

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

Injury No.: 06-094098

Employee: Curtis Leible
Employer: TG Missouri Corporation
Insurer: Tokio Marine and Nichido Fire Insurance Co. Ltd.
c/o Cannon Cochran Management Services

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, heard the parties, 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 26, 2009, as supplemented herein. The award and decision of Administrative Law Judge Matthew W. Murphy, issued June 26, 2009, is attached and incorporated by this reference.

I. Issue

The principal issue on appeal to the Commission is whether or not employee sustained injury due to an accident arising out of and in the course of his employment. The injury occurred October 1, 2006, consequently, the Workers' Compensation Law, as amended in 2005, governs the instant case.

II. Facts

The facts were accurately recounted in the award issued by the administrative law judge and in practicality were not in dispute.

In summary fashion, employee was coming to work October 1, 2006; employee had fixed hours of work and a fixed place of work; employee was scheduled to begin his work shift at 10:00 p.m.; employee arrived shortly before his work shift began and parked in a lot owned and controlled by the employer, which was also contiguous and adjacent to employer's building; employer provided several lots and parking spaces to its employees which were all on employer's premises; employees were not assigned a particular parking lot or parking space; and entrance to employer's building was dictated by the parking lot used.

The parking lot used by the employee on October 1, 2006, headed the employee through a security turnstile in order to gain entrance to employer's building; the turnstile is not motorized, i.e., employee must push the turnstile in order to gain access; after unlocking the turnstile with his badge, employee proceeded through the turnstile; the bottom rung of the turnstile struck the back of employee's right foot; this in turn caused employee to pivot on his left leg and as employee pivoted he felt a pop in his left knee followed by immediate onset of pain and he fell to the ground while exiting the turnstile.

Employee: Curtis Leible

- 2 -

The above described event is the injury/accident in dispute.

III. Relevant Statutes

As of the date of this accident § 287.120.1 RSMo, as amended in 2005, provided, in pertinent part, as follows: (the Commission notes the substantive provisions of this section were not changed in 2005).

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 . . .

The definitions of both accident and injury were changed in the 2005 legislation. The definitions are set forth in §§ 287.020.2 RSMo and 287.020.3 RSMo, and in pertinent part, are as follows:

2. 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 of precipitating factor.

3. (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 reasonable 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;

In addition to these definitions the legislature also provided the following additional legislation contained in § 287.020.10 which is as follows:

In 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

Employee: Curtis Leible

- 3 -

852 (Mo. 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo. 1999) and all cases citing, interpreting, applying, or following those cases.

IV. Findings of Fact and Rulings of Law

Employer's principal contention on appeal is that employee failed to prove that he sustained an injury due to an accident arising out of and in the course of his employment.

The Commission must consider and determine whether employee's injury occurring October 1, 2006, was due to an accident arising out of and in the course of employment pursuant to the current statutory scheme as amended in 2005. Furthermore, § 287.800 RSMo requires the Commission to strictly construe the statutory changes.

More specifically one of employer's contentions is that employee did not prove a work accident occurred under the statute because the injury was not derivative or caused from a specific event during a single work shift. Employer contends that due to the fact employee had not "clocked in," the accident did not occur during his work shift; therefore, employee's accident is not compensable. Employer's second contention is that the injury came 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.

Among its many features, the Workers' Compensation Law provides: (1) benefits to employees who sustain personal injury by accident arising out of and in the course of employment; and, (2) negligence and fault are largely immaterial. Section 287.120.1 RSMo.

The construction of the phrase "arising out of and in the course of employment" historically has been broken in half, resulting in a two prong test, with the "arising out of" portion construed to refer to cause or origin and the "course of employment" portion to the time, place and circumstances of the accident in relation to the employment.

The instant case is categorized as a "going to and from work" type case. At the time of the injury employee had parked his car on the parking lot owned by the employer, and provided for the employees; while entering or attempting to enter the building of the employer, employee was injured while passing through a security turnstile. Employee was attempting to enter the employer's building in order to clock in, and begin employee's scheduled work activities. The turnstile was on the premises of employer and the employee had to pass through the security turnstile in order to gain access to employer's building. (The Commission notes there were other entrances to the building, however, the most usual, customary and accepted entrance from the parking lot used by the employee was this particular turnstile.)

The general rule of law is that injuries occurring to employees going to and from work are not compensable unless the injuries occur on premises owned or controlled by the employer. The rule permits recovery of workers' compensation benefits provided the injury-producing accident occurs on premises owned or controlled by employer and if that portion of the premises is a customary, approved, permitted, usual and accepted

Employee: Curtis Leible

- 4 -

route or means employed by employees to arrive and depart from their place of employment.

Upon reviewing the current statutory scheme as amended in 2005, the Commission does not find a legislative intent to abolish this general rule. In further support of this finding, the Commission emphasizes the “new” statutory language contained in § 287.020.5 RSMo, which states in part:

The “extension of premises” doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

The instant case is not one of “extended premises,” which involve premises not owned by employer or contiguous to employer’s premises; rather, all relevant events undisputedly occurred on premises owned by employer. In addition, the injury-producing accident occurred on a customary, approved, permitted, usual or accepted route used by employee to get to and from his place of employment. Section 287.020.5 expressly limits the application of the extended premises doctrine to those cases in which accidents occur on property owned or controlled by the employer. *Hager v. Syberg’s Westport and Treasurer of Missouri as Custodian of Second Injury Fund*, (Mo.App. No. ED 93420).

