

TEMPORARY OR PARTIAL AWARD
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 05-102533

Employee: Tyler Moore

Employer: Rock Busters, Inc.

Insurer: Grinnell Mutual Reinsurance Company

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, heard oral arguments, and considered the whole record. Pursuant to § 287.090 RSMo, we issue this temporary award and decision modifying the February 25, 2010, award and decision of the administrative law judge (ALJ). The ALJ award is attached hereto and incorporated to the extent it is not inconsistent with our findings, conclusions, decision and award.

Preliminaries

The ALJ heard this matter to consider: 1) causation; 2) temporary total disability; 3) nature and extent of permanent partial disability; 4) liability for past medical expenses; and 5) future medical care.

The ALJ found that employee suffered a work-related injury to his knee on September 21, 2005. However, the ALJ found that the September 21, 2005, accident did not result in a complete tear of employee's ACL, nor necessitate the March 2007 ACL reconstructive surgery. She found that employee's ACL tear occurred when employee fell on ice at his home in January 2007. The ALJ found that this subsequent incident in January 2007 was an intervening event and was not part of a continuous chain of causation flowing from the original compensable accident.

For the foregoing reasons, the ALJ found that the treatment employee received following the September 21, 2005, accident and up until January 30, 2007, is compensable, but the ACL reconstruction surgery completed on March 5, 2007, and the medical care from that date forward, resulted from the intervening act in January 2007 and, therefore, is not compensable.

The ALJ issued a final award, as opposed to a temporary or partial award. The ALJ found employee is 15% permanently partially disabled rated at the 160 week level due to the work injury that occurred on September 21, 2005. Using employee's weekly compensation rate of \$246.67, the ALJ awarded employee \$5,920.08 (= \$246.67 x 24 weeks (15% of 160 weeks)) in permanent partial disability benefits. The ALJ also found employer/insurer liable for unpaid medical bills accrued from September 27, 2006 through January 30, 2007, totaling \$6,551.44. Lastly, the ALJ found employer/insurer liable for additional temporary total disability benefits for the period of September 28, 2006 through March 5, 2007, totaling \$5,567.69 (= 22 and 4/7 weeks x \$246.67).

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Employee appealed to the Commission alleging the ALJ erred in finding that the accident of September 21, 2005, was not the prevailing factor in causing his injury to his ACL and resulting disability and reconstructive surgery. Employee also alleged in his appeal that any injury and need for medical treatment that resulted from the January 2007 incident was a direct and natural result of the original injury. Employee argues that employer/insurer is liable for all of his unpaid medical bills from both the September 21, 2005 and January 2007 incidents, totaling \$46,735.24. Employee also seeks a temporary or partial award for additional temporary total disability benefits and additional medical care. Employee does not believe he has reached maximum medical improvement and, therefore, does not believe that the nature and extent of his permanent partial disability should be decided at this time.

Therefore, the issues currently before the Commission include the following: 1) causation of employee's ACL tear and resulting ACL reconstruction; 2) whether the January 2007 incident was part of a continuous chain of causation flowing from the September 21, 2005, accident; and 3) whether employee has achieved maximum medical improvement such that a final award is appropriate.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are incorporated and adopted by the Commission herein, to the extent they are not inconsistent with the facts listed below.

On September 21, 2005, while employee was in the course of his employment he slipped and fell approximately five feet off a backhoe, landing directly on his right leg. His right knee began to swell immediately after the injury. Employee saw Dr. Hufft, who prescribed "time healing" and physical therapy for his right knee. Dr. Hufft released employee to go back to work in December 2005.

Employee continued to have problems with his right knee and two weeks after he returned to work employee quit his job with Rock Busters, Inc. Employee began working at Lowe's in January 2006. However, his problems with his right knee had continued to get progressively worse.

On September 27, 2006, while working for Lowe's, employee got on all fours to move a product forward and when he attempted to stand up he put weight on his right leg and it collapsed, causing him to fall. Employee was not able to do his job at Lowe's and was bound to crutches until seeing Dr. Goodman in December 2006.

Dr. Goodman performed arthroscopic ACL debridement surgery on employee's right knee on January 2, 2007. Employee was prescribed crutches after his surgery.

Following a major ice storm, employee fell at his home in January 2007. On the morning following the ice storm, employee walked out of his home to determine what damage had occurred to his personal and real property. Employee testified that he wanted to check his fence because said fence contains a couple of horses employee

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owns on five acres of land. Employee stated that he has trees along the fence line and he wanted to make sure that the trees had not taken the fence down.

Employee traversed around his house on crutches on a sidewalk made of flat sandstones when the crutch on his left side went out and he was forced to place weight on the right knee.

Employee went back to Dr. Goodman, told him about the January 2007 incident, and on March 5, 2007, Dr. Goodman performed an ACL reconstruction surgery on employee's right knee. Employee continued to treat with Dr. Goodman through October 2007 and saw him again on at least one occasion in 2009. However, employee still had complaints with his knee in that it started to pop and swell again.

Employee testified that he currently continues to have popping and swelling in his knee and has problems doing his prior activities such as playing basketball, softball, volleyball, water skiing and he cannot go up and down ladders. Employee also complained that he has problems driving and that after driving for long periods of time he gets "blotchy places" and bruises on his knee.

Dr. Woodward evaluated employee on August 18, 2009, and was of the opinion that employee's initial right knee injury on September 21, 2005, caused a medial meniscus tear and only a partial ACL tear. Dr. Woodward further opined that employee's slip and fall on ice while using crutches caused an additional injury and trauma to the right knee and necessitated the ACL reconstruction surgery, which was performed by Dr. Goodman on March 5, 2007.

Dr. Hufft treated employee for injuries resulting from the initial September 21, 2005, accident and saw employee for an independent medical evaluation on April 27, 2007. In his independent medical evaluation report, Dr. Hufft indicated that had he chosen to perform arthroscopic surgery on employee's right knee, following the September 21, 2005, accident, it is probable that a medial meniscus tear would have been found based upon the treatment history. As a result, Dr. Hufft stated it is his opinion that employee sustained a torn medial meniscus and partial ACL tear during the initial injury of September 21, 2005. Dr. Hufft believed the event at Lowe's was merely an episode of acute displacement of a bucket handle tear and was not a new event. Dr. Hufft stated that the partial ACL tear was healing at the time of the arthroscopic surgery on January 2, 2007, based upon Dr. Goodman's description in the medical records. Dr. Hufft further opined that the subsequent complete tear of the ACL was the result of the slip and fall on ice in January 2007 and not as a result of the initial injury.

Dr. Rogers evaluated employee on November 6, 2006, and November 17, 2009. Dr. Rogers is of the opinion that the ACL tear, which he believed was initially caused by employee's 2005 injury, still has instability after the surgery performed by Dr. Goodman on March 5, 2007. Dr. Rogers believes employee needs additional surgeries in relation to his right knee because he is unable to straighten it by 26 degrees of extension, is still walking with a limp, and has additional pain. Dr. Rogers is of the opinion that without additional surgery there will be a definite impact on employee's ability to be employed.

