAW

Determination of the compensability of Claimant's left knee condition must be based on the 2005 amendments to the Workers Compensation Act. Specifically, prior to those statutory amendments, to qualify as a compensable injury or accident, work must have been "a substantial factor" in causing the resulting medical condition or disability. See Lawson v. Ford Motor Co., S.W.3d , Case No. ED88584 (Mo.App. E.D. March 20, 2007). Effective with the 2005 amendments, an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined

to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." RSMo. 287.020.3(1)(2005 Supp.).

The prevailing factor standard of compensability constitutes a substantive change in the law that is intended to narrow the category of work-related injuries by accident for which an employee is eligible to receive workers compensation benefits.

See, e.g., Lawson v. Ford Motor

Co., *supra*, (In denying retroactive application of the “prevailing factor” test, the court wrote that the amended language in RSMo. 287.020 and 287.067.2 [definition of “injury by occupational disease”] “resulted in a substantive change in the law which affected a claimant’s right to compensation.”). The legislature also added a section to RSMo. 287.020 stating its intent “to reject and abrogate earlier case law interpretations on the meaning of or definition of ‘accident,’ ‘arising out of,’ and “in the course of the employment’...” (New section 10). Clearly, “the prevailing factor” is a more rigorous standard for compensability than the prior “substantial factor” test.

Although as of the present date, no reported appellate decision of this state has construed the new “prevailing factor” test, it is clear that in the present case the February 1, 2006 fall was nothing more than a substantial factor in Claimant’s present medical condition and resulting disability, and not the prevailing factor. This case falls squarely in that categories of injuries by accidents that the legislature intended to be non-compensable under RSMo. 287.020.3(1), as currently amended. The primary factor in causing Claimant’s present medical condition was longstanding and preexisting left knee disease including bone-on-bone degenerative arthritis and varus deformity, which had regularly caused claimant pain, discomfort and difficulty walking.

The February 1, 2006 work-related incident was at most a triggering or precipitating factor, increasing pain but in no way altering the nature or course of the underlying disease process.

Both examining physicians concur that absent severe arthritic disease (bone on bone) in the left knee, the February 1, 2006 fall would not have triggered the resulting pain nor would a knee replacement have been necessary. Both physicians also essentially agree that the February 1, 2006 fall, other than increasing pain, did not accelerate, aggravate or alter the underlying medical condition. Diagnostic studies, including x-rays, showed no such acceleration or aggravation.

Where the doctors disagreed was on the characterization of “the prevailing factor” in causing Claimant’s medical condition and resulting disability. Dr. Jones persuasively testified, based on the meniscus removal surgery in the 1970s, based on Claimant’s admitted history of left knee pain and mobility difficulties, and based on diagnostic procedures (including x-rays), that the prevailing - that is, primary - factor in relation to other factors in necessitating knee replacement was the preexisting bone on bone arthritic disease. An individual without such severe disease process in his left knee would not have required such treatment as a result of the

February 1, 2006 fall. By contrast, with the substantial and longstanding disease in Claimant’s knee, any ordinary or minimal traumatic activity - such as falling, getting up out of a chair, etc. - could have triggered or precipitated the increased pain experienced on and after February 1, 2006.

Dr. Stuckmeyer’s opinions as to “prevailing factor” lack credibility and are not compelling. First, Dr. Stuckmeyer has not been a practicing physician in the last decade and he restricts his work to performing medical examinations, overwhelmingly for injured employees. Dr. Stuckmeyer’s failure to consider Claimant’s preexisting symptoms of left knee pain - to which both Claimant and supervisor Frankenfield testified - caused him to mischaracterize Claimant’s arthritic disease as being asymptomatic prior to February 1, 2006. Most importantly, Dr. Stuckmeyer’s testimony confuses “prevailing factor” with “a triggering or precipitating factor,” the latter being non-compensable under RSMo. 287.020.2. That no recommendation for knee replacement would have been made until Claimant’s pain became intolerable is not equivalent to a finding that the February 1, 2006 fall was anything other than a triggering or precipitating factor in a degenerative disease process that was already causing Claimant significant pain and mobility problems. That Claimant was able to work prior to February 1, 2006 (with noticeable pain and discomfort) and could not do so after that date is merely evidence that the fall was the straw that broke the camel’s back - an inevitable and inexorable outcome of the degenerative disease process. “Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.” RSMo. 287.067.2.

In relation to other factors including obesity and the February 1, 2006 fall, the degenerative and progressive arthritis of the left knee was the primary factor (the necessary and indispensable factor) causing Claimant’s present medical condition and resulting disability. While Claimant’s pain on and after February 1, 2006 may have constituted an “injury by accident,” it was not compensable under the new, more restrictive “prevailing factor” test adopted by the Legislature in 2005.

Based on the foregoing, I find that Joseph Leal did not sustain a compensable injury by accident, as defined in RSMo. 287.020.3(1)(2005 Supp.), because the February 1, 2006 fall was not the prevailing (primary) factor in causing the resulting medical condition and disability of the left knee. Accordingly, the claim for compensation benefits is denied and no award of

such benefits is herein made.

Date: _____

Made by: _____

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

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[1] All references are to the 2005 Revised Statutes of Missouri, unless otherwise indicated.

[2] L2005, S.B. Nos. 1 & 130.

[3] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1800 (3d ed. 1971).

[4] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 813 (3d ed. 1971).

[5] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 356 (3d ed. 1971). Also, "to bring about or effect <dry conditions caused the fire>." BLACK'S LAW DICTIONARY 235 (8th ed. 2004).

[6] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 356 (3d ed. 1971). Also, "something that produces an effect or result <the cause of the accident>." BLACK'S LAW DICTIONARY 234 (8th ed. 2004).

[7] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1937 (3d ed. 1971).

[8] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (3d ed. 1971).

[9] The preexisting disability relative to the degenerative joint condition will be a significant issue to consider after employee has reached maximum medical improvement and the time comes to determine his permanent disability, if any, resultant from the accident.

[10] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1041 (3d ed. 1971).

[11] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2432 (3d ed. 1971).

[12] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 767 (3d ed. 1971).

[13] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 802 (3d ed. 1971).

[14] Comparison of employee's work-related exposure to a hazard or risk against the exposure to the same hazard or risk of workers in general in their nonemployment life.

[15] "Deem" means, "to consider, think, or judge." BLACK'S LAW DICTIONARY 446 (8th ed. 2004).