These multiple statutory changes of 2005 are in pari materia and must be considered together. Adhering likewise to the strict construction of statutory provisions required by § 287.800, the Commission must consider the plain and ordinary meaning of the words used. *Hager, supra*. In so doing the Commission does not find a legislative intent to abandon the general “going to and coming from” work rule that injuries are not compensable unless they occur on premises owned or controlled by employer. Each case then must be decided as to its own particular facts.

Argument A. Employee did not sustain an injury due to an accident arising out of and in the course of employment because employee had not “clocked in”: therefore, the accident did not occur during his work shift.

The definition of accident, due to the 2005 legislation, states that it means an unexpected traumatic event 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. The injury and accident must also be deemed to have arisen out of and in the course of employment.

The fine distinction is the fact that the accident and injury must “arise” out of and in the course of employment, and it does not require that the accident and injury “occur” in the course of employment. The term “during a single work shift” in § 287.020.2 RSMo is not defined and there is no requirement an employee must have clocked in for his work shift in order to be eligible for workers' compensation benefits due to an accident.

Employee: Curtis Leible

- 5 -

In the case of *Henry v. Precision Apparatus*, No. SD29772 (Mo.App. S.D., February 16, 2010), the Court of Appeals stated the following:

Claimant argues in his first point that the Commission erred in its application of section 287.020.2 RSMo Cum Supp. 2005, because it construed the “work shift” too narrowly as being on the “company clock.” The Commission did not make such a finding, nor would we (emphasis added). The Commission simply found that Claimant was not yet working for the employer when he was injured; the Commission could have found that Claimant was working for the employer when he was arranging his tools and at his workbench if the injury had occurred at that time. Had the Commission found a compensable injury occurred at his workbench, but prior to seven o’clock in the morning, we would accept the Commission’s factual determination of when the injury occurred and Claimant’s activities at the time of the injury. In other words, we must accept the factual determination that the injury occurred prior to the time that Claimant was engaged in work activities and while Claimant was engaged in a non-work activity. Point I is denied.

The appellate court explicitly rejected construing “during a single work shift” so narrowly, and confining the term to being “clocked in” or on the “company clock.” The court properly noted the Commission must consider the activity of the employee and whether or not it was a work activity. The statute requires arising out of and in the course of, not “occurring” out of and in the course of employment at a confined time.

Section 287.020.2 delineates elements of what constitutes an injury due to an accident during a single work shift. The Commission reviews the employee’s activities in each case to determine if the injury/accident “arises” during the work shift, based on these elements.

In the instant case every activity in which employee was involved after entering the employer’s premises was a work activity: employee parked his car in a space on employer’s parking lot provided employees; employee proceeded through the security turnstile as required by employer with the intent to enter employer’s building, clock in, and begin his assigned work duties. The fact the injury occurred prior to clocking in does not mean employee’s injury did not arise out of his employment and did not occur during his work shift. *Henry, supra*. Employee was engaged in a work activity when injured and all elements of § 287.020.2 were proven.

Argument B. Employee’s injury came 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. Section 287.020.3(a) (b).

The gist of employer’s contention is employee’s injury was not caused by or attributable to a condition of his employment nor was there a causal connection between the injury and any work activity. It is contended that the injury merely occurred on the employer’s premises and the risk involved is one to which the employee would have been exposed

Employee: Curtis Leible

- 6 -

equally in nonemployment life. Employer relies principally on *Miller v. Mo. Hwy & Trans. Comm.*, 287 S.W.3d 671 (Mo. banc 2009).

The Commission finds the facts in the instant case distinguishable from those in *Miller, supra*, which result in a determination that the injury in the instant case was due to an accident arising out of and in the course of employment.

In basic, simple terms, the employee Miller (*Miller, supra*) was, at the time of his injury "in the course of" his employment. However, when he injured his knee, he was merely walking. There was no evidence of a distinctive condition of his employment that caused or contributed to his injury.

In the instant case, at the time of injury, employee was engaged in a necessary work-related activity, i.e., passing through employer's security turnstile in order to enter employer's building and commence his assigned work tasks.

The Commission agrees with the findings of fact by the administrative law judge that the act of being caught on the heel of his foot by the bottom rung of the turnstile directly resulted in the injury in dispute. This constitutes a hazard related to his employment; and a distinctive condition of his employment that caused or contributed to his injury. Consequently, an award of compensation was issued by the administrative law judge because the injury was a rational consequence of a hazard related and connected to the employment.

V. Conclusion

Under the current statutory scheme, the Commission agrees with the conclusion of the administrative law judge that employee sustained an injury due to an accident arising out of and in the course of employment.

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 5th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Curtis Leible Injury No.: 06-094098
Dependents: N/A
Employer: TG Missouri Corporation
Additional Party: Cannon Cochran Management Services
Insurer: Tokio Marine and Nichido Fire Insurance Co. Ltd.
Hearing Date: March 11, 2009 Checked by: MM/kh

SUMMARY OF FINDINGS

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?
Accident.
4. Date of accident or onset of occupational disease? October 1, 2006.
5. State location where accident occurred or occupational disease contracted:
Perryville, 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? 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.