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Dr. Rogers believes that if employee has additional treatment to his knee that it was still possible that he will need a knee replacement. Lastly, Dr. Rogers believes employee is at a greater risk to suffer arthritis than someone who never had his injuries.

Conclusions of Law

With regard to the issue of causation of employee's complete ACL tear and subsequent ACL reconstruction, we agree with the ALJ in finding that the ACL reconstruction was necessitated by the aggravation of the initial injury that occurred when employee fell on the ice at his home in January 2007. This finding is supported by the expert opinions of both Drs. Woodward and Hufft and is further supported by the medical records of Dr. Goodman. As the ALJ pointed out, it is not logical that Dr. Goodman, after seeing the damage to employee's knee during the January 2, 2007, surgery, would have merely performed an ACL debridement rather than an ACL reconstruction if the ACL was completely torn at that time. Having made this causation finding, the primary issue then turns on whether the January 2007 incident was part of a continuous chain of causation flowing from the September 21, 2005, accident.

Under Missouri Workers' Compensation Law, once it is determined that an accident, arising out of and in the course of employment, is the prevailing factor in producing an injury, every natural consequence that flows from said injury is compensable as a direct and natural result of the primary original injury. *Manley v. American Packing Co.*, 285 S.W.2d 165, 169 (Mo. 1952). Employee contends that his January 2007 fall on ice and resulting injury was a natural consequence that flowed from the September 21, 2005, injury.

The facts in *Manley* are very analogous to the facts in this case. In *Manley*, the claimant suffered a work-related knee injury. After the injury, the claimant knew his right knee would not hold him, he could not drive a car, and he had to use a cane to keep from falling. Some short time after the claimant's injury from which he suffered problems with his knee, he and his son were walking in an orchard when claimant's leg gave way, causing him to fall. The orchard where the claimant fell was level, unplowed ground, in bluegrass clover not over six or eight inches high. The fall caused claimant to have to undergo a surgical operation to repair the knee. During the surgery, the claimant suffered a pulmonary embolism which resulted in his death. *Id.* at 167-69.

In *Manley*, the Supreme Court of Missouri affirmed the Commission's award of death benefits, stating:

[The claimant's] fall in the orchard while walking on level unplowed grassland, was due to the weakened and injured knee rather than to some external force; and that the fatal embolism which followed was, in fact, the culmination of a series of injuries, beginning with the original, each in sequence thereafter being the result of the one immediately preceding.

Id. at 170.

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In a case citing *Manley, Wilson v. Emery Bird Thayer Co.*, 403 S.W.2d 953 (Mo. App. 1966), the Court put some limitation on what is considered a “natural consequence of the original injury.” In *Wilson*, the Court stated:

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, **unless it is the result of an independent intervening cause attributable to the claimant’s own intentional conduct.**

Id. at 958, citing 1 Larson, *Workmen’s Compensation Law*, §13.11, p. 192.59.

Missouri case law provides some guidance on what is considered an independent intervening cause. The ALJ correctly pointed out a clear example of an independent intervening cause in *Oertel v. John D. Streett & Company, Inc.*, 285 S.W.2d 87 (Mo. App. 1955). In *Oertel*, the claimant suffered a work-related disc injury. The Court affirmed the Commission’s denial of benefits for additional injuries to his back that occurred during a family baseball game four and one-half months after the original injury. The Court agreed that the baseball incident was an intervening cause. The claimant did not sustain his burden that his incapacity resulting from the baseball incident was brought about by a condition resulting from the first accident.

In addition to *Oertel*, the ALJ cited cases from other jurisdictions in which the court held that the claimant’s subsequent injuries were the result of independent intervening causes. In evaluating cases of this nature, it becomes evident that the controlling issue in these cases is whether the claimant was acting reasonably when the subsequent injury occurred. In the present case, the ALJ found that employee’s decision to use his crutches following an ice storm was an independent intervening cause in that it was a “risky venture for his own benefit.” We disagree.

This case is no different from the other cases finding that a claimant’s injuries flowed from a natural consequence of the primary original injury. Employee was on crutches because Dr. Goodman prescribed them. It is uncontradicted that employee could not get around without specifically using crutches. Employee was injured in January 2007 while he was checking his fence that contains his horses. Employee feared that the ice storm had knocked trees down along his fence line and that the trees had taken down his fence, leaving an opening for his horses to escape. This is a reasonable fear and something that needed to be addressed in a timely manner. Employee was not playing baseball like the claimant in *Oertel*, or entertaining any activity that was not necessary for him to sustain his livelihood. For these reasons, we find that the January 2007 injury was a direct and natural consequence of the September 21, 2005, injury and, therefore, is compensable.

Temporary Total Disability

With regard to the additional temporary total disability benefits claimed by employee, we conclude that employee was temporarily and totally disabled from September 28, 2006, until he returned to work at Lowe’s at the beginning of May 2007. Therefore, employee

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is awarded an additional 30 and 4/7 weeks of temporary total disability benefits at the rate of \$246.67, which equals \$7,541.05.¹

Additional Medical Care

We find based upon employee's current complaints and the opinion of Dr. Rogers, that employee has not yet achieved maximum medical improvement with regard to his right knee. For this reason, we grant employee's request that he receive additional medical care. Employee is entitled to all medical treatment necessary to cure and relieve him from the effects of his injury.

Because we find that employee has not yet achieved maximum medical improvement, this claim is not yet ripe for a final award. We also find that the issue of past medical expenses would more appropriately be addressed in the final award.

Award

We modify the award of the administrative law judge. We direct employer/insurer to pay temporary total disability benefits as directed above. We also direct employer/insurer to provide medical treatment necessary to cure and relieve employee of the effects of his injury.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

Brandon C. Potter, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 10th day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

¹ The Commission takes administrative notice that employer has already paid \$2,466.71 in temporary total disability benefits for the period of September 22, 2005 through December 11, 2005. The temporary total disability benefits paid by employer for this period were not challenged by either party.

Employee: Tyler Moore

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 affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

Alice A. Bartlett, Member

AWARD

Employee: Tyler Moore

Injury No. 05-102533

Employer: Rock Busters, Inc.

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

Insurer: Grinnell Mutual Reinsurance Company

Hearing Date: December 30, 2009

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

Checked by: VRM/db

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 21, 2005.
5. State location where accident occurred or occupational disease was contracted:
Springfield, 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 the 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:
Claimant slipped several feet off of a back hoe.
12. Did accident or occupational disease cause death? No. Date of death? Not Applicable.
13. Part(s) of body injured by accident or occupational disease: Right knee.

- 14. Compensation paid to-date for temporary disability: \$2,466.71.
- 15. Value necessary medical aid paid to date by employer/insurer? \$14,225.40.
- 16. Value necessary medical aid not paid by employer/insurer? \$6,551.44.
- 17. Employee's average weekly wages? \$370.00.
- 19. Weekly compensation rate: \$246.67(TTD)\$246.67(PPD).
- 20. Method of computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

24 weeks of permanent partial disability at the rate of \$246.67	\$ 5,920.08
Unpaid Medical Bills	\$ 6,551.44
Temporary total disability for 22 and 4/7 weeks	<u>\$ 5,567.70</u>
Total	\$18,039.22

- 22. Second Injury Fund liability: None.
- 23. Future requirements awarded: None.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of the amount awarded herein, in favor of the following attorney for necessary legal services rendered to the claimant: Brandon Potter.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tyler Moore

Injury No. 05-102533

Employer: Rock Busters, Inc.

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

Insurer: Grinnell Mutual Reinsurance Company

Hearing Date: December 30, 2009

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

Checked by: VRM/db

INTRODUCTION

The undersigned Administrative Law Judge heard this workers' compensation claim on December 30, 2009. Tyler Moore (Employee and Claimant) appeared in person and with his attorney, Brandon Potter. He requests a Temporary or Partial Award, including additional medical treatment. Employee, however, possesses a final rating. Employer Rock Busters, Inc., and its insurer, Grinnell Rensurance (hereafter referenced collectively as Employer), were represented by Greg Pearman. Employer requests a Final Award should the need for additional medical treatment be found unrelated to the work accident of September 21, 2005. Assistant Attorney General Susan Colburn appeared at the hearing for the Treasurer of Missouri as Custodian of the Second Injury Fund. This case was tried in conjunction with a claim against Lowe's Home Center, Inc., a self- insured entity, which was represented by John Dolence.

STIPULATIONS

1. On or about September 21, 2005, Rock Busters, Inc. was an employer operating under and subject to Missouri Workers' Compensation Law.
2. Employer was fully insured by Grinnell Mutual Reinsurance Company.
3. On September 21, 2005, Tyler Moore was an employee of Employer and working under and subject to Missouri Workers' Compensation Law.

4. On September 21, 2005, Employee's average weekly wage was \$370.00, yielding a compensation rate of \$246.67.
5. Employee has received \$2,466.71 in temporary total disability benefits from Employer Rock Busters, Inc.
6. Employer Rock Buster's Inc., paid medical on behalf of Employee in the amount of \$14,225.41.

ISSUES

1. Did Claimant suffer an injury within the course and scope of his employment?
2. Is Claimant entitled to reimbursement for unpaid medical?
3. Is Claimant entitled to additional temporary total disability?
4. Is Claimant at maximum medical improvement as a result of the work accident?
5. If Claimant has reached maximum medical improvement as a result of the September 21, 2005 work injury, is he entitled to permanent partial disability?
6. Is Claimant entitled to additional medical treatment as a result of the work injury?

EVIDENCE PRESENTED

The following exhibits were offered by Claimant and admitted:

- #1 Medical Billing
- #2 Lien for Attorney Fees
- #3 Deposition – Dr. David Rogers
- #4 Complete Medical Report – Dr. Shane Bennoch
- #5 Right Knee Scan
- #6 St. John's Regional Medical Center Records
- #7 Dr. Robert Hufft's Records
- #8 Republic Physical Therapy and Rehab Records
- #9 Republic Physical Therapy and Rehab Billing
- #10 Dr. David Rogers Medical Records
- #11 Cox Medical Center Records
- #12 Cox Medical Center Billing
- #13 St. John's Regional Medical Center Records
- #14 St. John's Regional Medical Center Billing
- #15 St. John's Clinic Records
- #16 Family Medical Walk-in Clinic Records
- #17 Family Medical Walk-in Clinic Billing
- #18 St. John's Physicians Clinics Billing

The following exhibits were offered by Employer and admitted:

- A. Notice of Intent – Dr. Hufft
- B. Deposition of Dr. Woodward including IME report dated August 18, 2009
- C. TTD Payments
- D. Medical Bills Paid

No exhibits were offered by Lowe's or the Second Injury Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant Tyler Moore is a 42 year old man with a high school diploma. For 18 years he worked with Western Lithotech. After that company was sold, and later closed, he found employment with GPLS for approximately one month. He then went to work for Rock Busters, Inc.

Claimant was working with Rock Busters, Inc., on September 21, 2005, when he fell several feet from a backhoe to the ground. He landed squarely on his right leg which caused immediate pain to his right knee. He was unable to get up from the ground. A co-worker came to his aid. Notice was given to a supervisor who was on the premises. Claimant was advised to go home for the rest of the day. He had a difficult time driving home. When he arrived at his residence, he had to crawl to the front door of his home. After entering the residence, he called his wife who came home to attend to him and his injury. That night he applied ice to his knee in an attempt to relieve the pain and swelling.

The following morning, Claimant's right knee was painful and swollen. He was unable to bear weight on the knee. After providing notice to a supervisor, Claimant's wife accompanied Claimant to the emergency room where his knee was x-rayed. He was prescribed medication and advised to get some crutches.

When his knee failed to improve after a couple of days, Employer referred Claimant to Dr. Robert Hufft, an orthopedic surgeon. Dr. Hufft treated Claimant for two months. He ordered an MRI and recommended physical therapy, but no surgery. When Claimant told Dr. Hufft that his knee would pop, Claimant was asked to reproduce the noise. Dr. Hufft mistakenly reported that the sound was emanating from Claimant's ankle rather than the knee. Dr. Hufft offered no treatment alternatives. Dr. Hufft released Claimant to return to work in December 2005, at which time he returned full duty to Rock Busters, Inc. Shortly thereafter, he realized that his knee would not allow him to continue to perform the same type of work so he quit his job. Soon after that he began working at Lowe's Home Center, Inc., in Springfield, Missouri.

Claimant began working for Lowe's in January 2006. He was employed as a team leader in the electrical department. His job duties required him to walk, stand, climb ladders, squat and do some lifting. On September 27, 2006, about nine months after going to work for Lowe's, Claimant bent down to "face" some product on a shelf. As he squatted, his knee popped and gave way. He fell to the floor and was not able to get up. Lowe's sent Claimant to Dr. Thomas Corsolini on September 28, 2006. Dr. Corsolini wrote Claimant a prescription for Hydrocodone. Dr. Corsolini determined that Claimant's knee problem was due primarily to his pre-existing problems. Dr. Corsolini referred to the September 27, 2006 event as "relatively trivial." He did not believe the work at Lowe's was the cause of the knee collapsing.

Prior to the Lowe's incident, Claimant had discussions with Debbie Miller, a claims adjuster for Grinnell Mutual, about obtaining additional treatment for his knee. Debbie Miller refused to authorize treatment with any physician other than with Dr. Hufft, who already had found Claimant to be at maximum medical improvement. Claimant declined to see Dr. Hufft again. Three days after his injury at Lowe's, Claimant's legal counsel wrote Debbie Miller at

Grinnell Mutual dated September 29, 2006, advising that Claimant could not work, and any treatment he received would be viewed as necessary emergency treatment to resolve his physical complaints. Ms. Miller did not reply.

On November 7, 2006, Claimant saw Dr. David Rogers who recommended an MRI. Claimant thereafter saw Dr. William Goodman due to his health insurance coverage. Dr. Goodman determined that Claimant likely suffered from a medial meniscus tear as well as a tear of his anterior cruciate ligament. On January 2, 2007, Dr. Goodman performed a right knee arthroscopy with debridement of a partial anterior cruciate ligament tear as well as a repair of a medial meniscus that suffered a bucket handle tear. It is significant that Dr. Goodman chose to debride the ACL rather than perform an ACL reconstruction. Claimant used crutches to ambulate after the surgery.