Employee: Curtis Leible

Injury No.: 06-094098

11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was passing through a turnstile when he twisted his left knee and fell to the ground resulting in injury to his knee.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left knee (160 week level).
14. Nature and extent of any permanent disability: 15% of the left knee at the 160 week level, \$7,320.24.
15. Compensation paid to date for temporary total disability: \$0.00
16. Value necessary medical aid paid to date by employer-insurer: \$0.00
17. Value necessary medical aid not furnished by employer-insurer: \$14,250.87
18. Employee's average weekly wage: \$457.51
19. Weekly compensation rate: \$305.01 for PPD and TTD.
20. Method wages computation: Stipulation.
21. Amount of compensation payable:

| | |
|-----------------|--------------------|
| TTD: | \$1,525.05 |
| PPD: | \$7,320.24 |
| <u>Medical:</u> | <u>\$14,250.87</u> |
| Total: | \$23,096.16 |
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

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

FINDINGS OF FACT AND RULINGS OF LAW

On March 11, 2009, the employee, Curtis Leible, appeared in person and by his attorney, Joseph Webb, for a hearing for a final award. The employer was represented at the hearing by its attorney, Eric Kukowski. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully funded by: Tokio Marine and Nichido Fire Insurance Company LTD.
2. On or about the date of the alleged accident or occupational disease, the employee was an employee of TG Missouri Corporation and was working under the Workers' Compensation Act.
3. Employer had notice of employee's accident.
4. Employee's claim was filed within the time allowed by law.
5. Employee's average weekly wage rate was \$457.51. The rate of compensation for temporary total disability and permanent total disability was \$305.01. The rate for permanent partial disability was \$305.01.
6. Employer/Insurer has not paid any medical aid.
7. Employer/Insurer has paid \$0.00 as temporary total disability benefits for 0 weeks of disability.
8. There is no claim for mileage or other medical expenses under 287.140 RSMo.
9. There is no claim for additional or future medical aid.
10. There is no claim for permanent total disability benefits.

ISSUES

1. There is a dispute as to whether the employee sustained an accident arising out of and in the course of his or her employment.
2. There is a dispute as to whether the employee's injury was medically causally related to the accident or occupational disease.
3. Employee is claiming previously incurred medical in the amount of \$14,250.87. There is a dispute as to authorization, reasonableness, necessity, and casual relationship. Furthermore, Employer seeks a credit for payments and adjustments made pursuant to Employer's Employer provided group health coverage.
4. Employee is claiming additional TTD in the amount of \$1,525.05 representing five (5) weeks for the period 10/3/2006 - 11/9/2006.
5. Employee is claiming permanent partial disability benefits.
6. Employee is claiming attorney fees and costs pursuant to RSMo. §287.560.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Perry County Memorial Hospital Emergency Room Records
- B. MRI Report
- C. Dr. David Knapp Medical Records
- D. Dr. William Kapp Medical Records And Op Report
- E. Perry County Memorial Hosp MRI Bill
- F. Dr. David Kapp Bill
- G. Dr. William Kapp Bill
- H. Southeast Missouri Hospital Bill
- I. IME Report Of Dr. Guidos
- J. Deposition Of Dr. Guidos
- K. Photos
- L. Correspondence From EI Dated 10/5/2006
- M. Correspondence From EI Dated 10/24/2006
- N. TG Return To Work Record Dated 10/3/2006
- O. Dr. William Kapp's Return To Work Record Dated 11/9/2006
- P. Report Of Injury
- Q. Timesheet

Employer-Insurer's Exhibits

- 1. Deposition Of Dr. Nogalski
- 2. Claim For Compensation
- 3. Wage Statement
- 4. Report Of Injury
- 5. Incident Report
- 6. Perryville Family Care Clinic Medical Records
- 7. Dr. William Kapp Medical Records
- 8. Perry County Memorial Hospital Medical Records
- 9. Turnstile Entries For Building 2
- 10. Medical Bill From Perryville Family Care Clinic
- 11. Medical Bills From Perry County Memorial Hospital
- 12. Medical Bills From Southeast Missouri Hospital

FINDINGS OF FACT

Testimony of Curtis Leible

Curtis Leible (hereinafter referred to as "Employee") began working for TG Missouri Corporation (hereinafter referred to as "Employer") on January 30, 2006. On October 1, 2006, Employee sustained an injury while passing through a turnstile on Employer's premises.

On October 1, 2006, Employee was scheduled to work the night shift. His shift was scheduled to begin at 10:00 p.m. Employee arrived shortly before his shift began and parked on Employer's parking lot. This lot was one of several lots available to him for parking. The employees are not assigned to a particular parking lot or parking space. The particular entrance used by the employees is dictated by the parking lot they use. Employee must pass through a floor to ceiling turnstile to gain entry to Employer's building. The lowest rung of the turnstile is approximately one (1) inch off the ground. A badge is required to unlock the turnstile.