In January 2007, while recuperating from his recent surgery, Claimant testified that Springfield, Missouri experienced a severe ice storm. He was only partially weight-bearing at the time. He admitted on cross-examination that it was obvious there was ice outside. While on crutches, Claimant made the decision to check the fence line on his property. There is no evidence that the need to check the fence was an emergency. As he began to traverse a stone walkway beside his home, his crutches slipped out from underneath him. He fell to the ground toward the right, immediately feeling pain in the right knee. Claimant did not go to the emergency room, but told Dr. Goodman of his fall.

Dr. Goodman noted that Claimant had been "making great gains and improving his strength" after the surgery and prior to the fall on the ice. Following a January 30, 2007 office visit, Dr. Goodman was concerned that Claimant now had ruptured the remaining portion of his ACL. On February 14, 2007, Dr. Goodman opined that Claimant had instability of the knee

consistent with an ACL tear. He recommended that Claimant have an ACL reconstruction which would keep him off work until the second week of April. In the operative report dated March 5, 2007, Dr. Goodman indicated that he performed a right knee arthroscopy of the anterior cruciate ligament. After the second surgery in March 2007, Claimant went through another round of physical therapy.

Claimant indicated that after this last surgery in March 2007, he initially improved. He continued to receive follow-up treatment from Dr. Goodman until his release from care. He testified he was off work from September 28, 2006 until the beginning of May 2007 when he returned to Lowe's. Dr. Goodman did not provide a rating for Claimant.

Claimant's current right knee complaints include pain, swelling, popping and decreased extension. He does not participate in water skiing, basketball, or softball anymore, but he remains employed full time at Lowe's in the Receiving Department. Claimant has requested additional medical treatment.

Medical Testimony

Dr. Robert Hufft initially rated Claimant in his report of January 2006 as having a four percent body as whole disability. He saw Claimant again for an independent medical examination on April 27, 2007. At the time of this latter examination, Dr. Hufft agreed the MRI demonstrated a partial tear of the ACL. He stated that if he had chosen to perform arthroscopic surgery on Claimant's right knee, it is probable that a medial meniscus tear would have been found based upon the treatment history. As a result, Dr. Hufft stated it is his opinion Claimant sustained a torn medial meniscus and partial ACL tear during the initial injury of September 21, 2005. He believed the event at Lowe's was merely an episode of acute displacement of a bucket handle tear and was not a new event. He stated the partial ACL tear was healing at the time of

the arthroscopic surgery on January 2, 2007 based upon Dr. Goodman's description in the medical records. Dr. Hufft indicated the subsequent complete tear of the ACL was the result of the slip and fall on ice, and not as a result of the initial injury when he slipped from the backhoe.

Dr. David Rogers,¹ an orthopedic specialist in Springfield, Missouri, saw Claimant on two occasions: November 6, 2006 and November 17, 2009. His deposition was also taken on December 8, 2009. When Dr. Rogers first saw Claimant, no surgery had yet been performed. At that time, Dr. Rogers believed Claimant suffered an ACL tear. He did not address the meniscus. He believed the injury of September 21, 2005 was the cause of Claimant's physical problems, and the September 2006 incident at Lowe's merely aggravated the situation.

Dr. Rogers has recommended further evaluation of the knee including an MRI and possible surgery in order to remedy the current condition. He states that if no additional treatment is provided, it is likely Claimant will need a right knee replacement surgery sometime in the future. Dr. Rogers indicates that even if Claimant does have additional treatment which remedies the current complaints, it is possible he may need a total knee replacement in the future due to the development of arthritis/osteoarthritis in the knee and general degeneration caused by a combination of the meniscus tear and ACL tear and subsequent reconstruction surgery. Dr. Rogers did not testify within a reasonable degree of medical certainty that Claimant will be in need of a total knee replacement or future medical treatment solely as a result of the original injury on September 21, 2005. Dr. Rogers did not provide an assessment regarding permanent partial disability.

Dr. Jeffrey Woodward saw Claimant on August 18, 2009. Dr. Woodward was deposed on October 5, 2009. Dr. Woodward opined within a reasonable degree of medical certainty that

¹ Marks and comments appearing in Dr. Rogers' deposition, as well as marks in other exhibits, were not made by the Administrative Law Judge, but existed at the time the exhibits were admitted into evidence.

the initial right knee injury on September 21, 2005 caused a medial meniscus tear and partial ACL tear which lead to the need for surgery on January 2, 2007 with Dr. Goodman. Dr. Woodward indicates that the slip and fall on ice while using crutches at Claimant's home caused an additional injury and trauma to the right knee, causing a new onset of severe pain and significantly worse right knee instability which necessitated an ACL reconstruction surgery which was performed by Dr. Goodman on March 5, 2007. Dr. Woodward found Claimant to be at maximum medical improvement as of the date of the IME on August 18, 2009. He provided the claimant with a 12 percent rating to the right knee at the 160-week level related to the work injury at Rock Busters, Inc. on September 21, 2005 and the resulting conditions including medial meniscus tear and partial ACL tear. Dr. Woodward provided an additional 13 percent permanent partial disability rating to the right knee at the 160-week level related to the January 2007 slip and fall on ice. This caused an additional injury to Claimant's right knee, including a complete ACL tear which required a more invasive and complex surgical procedure to be completed in the form of an ACL reconstruction. Dr. Woodward did not recommend additional treatment for the original work injury on September 21, 2005, or additional treatment related to the subsequent slip and fall on ice in January 2007.

Dr. Shane Bennoch examined Claimant on May 3, 2007. He determined that both surgeries performed on Claimant's knee were the result of the September 21, 2005 injury. In May 2007, Dr. Bennoch found that Claimant was at maximum medical improvement. He determined that Claimant suffered from 35 percent permanent partial disability to the right lower extremity. Dr. Bennoch also found that Claimant would have accelerated acute degenerative changes to his right knee due to the injuries that had occurred.

Other Evidence

In addition to the medical records, Claimant presented evidence regarding total medical bills. Additionally, Claimant presented evidence regarding an Application for Payment of Additional Reimbursement of Medical Fees submitted by St. John's Clinic. Employer presented evidence that it paid temporary benefits from September 22, 2005 to December 11, 2005, totaling \$2,466.71 (Exhibit C), and medical bills paid for treatment related to the September 21, 2005 injury, totaling \$14,225.41.

Based on the whole record, I find and conclude that Claimant suffered a work-related injury to his knee on September 21, 2005. The overwhelming evidence indicates that the incident at Lowe's is not the cause for any significant injury or residual disability to the knee.

I further find, however, that the September 21, 2005 accident did not result in a complete tear of the ACL. While this may be contrary to the opinion of Dr. Rogers, an orthopedic specialist, it is supported by the records of Dr. Goodman, the treating orthopedic surgeon, and the opinions of Dr. Woodward and Dr. Hufft. It makes no sense that Dr. Goodman, seeing the damage to Claimant's knee, would have performed a debridement rather than an ACL reconstruction in January 2007 if the ACL was completely torn at that time. I further find that the ACL reconstruction was necessitated by the aggravation of the injury that occurred when Claimant fell on the ice at his home in January 2007.

Having made the above findings, the key issue is whether Employer is responsible for the ACL reconstruction, related future medical benefits, as well as any additional temporary total and permanent partial disability.

Claimant correctly states that once it is determined that an accident within the course and scope of employment is the prevailing factor in producing an injury, every natural consequence

that flows from the injury is compensable as a direct and natural result of the primary or original injury, citing *Cahall v. Riddle Trucking Corp.*, 956 S.W.2d 315 (Mo. App. E.D.1997), and *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561, 563 (Mo. App. W.D. 1991). Whether a subsequent incident is part of a continuous chain of causation flowing from the original compensable accident, or whether it is an independent intervening agency, is a question of fact. *Oertel v. John D. Streett & Company, Inc.*, 285 S.W.2d 87 (Mo. App., St. L. D. 1955). Thus, Claimant contends his fall, which occurred while using prescribed crutches, flowed from the original injury.

Routinely, courts have held an employer liable when the exacerbation of the original injury results from authorized medical treatment. For instance, in *Schumacher v. Leslie*, 232 S.W.2d 913 (Mo. 1950), the employer was found liable for an aggravation of the primary injury where the authorized treating physician committed medical malpractice. *See also, Jennings v. Station Casino St. Charles*, 196 S.W.3d 552 (Mo. App. E.D. 2006) (finding the employer liable for discitis, arising from an authorized discogram); *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655 (Mo.App. 1997) (finding that low back complaints arose from authorized physical therapy for treatment to the neck); and *Wilson v. Emery Bird Thayer Col*, 403 S.W.2d 953 (Mo. App. K.C.D. 1966) (finding liability when jaw pain developed as a complication of traction for a work related back injury). The *Wilson* Court recognized, however, that if an employee engages in some intentional conduct resulting in an exacerbation of his original injury, such conduct may be considered an independent intervening cause and not a natural consequence of the original injury.

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct.

403 S.W.3d at 958, *citing* 1 Larson, *Workmen's Compensation Law*, §13.11, p. 192.59.

Claimant relies on a number of cases in which the appellate courts agreed with an award of additional benefits after there was an complication of the original injury. In none of these cases, however, can the exacerbated injury be considered the result of an intentional conduct on the part of the employee. Most notably is *Manley v. American Packing Co.*, 285 S.W.2d 87 (Mo 1952), wherein the employee sustained a severe injury to his right knee in a work-related automobile accident. He subsequently walked with a limp and frequently fell when his right knee would give way. Two years after the original work accident, the employee was walking in an orchard on level ground when his knee gave way and he fell. The employee subsequently died of a pulmonary embolism related to the last fall. His dependents sought death benefits. The Supreme Court affirmed the Industrial Commission's award of death benefits, stating,

[H]is fall in the orchard while walking on level unplowed grassland, was due to the weakened and injured knee rather than some external force; and that the fatal embolism which followed was, in fact, the culmination of a series of injuries, beginning with the original, each in sequence thereafter being the result of the one immediately preceding.

253 S.W.2d at 170).

Similarly in *Cahall v. Riddle Trucking, Inc.*, 956 S.W.2d 315 (Mo. App. E.D. 1997), the employee sustained an open proximal right tibia fracture, requiring three surgeries and the insertion of a plate. He obtained an award against the employer on September 3, 1993. Within the next year, the employee sustained two additional minor scrapes or bruises to his right leg while performing ordinary job duties. These were described by one medical expert as trivial incidents, but the scrapes resulted in recurring spontaneous ulcers and vein problems at the site of the original injury. The treating physician stated that in the absence of the 1988 injury, the two 1994 accidents would not have caused any problems. The employee sought to reopen the

award. In affirming a ruling in employee's favor, the Court of Appeals rejected the employer's contention that the 1994 incidents were independent intervening events. As in *Manley*, the employee in *Cahall* did not intentionally engage in any conduct that could be considered an intervening incident.

This begs the question: what is an intervening incident? One example is *Oertel v. John D. Streett & Company, Inc.*, 285 S.W.2d at 87. There, the employee suffered a work-related disc injury. The Court affirmed the Industrial Commission's denial of benefits for additional injuries that occurred during a family baseball game four and one-half months after the original injury. The Court agreed the baseball incident was an intervening cause, and the employee had failed to sustain his burden of proof.

A number of sister jurisdictions have held similarly. In *Johnnie's Produce Co. v. Benedict & Jordan*, 120 So.2d 12 (Fla.1960), an employee jumped from a truck, and due to the weak ankle from an earlier work injury, he fell injuring his back. The employee argued that the employer for whom he was working when he injured his ankle was responsible for the back injury as well. The Florida Supreme Court rejected that contention. It cited with approval the Florida Labor Commission's holding: "If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by claimant's own negligence." 120 So.2d at 13. *See also*, 1 Larson, *The Law of Workmen's Compensation* § 13.12(c), at 3-558 to 3-564 (1990).

In *Brown v. State Indus. Ins. System*, 106 Nev. 878, 803 P.2d 233 (Nev. 1990), Bonnie Brown suffered work-related bilateral carpal tunnel and had surgery. An accomplished equestrian, the employee was riding a horse shortly after her surgery. When the horse bolted, she was unable to grab the saddle horn due to her weakened wrists. She fell from the horse,

breaking both wrists. The Court affirmed the hearing officer who ruled that Brown was negligent for riding the horse so soon after the carpal tunnel surgery. The chain of causation was broken.

Likewise in *Sullivan v. B & A Constr., Inc.*, 120 N.E.2d 694, 696 (1954), an employee continued to drive despite knowing that his knee would lock up, preventing him from deploying the brakes on a vehicle. The court denied compensation for any new injuries sustained as a result of the automobile accident.

Interestingly, the *Sullivan* decision was distinguished in *Dickerson v. Essex County*, 2 A.D.2d 516, 521-520, 157 N.Y.S.2d 94, 96 - 98 (N.Y.A.D. 1956), which involved the employee's use of crutches, as in the instant case. *Dickerson* had injured his leg in a work incident. He subsequently sustained an exacerbation of that injury while walking in his yard. While still on crutches, he returned to his work as a caretaker and fell down a number of steps while using the crutches. He died as a result of those injuries. The *Dickerson* Court cited the Missouri Supreme Court's decision in *Manley v. American Packing Co*, 285 S.W.2d at 87, and found that *Dickerson* had died as a natural consequence of the original work injury. The *Dickerson* Court distinguished *Sullivan*, 120 N.E.2d at 694, discussed above, as follows:

[T]he *Sullivan* case turned upon the rashness of the claimant's conduct in undertaking to drive an automobile without auxiliary equipment, at an immoderate rate of speed, despite the fact that he knew that his knee was likely to lock and render him incapable of using the foot brake. In that situation, the court held that the 'claimant's own temerity' was primarily responsible for the subsequent accident. In the present case, the decedent's conduct was not temerarious or rash. Getting about on crutches during the period of recovery is a natural and ordinary activity on the part of one who has suffered a leg fracture. In fact, such activity is an essential part of the recovery process.