After unlocking the turnstile with his badge, Employee proceeded through. The turnstile is not motorized, i.e. Employee must push his way through. As he was passing through, the bottom rung of the turnstile struck the back of his right foot. This caused Employee to pivot on his left leg. As he pivoted on this leg, he felt a "pop" in his left knee followed by the immediate onset of pain and he fell to the floor just through the turnstile.

After falling, Employee lay on ground in pain. At this same time, a co-worker was halfway up a set of steps that lead from the turnstile to the entrance to the building in which Employee works. The co-worker asked if Employee was alright and went to get a supervisor. While waiting for the supervisor to respond, Employee scooted himself to the bottom of the aforementioned steps.

The responding supervisor called a guard for assistance. The guard wrapped the knee and propped it up. The supervisor and security guard got Employee to a company vehicle and the supervisor drove Employee to Perry County ER.

At the ER, Employee gave a history to the medical staff, underwent x-ray, was given a leg brace and instructed not to weight bear. He does not recall what if any follow-up instructions were given. Employee was transported back to Employer's place of business by the same vehicle that took him to the ER.

Employee does not remember if he finished his shift or went home immediately after returning from the ER. The next morning, Employer contacted him and requested that he come in to see the company nurse. During this visit, Employee met with "comp people" and answered their questions. An incident report was prepared during this meeting and Employee was instructed to follow-up with Dr. David Kapp on the following day, October 3, 2006.

On October 3, 2006, Dr. Kapp examined Employee's knee and arranged for an MRI. Just prior to Employee leaving Dr. Kapp's office, they received a call from Employer advising that Employee's treatment would no longer be covered under workers' compensation. Dr. Kapp's office requested Employee's health insurance information. Employee provided this information and planned to continue with the MRI. In the mean time, Dr. Kapp placed Employee on light duty as of October 3, 2006.

Employee received a letter dated October 5, 2006 which stated that the injuries Employee received were not sustained “within the course and scope of employment with [Employer].”

Dr. David Kapp referred Employee to Dr. William Kapp, an orthopedist. Employee’s initial visit with Dr. William Kapp was on October 19, 2006. Employee filled out a patient information sheet prior to seeing the doctor. On that form, Employee related his pain to an injury that he suffered on October 1, 2006, however, he denied that it was due to a work-related injury. Employee explained that he denied that the injury was work related because of the October 2, 2006 letter he received and because he had been advised by a co-worker that he would have less trouble with payment arrangements if he denied that the injury was work related. Employee’s description on the form of how the accident occurred was consistent with his testimony at the hearing and Employer’s Report of Injury. Dr. William Kapp recommended surgery which was performed by him on October 20, 2006. On November 9, 2006 Dr. William Kapp released Employee to return to work.

Employee received a letter from Employer dated October 24, 2006 which stated that his leave expired on October 26, 2006 and “employment will end effective October 27, 2006.” Employee was not eligible for Family Medical Leave Act (“FMLA”) because he had not been in Employer’s employ for the requisite amount of time.

Employee has since found another job as a mechanic working for Perryville Muffler and Automotive. He continues to work there as of the date of the hearing of this matter.

As of the date of the hearing, Employee complained of numbness to the left side of his left knee, shooting pain in the knee, and occasional swelling. He had problems moving his knee and didn’t have full extension or flexion. The medical record reflects no lost range of motion. Employee testified that Dr. William Kapp did not do a physical; he only asked Employee how he was feeling. The physical was performed by a physician’s assistant. Employee did not dispute that the record reflected the he felt fine because he did at the time the question was asked. However, Employee stated that he continues to have pain.

Employee complained that he can’t get down on the floor to play with his children because it hurts too badly, and he can’t run around outside. He did state that he can walk fairly well and is “getting along” in his current job. He doesn’t have to walk around very much with his current job and there is a roll-around chair that he is able to use.

Employee used his health insurance to pay for his medical care related to this incident. He does not know if he will have to pay the group health insurer back. Employer pays the entire cost of the premium. Employee was only responsible for co-pays and deductibles. As of the date of the hearing, Employee has not received a demand for repayment from the group health insurer.

Employee testified that he underwent a left ACL reconstruction in 1999. He stated that as of October 1, 2006 his symptoms had resolved from that procedure. However, on cross-examination, Employee did testify that he had given up running and sports as a result of the 1999 left knee injury and surgery.

Employee filed for unemployment benefits with the State of Missouri, however, he was denied due to his inability to work. He had no complaints regarding his back or arms. Employee did not seek sedentary work during the period from October 3, 2006 through November 9, 2006 because of his brace and the surgery. He was “laid up” until November 9, 2006. He required the use of a crutch for some time after the surgery.

Testimony of Shawn Moore

Shawn Moore testified on behalf of Employer. Mr. Moore has worked for Employer for 20 years. He currently serves as the safety and environmental supervisor. The position is responsible for investigating accidents and ordering supplies. At the time of the incident giving rise to this claim, Mr. Moore was a safety specialist, which is an assistant to his current position.

On October 1, 2006, Mr. Moore was sent by his then boss, Jay Bird, to investigate the incident giving rise to this claim. Mr. Moore instructed the maintenance department to examine the turnstile. Maintenance found no problems or defects with the turnstile.