It certainly cannot be said as a matter of law that the decedent's duties as a supervisory caretaker were so dangerous for a man on crutches that it was improper or unreasonable for the decedent to undertake them. At most, this presented a question of fact and all questions of fact have been resolved against

the appellant by the board. Implicit in the Board's findings is the conclusion that the decedent's activity was neither improper nor unreasonable and this conclusion is amply supported by the record.

2 A.D. at 520.

As these cases demonstrate, the controlling issue is whether Claimant was acting reasonably. To walk on stone steps after an ice storm is hazardous even for an able-bodied individual. To engage in such conduct, knowing that one has a weakened leg, is not fully weight bearing, and must proceed on crutches, is intervening negligence breaking the chain of compensable consequences, just as in the *Oertel*, *Johnnie's Produce, Co.*, *Sullivan*, and *Brown* cases discussed above. This is not a case in which Claimant fell simply because his prescribed crutches slipped out from underneath him. This is not a case in which Claimant was walking up some stairs in a reasonable manner to perform some duty for Employer. Claimant undertook a risky venture for his own benefit: to check on fence, knowing the obvious threat of ice on the stone steps.

Claimant suffered a compensable injury arising out of and in the course of his employment with Rock Busters, Inc. on September 21, 2005. The treatment he received from Family Medical Walk-in Clinic, Dr. Hufft, Cox Medical Center, Litton & Giddings, St. John's Regional Medical Center and Dr. Goodman between September 21, 2005 and January 30, 2007, is related to the original work injury on September 21, 2005. Based on the medical evidence presented, I conclude the ACL reconstruction surgery completed by Dr. Goodman on March 5, 2007, and medical care from that date forward, resulted from the intervening act of falling while using crutches after the ice storm in January 2007.

Future Medical Care

I find and conclude that the need for any future medical care is not related to the work accident on September 21, 2005, but is due to complications arising since Claimant's slip and fall on ice, which is not compensable. That latter injury caused a complete right ACL tear which resulted in ACL reconstruction surgery performed by Dr. Goodman on March 5, 2007. Drs. Goodman, Hufft, and Woodward do not recommend additional treatment as a result of the September 21, 2005 work injury.

While Dr. Rogers finds that Claimant needs additional treatment, he also indicated that the need for such treatment is related to either the misplacement of the ACL reconstruction graft or the development of scar tissue at the site of the ACL reconstruction. Based on my finding that the ACL reconstruction occurring on March 5, 2007 does not flow from the September 21, 2005 work injury, I conclude that Claimant is not entitled to future medical treatment as recommended by Dr. Rogers regarding a current need for medical treatment.

Although Dr. Rogers suggested that Claimant may need a total knee replacement surgery as a result of the partial ACL tear and meniscus tear which were addressed by Dr. Goodman during surgery on January 2, 2007, I find such opinion speculative. Claimant is not entitled to future medical treatment benefits.

Having determined that Claimant is not entitled to future medical treatment as a result of the September 21, 2005 accident, and because Claimant had permanency ratings, I further conclude that a Final Award is appropriate rather than a Temporary or Partial Award.

Nature and Extent of Disability

Dr. Bennoch provided Claimant with a 35 percent rating to the right knee at the 160-week level. Dr. Bennoch did not provide separate permanent partial disability ratings for the two

distinguishable events (September 21, 2005 and January 2007). Dr. Woodward provided Claimant with a rating of 12 percent attributable to the work injury at Rock Busters, Inc. on September 21, 2005, and the resulting conditions including medial meniscus tear and partial ACL tear and the need for surgery with Dr. Goodman on January 2, 2007. Dr. Woodward provided a separate and distinct permanent partial disability rating of 13 percent to the right knee at the 160-week level related to Claimant's slip and fall on ice while using crutches in January 2007, and the subsequent need for ACL reconstruction surgery performed by Dr. Goodman on March 5, 2007, for an overall disability of 25 percent to the right knee.

Dr. Hufft provided a permanent partial disability rating of four percent to the right knee at the 160-week level when he released the claimant from treatment on January 23, 2006. Dr. Hufft's rating, however, is incomplete as it does not take into consideration the full extent of Claimant's injury as referenced by Dr. Hufft in his IME report dated April 27, 2007.

Based on all of the evidence, I conclude that Dr. Woodward's opinion is the most helpful in determining the extent of disability emanating from the September 21, 2005 accident. Although I find his opinion too conservative given the extent of the injuries sustained, the type of surgery performed in January 2007, and the overall rating given by Dr. Bennoch, I award permanent partial disability in the amount of 15 percent at the 160 week level as a result of the work injury at Rock Busters, Inc. on September 21, 2005. At the rate of \$246.67, the 15 percent rating equals \$5,920.08.

Past Medical Bills

Claimant seeks payment of medical bills totaling \$46,735.24. Of this amount, Employer, demonstrated that it had paid the St. John's Emergency Room bill of September 27, 2006 in the amount of \$931.00 and the St. John's Regional Health Center bill for the surgery on January 2,

2007, in the amount of \$8,933.00, leaving a balance of \$36,871.24. But, many of these bills relate to treatment received after Dr. Goodman began treating Claimant for his fall on the ice. Since the slip and fall on ice did not result in an accident arising out of and in the course of Claimant's employment with Rock Busters, Inc., I conclude that Claimant is not entitled to payment of any medical bills after his evaluation with Dr. Goodman on January 30, 2007.

The unpaid medical bills for treatment rendered from September 27, 2006 through January 30, 2007, includes \$3,416.44 from Dr. Goodman, \$1,099.00 from St. John's Physicians and Clinics, and \$2,036.00 from Republic Physical Therapy and Rehab, for a total of \$6,551.44. Employer is liable for this additional amount in unpaid medical bills.

Temporary Total Disability

Claimant was off of work from September 28, 2006 until he returned to work at Lowe's at the beginning of May 2007. It is not clear from the record when Claimant would have been released to return to work had he not fallen at his home in January 2007, but medical records substantiate that he was progressing. Because I have found that the slip and fall in January 2007 was an intervening accident, I conclude that Claimant is not entitled to temporary total disability from the date of the second surgery on March 5, 2007. Claimant is due 22 and 4/7 weeks of temporary total disability at the rate of \$246.67, which equals \$5,567.69.

Second Injury Fund

I find no evidence of preexisting disabilities on which I can award any benefits from the Second Injury Fund. The claim against the Second Injury Fund is denied.

Medical Fee Dispute

As the Medical Fee Dispute in this case pertained to a reasonableness issue and not a direct pay issue, and the Division's records fail to indicate that notice of the hearing was provided to the Health Care Provider, the Medical Fee Dispute remains open for a determination in a separate proceeding.