The turnstile at issue is located such that it provides access to the building from the lower, smaller parking lot. Mr. Moore goes through this very turnstile one to three times per week. Employer does not assign parking spots nor mandate which entrance is to be used by the employees.

Mr. Moore is not aware of any other employees that have been injured from the use of this turnstile. The turnstile, on October 1, 2006, appeared to be in normal working condition.

Summary of Medical Evidence

Employee presented at Perry County Memorial Hospital on October 1, 2006 with complaint of knee pain. Employee gave a history of left knee pain that onset at approximately 9:40 p.m. on that date while twisting his left leg. Employee described hearing a “pop”. Employee had an ice pack on his knee upon arrival. An x-ray of his left knee was performed which showed no fractures, very small effusion, very old degenerative changes in the femorotibial and patellofemoral joint compartments, and post-operative changes from the prior ACL repair. Employee was discharged at approximately midnight that night with a diagnosis of knee strain. He was excused from work until Employee followed up with his family doctor and given a prescription for 500 mg of Naprosyn to be taken every 12 hours.

As described during live testimony, Employee was sent to Dr. David Kapp on October 3, 2006. Employee gave a history consistent with his testimony that he twisted his left knee and fell while passing through a turnstile at work. Dr. David Kapp observed mild effusion and swelling. Employee demonstrated pain with full flexion and tenderness along the medial aspect. Dr. David Kapp recommended an MRI which was performed on October 6, 2006. In the interim, Employee was instructed to continue the use of his immobilizer and one crutch. The MRI revealed a tear involving the anterior horn of the medial meniscus and a complex tear involving the posterior horn of the medial meniscus. When Dr. David Kapp saw Employee on October 12,

2006 for follow-up, he referred Employee to Dr. William Kapp for orthopedic evaluation. No changes to Employee's work restrictions were noted.

Employee was seen by Dr. William Kapp on October 19, 2006. Employee gave a history consistent with his testimony that he twisted his left knee and fell while passing through a turnstile at work. He did note on the patient information sheet that the accident was not work related. However the next question on the information sheet was, "If yes, is your employer aware of this injury?" to which Employee answered in the affirmative. Dr. William Kapp recommended surgery which was performed on the following day, October 20, 2006. The pre- and post-operative diagnoses were: Left knee medial meniscus tear with Cyclops lesion and patella femoral chondromalacia. Dr. William Kapp saw Employee two times for follow-up. On November 9, 2006, the second follow-up, Employee was seen by Christopher Benet, PA, under the supervision of Dr. William Kapp who noted: "full and complete recovery and he now has good ROM with no pain. He is doing activities as tolerated." Dr. William Kapp released Employee from his care and back to full duty as of that date.

Testimony of Dr. Annamaria Guidos

Dr. Annamaria Guidos, a Missouri physician, testified on behalf of Employee on the issues of accident, medical causation, reasonableness and necessity of the treatment, and nature and extent of disability. Dr. Guidos reviewed the medical records previously summarized herein and examined Employee. Upon examination of Employee, Dr. Guidos observed and noted the following which are relevant to the issues at hand:

1. Gait was normal;
2. Motor testing of the lower extremities revealed 5/5 strength in all major muscle groups;
3. Employee perceived light touches bilaterally in the lower extremities, however, there was a small patch of decreased sensation in the lateral aspect of his left knee;
4. deep tendon reflexes were normal;
5. Lachman's test was negative;
6. McMurray's sign was negative;
7. No tenderness to palpation in the medial or lateral compartments of the knee, and;
8. No ecchymosis or bruising.

Dr. Guidos testified that she had the following opinions to reasonable degree of medical certainty:

1. Employee's fall of October 1, 2006 was the prevailing factor in causing his medial meniscus tear;
2. The treatment described in the admitted medical records and discussed herein was necessary to cure and relieve the effects of his work injuries;
3. The cost of the aforementioned medical treatment was reasonable and necessary;
4. Employee was temporarily and totally disabled from October 3, 2006 through November 9, 2006, and;
5. Dr. Guidos testified that Employee had suffered a 20% permanent partial disability (PPD) to the left knee at the 160 week level as a result of the knee injury. Dr. Guidos'

report provided the opinion that Employee suffered a 15% PPD to the left knee. At her deposition, she explained that she was modifying her opinion to reflect an additional 5% of disability taking into consideration the amount of meniscus that was removed and the anticipated problems that Employee will have in the future due to the significant resection.

Testimony of Dr. Michael Nogalski

Dr. Michael Nogalski, a Missouri physician, testified on behalf of Employer on the issues of necessity of treatment, and nature and extent of disability. Dr. Nogalski reviewed the medical records discussed herein and examined Employee on March 12, 2008. Upon examination of Employee, Dr. Nogalski observed and noted the following which are relevant to the issues at hand:

1. Full extension of the left knee;
2. Flexion to about 135 degrees;
3. Mild pain with deep knee flexion;
4. Grade I-a Lachman's;
5. Motor strength grade 5/5;
6. Some pain in the anterior knee with resisted knee extension, and;
7. Normal gait.