Summary

Claimant is awarded the following compensation as a result of his work-related injury occurring on September 21, 2005:

24 weeks of permanent partial disability at the rate of \$246.67	\$ 5,920.08
Unpaid Medical Bills	\$ 6,551.44
Temporary total disability for 22 and 4/7 weeks	<u>\$ 5,567.70</u>
Total	\$18,039.22

This Award is final and subject to review. Claimant's attorney, Brandon Potter, is entitled to 25 percent of the amount awarded as a reasonable fee for necessary legal services rendered to Claimant.

Date: February 25, 2010

/s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

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

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

Injury No.: 06-096220

Employee: Tyler Moore
Employer: Lowe's Home Center, Inc.
Insurer: Self, c/o Specialty Risk Services
Additional Party: Treasurer of Missouri as Custodian
of the Second Injury Fund

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, read the briefs, heard oral argument, 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 February 25, 2010.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued February 25, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Tyler Moore

Injury No. 06-096220

Employer: Lowe's Home Center, Inc.

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

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

Insurer: Self, c/o Specialty Risk Services

Hearing Date: December 30, 2009

Checked by: VRM/db

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? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 27, 2006.
5. State location where accident occurred or occupational disease was contracted:
Springfield, 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 the 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:
Claimant's knee gave out as he was facing product on the shelves at work.
12. Did accident or occupational disease cause death? No. Date of death? Not Applicable.
13. Part(s) of body injured by accident or occupational disease: Right knee.

14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? \$334.32.
16. Value necessary medical aid not paid by employer/insurer? None.
17. Employee's average weekly wages? \$486.00.
19. Weekly compensation rate: \$324.00 TTD and PPD.
20. Method of computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tyler Moore

Injury No. 06-096220

Employer: Lowe's Home Center, Inc.

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

Insurer: Self, c/o Specialty Risk Services

Hearing Date: December 30, 2009

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

Checked by: VRM/db

INTRODUCTION

The undersigned Administrative Law Judge heard this workers' compensation claim on December 30, 2009. Tyler Moore (Employee and Claimant) appeared in person and was represented by his attorney, Brandon Potter. He requested a Temporary or Partial Award to obtain additional medical treatment and temporary total disability. But, Claimant possessed a final rating. Lowe's Home Center, Inc. (Employer), represented by John Dolence, requested a final hearing. This case was tried in conjunction with a claim against Rock Busters, Inc., and its insurer, Grinnell Insurance, who were represented by Greg Pearman. Assistant Attorney General Susan Colburn appeared on behalf of the Treasurer as Custodian of the Second Injury Fund (hereafter SIF).

STIPULATIONS

1. On September 27, 2006, Lowe's Home Center, Inc., in Springfield, Missouri, was an employer operating under and subject to Missouri Workers' Compensation Law.
2. Employer is self-insured.
3. On September 27, 2006, Tyler Moore was an employee of the Employer and working under and subject to Missouri Workers' Compensation Law.
4. Claimant's average weekly wage was \$486.00, yielding a temporary total and permanent partial disability rate of \$324.00

5. Employer paid \$334.32 in medical care.

ISSUES

1. Is Claimant's disability and need for additional medical treatment medically and causally related to the work accident at Lowe's on September 27, 2006?
2. What is the nature and extent of any permanent disability?
3. What, if any, is the liability of the Second Injury Fund?

EXHIBITS

The following exhibits were offered by Claimant and admitted:

- #1 Medical Billing
- #2 Lien for Attorney Fees
- #3 Deposition – Dr. David Rogers
- #4 Complete Medical Report – Dr. Shane Bennoch
- #5 Right Knee Scan
- #6 St. John's Regional Medical Center Records
- #7 Dr. Robert Hufft's Records
- #8 Republic Physical Therapy and Rehab Records
- #9 Republic Physical Therapy and Rehab Billing
- #10 Dr. David Rogers Medical Records
- #11 Cox Medical Center Records
- #12 Cox Medical Center Billing
- #13 St. John's Regional Medical Center Records
- #14 St. John's Regional Medical Center Billing
- #15 St. John's Clinic Records
- #16 Family Medical Walk-in Clinic Records
- #17 Family Medical Walk-in Clinic Billing
- #18 St. John's Physicians Clinics Billing

The following exhibits were offered by Rock Busters, Inc., and admitted:

- A. Notice of Intent – Dr. Hufft
- B. Deposition of Dr. Woodward including IME report dated August 18, 2009
- C. TTD Payments
- D. Medical Bills Paid

No exhibits were offered by Employer Lowe's Home Center, Inc. or the Second Injury Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant Tyler Moore is a 42 year old man with a high school diploma. For 18 years he worked with Western Lithotech. After that company was sold, and later closed, he found employment with GPLS for approximately one month. He then went to work for Rock Busters, Inc. While working with Rock Busters, Inc., on September 21, 2005, he fell several feet from a backhoe to the ground.

Claimant landed squarely on his right leg, which caused immediate pain to his right knee. He was unable to get up from the ground. A co-worker came to his aid. Notice was given to a supervisor who was on the premises. He was advised to go home for the rest of the day. When he arrived at his residence, he had to crawl to the front door of his home. After entering the residence, he called his wife who came home to attend to him and his injury. That night he applied ice to his knee in an attempt to relieve the pain and swelling.

The following morning, Claimant's right knee was painful and swollen. He was unable to bear weight on the knee. After providing notice to a supervisor, Claimant's wife accompanied Claimant to the emergency room where his knee was x-rayed. He was prescribed medication and advised to get some crutches.

When his knee failed to improve after a couple of days, Rock Busters referred Claimant to Dr. Robert Hufft, an orthopedic surgeon. Dr. Hufft treated Claimant for two months. He ordered an MRI and recommended physical therapy, but no surgery. When Claimant told Dr. Hufft that his knee would pop, Claimant was asked to reproduce the noise. Dr. Hufft mistakenly reported that the sound was emanating from Claimant's ankle rather than the knee. Dr. Hufft offered no treatment alternatives. Dr. Hufft released Claimant to return to work in December 2005, at which time he returned full duty to Rock Busters, Inc. Shortly thereafter, he realized

that his knee would not allow him to continue to perform the same type of work so he quit his job. In January 2006, he began working at Lowe's Home Center, Inc., in Springfield, Missouri.

Claimant was a team leader in the electrical department at Lowe's Home Center, Inc. The job required that he walk, stand, climb ladders, squat and do some lifting. On September 27, 2006, about nine months after going to work for Lowe's Home Center, Inc., Claimant bent down to "face" some product on a shelf. As he squatted, his knee popped and gave way. He fell to the floor and was not able to get up. Lowe's Home Center, Inc. sent Claimant to Dr. Thomas Corsolini on September 28, 2006. Dr. Corsolini wrote Claimant a prescription for Hydrocodone. He determined that Claimant's knee problem was due primarily to his pre-existing problems. Dr. Corsolini referred to the September 27, 2006 event as "relatively trivial." He did not believe the work at Lowe's Home Center, Inc. was the cause of the knee collapsing.