Dr. Nogalski testified that he had the following opinions to a reasonable degree of medical certainty:

1. The findings of the MRI and Dr. Williams Kapp were as a result of a chronic condition that predated the incident of October 1, 2006;
2. Employee did not require any additional treatment related to his accident on October 1, 2006, and;
3. Employee has suffered an 11% PPD to his left knee with 6% related to his pre-existing ACL repair and 5% related to the claimed event of October 1, 2006¹.

RULINGS OF LAW:

Issues 1 and 2: Accident and Medical Causation

There is a dispute as to whether the Employee sustained an accident arising out of and in the course of his or her employment and whether Employee's injuries are medically related to the accident.

The facts surrounding the incident that occurred on October 1, 2006 shortly before 10:00 p.m. are not in dispute. Employee credibly testified that he was passing through Employer's turnstile

¹ Dr. Nogalski actually attributed the 5% PPD to a claimed event of 10/6/2006, however, taking the entire record and deposition into consideration, it is found that Dr. Nogalski simply misstated the date and was actually referring to the claimed event of October 1, 2006.

on Employer's property to enter Employer's building to begin his shift when his right foot was caught or otherwise disturbed by the lowest rung of the turnstile, and as a result twisted his left knee, heard a "pop" sound and fell to the ground. This testimony is supported throughout the record. Employer's Report of Injury documents that Employee related the same facts on the day after the alleged injury. Employee consistently reported the incident to each of the medical providers and examining experts. Finally, Employer's post hearing brief confirms the facts giving rise to this claim, "In the instant case, the facts are simple, straight-forward and undisputed...As he was walking through the gate, Leible's right leg was reportedly either struck by the lower rung of the turnstile or became caught in it. As he turned to see what was happening, Leible testified that he twisted his left knee." Employer's Brief at p.18.

Since the facts are not in dispute, the issue is purely legal. "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 ... of the employee by accident arising out of and in the course of the employee's employment..." §287.120.1² "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..." §287.020.2 "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." §287.020.3(2)

It is found that Employee sustained an accident as defined in the Missouri Revised Statutes on October 1, 2006 when he twisted his left knee and fell to the ground while passing through the aforementioned turnstile. This incident was clearly an "unexpected traumatic event or unusual strain identifiable by time and place of occurrence..." This incident (hereinafter referred to as "accident") occurred while and as a result of passing through Employer's turnstile.

Both parties' medical experts commented on the causal connection between Employee's accident and the torn meniscus and resulting medical care. The opinion of Dr. Annamaria Guidos is found to be more credible on this matter. Dr. Guidos' opinion is consistent and unequivocal by stating that "[Employee's accident] was felt to be the prevailing factor in causing his meniscal injury." Dr. Nogalski's opinion regarding causation is unclear. Dr. Nogalski stated, "that this type of bucket handle tear would be a chronic one that would not have been **entirely** related to the claimed [10/1/2006] event." Such a statement suggests that, at least in some part, the bucket handle tear was related to the accident. It is unclear from Dr. Nogalski's opinion the extent of that relationship. There is no requirement that the accident be the sole or only factor in causing the injury. In fact, the accident need only be the "prevailing factor" in causing both the resulting medical condition and disability. "Prevailing factor" is defined to the primary factor, **in relation to any other factor**, causing both the resulting medical condition and disability. §287.020.2 (emphasis added). Dr. Nogalski's opinion is that the accident was not the only factor in causing Employee's injury and disability. This is a higher standard that is mandated by the statutes. It is

² Unless stated otherwise, all statutory references are made to Missouri Revised Statutes, Cumulative Supplement 2008.

found that the prevailing factor resulting in Employees aforementioned injury to his left knee was the accident of October 1, 2006.

Dr. Guidos clearly provides the opinion that his medical treatment was necessary to cure and relieve the effects of his work injuries. It is unclear from the record as to whether Dr. Nogalski disagrees with this opinion. Dr. Nogalski provides his opinion regarding the need for **additional treatment** related to the accident by stating, "I did not feel that [Employee] required any **further treatment.**" It is unclear from the testimony as to how much of the treatment received by Employee Dr. Nogalski believes was or was not required or necessitated by the accident of October 1, 2006. Dr. Nogalski "apportioned and will continue to apportion his current disability into a five percent permanency with respect to the claimed [10/1/2006] event..." He testified later at his deposition that the five percent PPD accounts for arthroscopy. Taking into consideration the live testimony, the medical evidence, and the expert testimony, it is found that the medical care admitted into the record was reasonable and necessary to cure and relieve Employee from the effects of the injury sustained in the accident of October 1, 2006.

There is nothing in the record that suggests Employee's injury came "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 unemployment life." §287.020.3(2)(b) This accident occurred while and as a result of Employee passing through the turnstile. There is no evidence that Employee or any other employee would be equally exposed to such a hazard but for passing through this very turnstile.

In summary, the overwhelming weight of the evidence suggests that Employee was involved in an accident on October 1, 2006. That accident resulted in an injury that arose out of and in the course of employment in that (a) the accident was the prevailing factor in causing the injury, resulting medical condition and disability, and (b) the accident 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. For these reasons, it is found that Employee sustained a compensable injury on October 1, 2006 and the medical care resulting from that injury as found in the record was necessary to cure and relieve Employee from the effects of that injury.

Issue 3: Previously Incurred Medical Expenses

Employee is claiming previously incurred medical in the amount of \$14,250.87. There is a dispute as to authorization, reasonableness, necessity, and casual relationship. Furthermore, Employer seeks a credit for payments and adjustments made pursuant to Employee's Employer provided group health coverage.

Employee offered without objection the following medical bills upon which he bases his claim:

1. Exhibit E – Perry County Memorial Hospital (MRI) - \$1,502.00
2. Exhibit F – Perryville Family Care Clinic (Dr. David Kapp) - \$132.00
3. Exhibit G – Orthopaedic Associates (Dr. William Kapp) - \$4,324.87

4. Exhibit H – Southeast Missouri Hospital - \$8,292.00

These bills total \$14,250.87.

As held, *supra*, the medical care admitted at the hearing of this matter was necessitated by the compensable accident and injury of October 1, 2006.

Dr. Guidos credibly testified that the cost associated with the medical care related to Employee's knee was reasonable and necessary. There is no evidence in the record to the contrary. Dr. Guidos was not cross-examined on this issue. Dr. Nogalski did not provide an opinion on the issue of reasonableness of the care received. It is found that the care and associated charges were reasonable.

There is no question that the medical care received by Employee after the initial visit to Dr. David Kapp was not authorized. Pursuant to §287.140, the employer has the right to select the treating physician but waives that right by failing or neglecting to provide necessary medical aid. See Banks v. Springfield Park Care Center, 981 S.W.2d 161 (Mo. App. 1998). In Wiedower v. ACF Industries, 657 S.W.2d 71 (Mo. App. 1983), medical bills were awarded to the employee when the employer had notice of the injury but chose to treat the injury as non-compensable and did not offer medical services.

The employer will be liable for medical expenses incurred by the employee when the employer has unsuccessfully denied compensability of the claim. Denial of compensability is tantamount to a denial of liability for medical treatment. Beatty v. Chandeysson Elec. Co., 190 S.W.2d 648 (Mo. App. 1945). I Mo. Workers' Compensation Law Section 7.2 (Mo. Bar 3rd ed. 2004).

Based upon the case law and a review of the evidence, it is found that Employer waived its right to select the treating physician by denying the compensability of the case and by failing or neglecting to provide necessary medical aid. The defense of authorization is not valid for the medical care received by Employee regarding his left knee.

Employer seeks a credit for the "adjustments" made by the providers and for the amount paid through Employee's group health provider. Employer cites Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. banc. 2003) in its brief to support the claimed credits. Employer's reliance on Farmer-Cummings is misplaced.

"[§287.270] clearly was intended to allow the employee to benefit from any collateral source the employee might have available to him or her, independent of the employer, whether purchased or not." Employee's medical bills were paid by Blue Cross/Blue Shield (hereinafter referred to as "BC/BS"). Clearly this is a collateral source independent of the employer. It is acknowledged that the premiums for the BC/BS coverage were paid by Employer. §287.270 does not allow a credit to the employer for any "savings or insurance of the employee." The medical bills were paid by BC/BS, an insurance of the employee. Therefore, Employer is not allowed a credit for those payments. Employer suggests that it should be allowed a credit for these payments because it paid the premium for BC/BS. Employer seems to take this position based on the second phrase of §287.270, to wit: "benefit derived from ... the employer". A strict

construction of the statute does not allow Employer's proffered interpretation on this issue. If "benefit derived from the employer" was construed to include group health coverage, whether paid for by the employer or not, such an interpretation would be in direct competition with the first phrase which excludes "insurance of the employee" as being used as a credit by the employer. The Missouri Supreme Court does not subscribe to Employer's interpretation. This was made clear when it stated the "section clearly was intended to allow the employee to benefit from **any** collateral source ... whether **purchased or not.**"

Farmer-Cummings does allow Employer a credit for "write-offs and reductions" if Employer "establishes by a preponderance of the evidence that the healthcare provider allowed write-offs and reductions for their own purposes and [Employee] is not legally subject to further liability..." There is no evidence in the record regarding the purpose of the providers' adjustments. The medical bills submitted by Employer certainly indicate that these adjustments were related to the payments by BC/BS. However, that does not establish for whose purpose the adjustments were made. Likewise, there is no evidence regarding further liability for the amount so adjusted. Employee did testify that he had not received a bill for the adjustments or a request for payment from BC/BS. A lack of previous attempts to collect does not establish that there will be no future attempts to collect. BC/BS presumably made payment on these accounts based on a determination that the medical care was not the result of a work-related injury. Obviously, this award may be grounds for BC/BS to modify their position and seek reimbursement from Employee or repayment from the providers. Either one of these contingencies could result in liability on the part of Employee. In any event, there is no evidence in the record that Employee will not have future liability for the adjustments. Employer failed to meet its burden on this point.

In summary, Employee introduced medical bills in the amount of \$14,250.87. As previously held, these charges were causally connected and necessitated by the compensable injury of October 1, 2006. It is further held that the charges were reasonable and Employer waived its defense of "authorization" by failing to provide or direct medical care. Finally, Employer is not entitled to a credit for payments made by BC/BS pursuant to §287.270 nor is it entitled to a credit for adjustments because it did not meet its burden insofar as there is no evidence that Employee will not have any future liability based on these adjustments.