On November 7, 2006, Claimant saw Dr. David Rogers who recommended an MRI. Thereafter, Claimant saw Dr. William Goodman due to his health insurance coverage. Dr. Goodman determined that Claimant likely suffered from a medial meniscus tear as well as a tear of his anterior cruciate ligament. On January 2, 2007, Dr. Goodman performed a right knee arthroscopy with debridement of a partial anterior cruciate ligament tear as well as a repair of a medial meniscus that suffered a bucket handle tear. It is significant that Dr. Goodman chose to debride the ACL rather than perform an ACL reconstruction. Claimant used crutches to ambulate after the surgery.

In January 2007, while recuperating from his recent surgery, Claimant testified that Springfield, Missouri experienced a severe ice storm. He was only partially weight-bearing at the time. He admitted on cross-examination that it was obvious there was ice on the stone outside. While on crutches, Claimant made the decision to check the fence line on his property.

There is no evidence that the need to check the fence was an emergency. As he began to navigate a stone walkway beside his home, his crutches slipped out from underneath him. He fell to the ground toward the right, immediately feeling pain in the right knee. Claimant did not go to the emergency room, but told Dr. Goodman of his fall.

Dr. Goodman noted that Claimant had been "making great gains and improving his strength" after the surgery and prior to the fall on the ice. Following a January 30, 2007 office visit, Dr. Goodman was concerned that Claimant now had ruptured the remaining portion of his ACL. On February 14, 2007, Dr. Goodman opined that Claimant had instability of the knee consistent with an ACL tear. He recommended that Claimant have an ACL reconstruction which would keep him off work until the second week of April. In the operative report dated March 5, 2007, Dr. Goodman indicated that he performed a right knee arthroscopy of the anterior cruciate ligament. After the second surgery in March 2007, Claimant went through another round of physical therapy.

Claimant indicated that after this last surgery in March 2007, he initially improved. He continued to receive follow-up treatment from Dr. Goodman until he was released from treatment. He testified he was off work from September 28, 2006 until the beginning of May 2007 when he returned to Lowe's. Dr. Goodman did not provide a rating for Claimant.

Claimant's current right knee complaints include pain, swelling, popping and decreased extension. He does not participate in water skiing, basketball, or softball anymore, but he remains employed full time at Lowe's Home Center, Inc., in the Receiving Department. Claimant requested additional medical treatment, as recommended by Dr. Rogers.

Medical Testimony

Dr. Robert Hufft initially rated Claimant in his report of January 2006 as having a four percent body as whole disability. He saw Claimant again for an independent medical examination on April 27, 2007. At the time of this latter examination, Dr. Hufft agreed the MRI demonstrated a partial tear of the ACL. He stated that if he had chosen to perform arthroscopic surgery on Claimant's right knee, it is probable that a medial meniscus tear would have been found based upon the treatment history. As a result, Dr. Hufft stated it is his opinion Claimant sustained a torn medial meniscus and partial ACL tear during the initial injury of September 21, 2005. He believed the event at Lowe's Home Center, Inc. was merely an episode of acute displacement of a bucket handle tear and was not a new event. He stated the partial ACL tear was healing at the time of the arthroscopic surgery on January 2, 2007 based upon Dr. Goodman's description in the medical records. Dr. Hufft indicated the subsequent complete tear of the ACL was the result of the slip and fall on ice, and not as a result of the initial injury when he slipped from the backhoe.

Dr. David Rogers,¹ an orthopedic specialist in Springfield, Missouri, saw Claimant on two occasions: November 6, 2006 and November 17, 2009. His deposition was taken on December 8, 2009. When Dr. Rogers first saw Claimant, no surgery had yet been performed. Dr. Rogers believed Claimant had an ACL tear at the time he examined Claimant in 2006. Dr. Rogers believed the injury of September 21, 2005 was the cause of Claimant's physical problems, and the September 2006 incident at Lowe's Home Center, Inc. merely aggravated the situation.

¹ The numerous markings in Dr. Rogers' deposition, as well as on some other exhibits, were not made by the Administrative Law Judge, but were present on the exhibits when they were received into evidence.

Dr. Rogers now recommends further evaluation of the knee including an MRI and possible surgery in order to remedy the current condition. He states that if no additional treatment is provided, it is likely Claimant will need a right knee replacement surgery sometime in the future. Dr. Rogers indicates that even if Claimant does have additional treatment which remedies the current complaints, it is possible he may need a total knee replacement in the future due to the development of arthritis/osteoarthritis in the knee and general degeneration caused by a combination of the meniscus tear and ACL tear and subsequent reconstruction surgery. Dr. Rogers did not provide an assessment regarding permanent partial disability.

Dr. Jeffrey Woodward saw Claimant on August 18, 2009. Dr. Woodward was deposed on October 5, 2009. Dr. Woodward opined within a reasonable degree of medical certainty that the initial right knee injury on September 21, 2005, caused a medial meniscus tear and partial ACL tear which lead to the need for surgery on January 2, 2007 with Dr. Goodman. Dr. Woodward indicated that the slip and fall on ice while using crutches at Claimant's home caused an additional injury and trauma to the right knee, causing a new onset of severe pain and significantly worse right knee instability which necessitated an ACL reconstruction surgery which was performed by Dr. Goodman on March 5, 2007. Dr. Woodward found Claimant to be at maximum medical improvement as of the date of the IME on August 18, 2009. He provided the claimant with a 12 percent rating to the right knee at the 160-week level related to the work injury at Rock Busters, Inc. on September 21, 2005 and the resulting conditions including medial meniscus tear and partial ACL tear. Dr. Woodward provided an additional 13 percent permanent partial disability rating to the right knee at the 160-week level related to the January 2007 slip and fall on ice, which he believed caused an additional injury to Claimant's right knee, including a complete ACL tear which required a more invasive and complex surgical procedure to be

completed in the form of an ACL reconstruction. Dr. Woodward did not recommend additional treatment.

Dr. Shane Bennoch examined Claimant on May 3, 2007. He determined that both surgeries performed on Claimant's knee were the result of the September 21, 2005 injury. In May 2007, Dr. Bennoch found that Claimant was at maximum medical improvement. He determined that Claimant suffered a 35 percent permanent partial disability to the right lower extremity. Dr. Bennoch also found that Claimant would have accelerated acute degenerative changes to his right knee based on the injuries that occurred.

Other Evidence

In addition to the medical records, Claimant presented evidence regarding total medical bills. Rock Busters, Inc., presented evidence that it paid medical bills in relation to the September 21, 2005 in the amount of \$14,225.41.

CONCLUSIONS OF LAW

Claimant has the burden of establishing all elements of his case. *Fitzwater v. Department of Public Safety*, 198 S.W.3d 612, 628 (Mo. App. W.D. 2006). "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." § 287.020, RSMo Cum Supp. 2006.

Claimant's medical evidence unequivocally demonstrates that the accident at Lowe's was either a trivial incident causing no disability, or a mere aggravating event not responsible for a preexisting condition and disability, in Claimant's knee. I find no medical evidence in the record even suggesting that the event at Lowe's was the prevailing factor in causing either the current medical condition or disability in Claimant's knee.

Because I find and conclude there is no evidence of any disability from the event on September 27, 2006 at Lowe's, there also is no liability against the Second Injury Fund for enhanced disability. This Award is final and subject to review.

Date: February 25, 2010

/s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

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