Employer is ordered to pay previously incurred medical in the amount of \$14,250.87.

Issue 4: Past TTD

Employee is claiming additional TTD in the amount of \$1,525.05 representing five weeks for the period 10/3/2006 - 11/9/2006.

Employee was seen on the night of the accident at Perry County Memorial Hospital Emergency Room. He was fitted with a knee immobilizer/brace and excused from work from "10/1/06 until [follow-up with] family [doctor]." On October 3, 2006, Employee saw Dr. David Kapp. His plan was to obtain an MRI and "continue in a knee immobilizer and use one crutch to avoid full weight bearing on the knee until able to do so without pain." After the MRI, Employee was referred to Dr. William Kapp who performed surgery the day after Employee's initial

consultation. Finally, on November 9, 2006, Dr. William Kapp, by and through his physician's assistant, released Employee "back to work full duty." The medical records are void of any other references to work status and restrictions. The only references to work were the 10/1/2006 excuse from work and the 11/9/06 release back to work.

Dr. Guidos opined that Employee was temporarily totally disabled for the period from October 3, 2006 through November 9, 2006. Dr. Nogalski did not comment on Employee's condition during the period of alleged total disability. This condition is supported by Employee's testimony that he was denied unemployment benefits during the aforementioned period because it was determined that he was unable to work.

For the reasons stated herein, it is found that Employee was temporarily totally disabled for the five week period from October 3, 2006 through November 9, 2006. Employer is ordered to pay the benefits due for that period without a credit for the first three days of disability, or \$1,525.05.

Issue 5: Nature and Extent of Disability

Employee is claiming permanent partial disability benefits.

Dr. Guidos testified that Employee has suffered a permanent partial disability of 15% of the left knee. She also indicated that she would include an additional 5% for future problems that will likely develop with age. "Permanent partial disability" means a disability that is permanent in nature and partial in degree..." §287.190.6(1) "Any award of compensation shall be reduced by an amount proportional to the permanent partial disability ... attributed to the natural process of aging sufficient to cause or prolong the disability or need for treatment." §287.190.6(3) For this reason, the additional 5% attributed to the natural aging process and its impact on this injury by Dr. Guidos is disregarded. Dr. Nogalski opined that Employee suffered a 5% permanent partial disability for the arthroscopic surgery.

Dr. Guidos' opinion is found to be more credible. Apparently, Dr. Nogalski was willing to assign disability to the procedure but not the underlying condition. As held, supra, the underlying knee injury is found to be compensable. Additionally, when giving his opinion, Dr. Nogalski chose to disregard Employee's characterization of the event as a "fall". Employee testified that he fell. Employee told the medical providers that he fell. Employer's incident report indicates a fall. Employer's report of injury indicates a fall. Employee's claim for compensation indicates a fall. Even Dr. Nogalski's report indicates a reported history of a fall and that Employee could not get up and "laid there for a while." However, Dr. Nogalski's testified, "I don't think that Mr. Leible had a fall and it seems to be that [Employee's counsel is] trying to characterize this as a bigger event than it really was." It is found that Employee fell. Dr. Nogalski's unwillingness to consider this fact calls into question the basis upon which he formed his opinion.

For the reasons stated herein, Employee is found to have suffered a 15% permanent partial disability of the left knee and is ordered to pay PPD benefits in the amount of \$7,320.24.

Issue 6: Attorney Fees and Costs Pursuant to RSMo. §287.560

Employee is claiming attorney fees and costs pursuant to RSMo. §287.560.

Employee's brief cites Monroe v. Wal-Mart Assocs., Inc., 163 S.W.3d 501, (Mo. App 2005) for authority on this issue. As stated in Employee's brief, the Court found employer's actions unreasonable because:

1. Employer had notice of the injury;
2. Employer failed to make a reasonable investigation;
3. Employer failed to heed the opinion of its own medical examiner;
4. Employer failed to make an offer of settlement for a period of years, and;
5. Employer defended the case through hearing without contrary medical evidence.

Other than the fact that Employer had notice of the incident, the facts at hand are distinguishable on the remaining four elements. Employer's testimony was that maintenance and safety crews investigated the turnstile. Employee offered Employer's October 5, 2006 correspondence which stated, "After completing our investigation, we have determined that the injuries you sustained, if any, were not within the course and scope of your employment..." Employer made an investigation.

While Dr. Nogalski opined that Employee suffered a 5% PPD related to the October 1, 2006 accident, there was no opinion that further medical care was necessary.

The record does not establish what if any settlement negotiations took place. Employee did not testify whether he had or had not received any offers of settlement.

Employer had the opinion that his knee problems were to some degree pre-existing and chronic. While that testimony may misapply the proper legal standard or be less credible than Employee's expert, Dr. Nogalski is a qualified physician and it is not unreasonable for Employer to rely on his opinion.

For the reasons state herein, Employee claim for attorney fees and costs pursuant to §287.560 is denied.

ATTORNEY'S FEE

Joseph Webb, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Curtis Leible

Injury No.: 06-094098

Date: _____

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation