

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

Injury No.: 02-150563

Employee: James Murphy, deceased
Dependent: Ruth Lee Ann Murphy, widow
Employer: A & M Pizza, Inc. d/b/a Domino's Pizza
Insurer: Missouri Chamber of Commerce Group c/o CCMSI
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This 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, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated October 28, 2010.

Introduction

The parties stipulated the following issues for determination at the hearing: (1) whether employee sustained an accident arising out of and in the course and scope of employment; (2) if the accident occurred, the proper date of the accident; (3) whether the accident caused the injuries and disabilities for which employee claims benefits; (4) whether employer is obligated to pay for past medical expenses; (5) any temporary total disability benefits owed to employee; (6) the nature and extent of any permanent disabilities, including permanent total disability; (7) the liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability; and (8) whether employee's dependents are entitled to death benefits.

The administrative law judge made the following findings and conclusions: (1) employee sustained an accident arising out of the course and scope of his employment; (2) the proper date of the accident is on or about January 14, 2002; (3) Drs. Koprivica and Swaim are more credible than Drs. Richie and Mankowitz; (4) the accident of January 2002 was a substantial factor in causing employee's left knee condition and injury; (5) the accident of January 2002 was a substantial factor in causing employee's death on July 16, 2007; (6) employer is liable for employee's past medical bills; (7) employee was temporarily and totally disabled from April 29, 2002, to October 30, 2002; (8) employee was temporarily and totally disabled from November 1, 2005, until July 16, 2007; (9) employer is liable for death benefits; and (10) there is no Second Injury Fund liability.

Employer submitted a timely Application for Review with the Commission alleging that the administrative law judge erred as to the issues of: (1) whether employee sustained an accident arising out of and in the course of employment; (2) the proper date of the alleged accident; (3) medical causation of employee's left knee condition and subsequent death; (4) employer's obligation to pay past medical expenses; (5) temporary total disability; (6) death benefits; and (7) Second Injury Fund liability.

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For the reasons set forth in this award and decision, the Commission reverses the award of the administrative law judge.

Findings of Fact

Accident

In September 1999, employee suffered acute renal failure. While undergoing treatment for that condition, employee also suffered swelling and deep vein thromboses in both legs. A September 15, 1999, treatment record reveals a diagnosis of bilateral knee synovitis involving painful swelling of the knees. Doctors performed a procedure to drain fluid from his left knee. Later treatment records reveal a diagnosis of acute gouty arthritis in both knees. Employee underwent a kidney transplant in December 2000. On January 9, 2002, employee called his nephrologist, Dr. Wade Jordan, to report swelling in his left leg. Employee was advised to eat less salt and follow-up in a week.

Employee worked for employer as a pizza delivery driver. At some point in January 2002, employee stumbled on a broken piece of sidewalk while out delivering pizzas for employer. The appropriate date of this incident is a matter of contention between the parties. We find the emergency room records from St. John's Hospital persuasive as to the date of this incident. These records, dated January 14, 2002, suggest employee reported an injury occurring three days prior. This is consistent with a treatment note from employee's chiropractor dated January 11, 2002, which suggests employee complained of a broken toe on that date. We find that employee stumbled on the broken sidewalk during his shift on January 11, 2002.

The above-mentioned January 14, 2002, emergency room records from St. John's Hospital indicate that employee presented with a chief complaint of a left 2nd toe injury and that employee was "uninjured above ankle." *Transcript*, page 2793. X-rays of employee's left toe suggested employee might have a non-displaced fracture. Employee's toes were buddy-taped, and he was released with instructions to follow up with his personal physicians as needed. The records make no mention of a left knee injury.

Employee went to Dr. Jordan's office on January 28, 2002. The notes from that visit indicate employee reported his recent left toe injury, and also that employee complained of some pain in his left knee after that injury, but does not record any traumatic injury to the left knee. On February 25, 2002, Dr. Jordan recorded that employee "fractured his great toe when he stumbled on the sidewalk, but otherwise has been feeling well." *Transcript*, page 3657. On March 22, 2002, employee called Dr. Jordan's office to report swelling in his left leg, and on March 25, 2002, a venous Doppler of the lower extremities was performed. No history of injury is recorded in the note associated with the Doppler study. The results of the Doppler study indicated possible bursitis of the left knee.

Dr. Marion Wolfe began treating employee for his left knee complaints in April 2002. Dr. Wolfe's initial treatment records reveal that employee complained of left knee swelling and pain, but indicate that employee provided no history of injury to the left knee. Rather, the notes record a four to five month history of a mass in the left knee. On April 26, 2002, Dr. Wolfe performed surgery to remove a synovial mass from the left knee. After the surgery, employee continued to have swelling of the left knee. Dr. Wolfe believed the mass would recur and have to be removed again. Dr. Wolfe couldn't identify a reason why employee had the proliferative mass in his left knee.

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Dr. Wolfe removed a second left knee mass during surgery on August 29, 2002, and also performed an arthroscopic examination of the left knee with shaving of the articular cartilage of the medial femoral condyle. Dr. Wolfe's post-operative diagnosis was left knee synovitis with severe chondromalacia of the femoral condyle. The records from employee's follow-up treatment with Dr. Wolfe reveal the doctor's impression that employee would have long-term problems with the left knee secondary to osteoarthritis.

None of the records associated with either surgery suggest Dr. Wolfe found evidence of an acute left knee injury, nor do they relate any of employee's left knee problems to the accident in January 2002. After the second surgery, employee continued to complain of intermittent pain and swelling in the left knee. Dr. Wolfe's only treatment recommendation was to continue on anti-inflammatory medications.

Expert medical testimony

Dr. Joseph Ritchie evaluated employee and provided his opinion on behalf of employer. Dr. Ritchie believes employee's left knee condition is a result of a pre-existing arthritic condition and that the January 2002 fall had no impact on the development of the osteoarthritic changes in employee's knee. Dr. Ritchie explained that a synovial mass is not a typical result of a fall or traumatic injury. Dr. Ritchie opined that none of employee's treatment for the left knee was related to the January 2002 accident. Dr. Keith Mankowitz also provided his expert testimony for employer. Although Dr. Mankowitz understood that employee "injured" his left knee in the January 2002 accident, Dr. Mankowitz believes that accident had no relationship to employee's subsequent knee problems. Dr. Mankowitz opined that employee's left knee problem was related to the inflammatory condition diagnosed in 1999.

Dr. P. Brent Koprivica provided his expert opinion for employee. Dr. Koprivica believes employee sustained a permanent aggravating injury to his left knee due to the January 2002 accident, which caused the synovitis and swelling. Dr. Truett Swaim also provided his expert opinion for employee. Dr. Swaim believes the accident of January 2002 caused employee to develop left knee synovitis and arthritis, or alternatively caused employee's preexisting arthritis to become symptomatic.

We must decide what injuries employee sustained in the accident of January 11, 2002. As we noted above, none of the contemporaneous treatment records contain a history of any traumatic left knee injury secondary to an accident in January 2002. The treatment record does reveal, on the other hand, that employee had complaints of pain and swelling and problems in his knees referable to synovitis and gouty arthritis before the accident. We acknowledge that employee, in his testimony, alleged that he did tell the treating doctors that he injured his left knee in the January 2002 fall, and that employee's wife testified she heard him tell the doctors that he injured his left knee during the emergency room visit at St. John's. We acknowledge that employee also testified that he had persistent swelling in his left knee following that accident.

We are not persuaded, however, that each of these treating physicians (and especially the treating surgeon, Dr. Wolfe) would fail to mention that employee provided a history of an acute injury to the left knee, especially when we consider the particular attention to employee's lower extremities following his synovitis, DVTs, and gouty arthritis conditions stemming back to 1999. We find it especially notable that Dr. Wolfe seemed perplexed

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as to the cause of employee's proliferative synovium after the surgery in April 2002. Certainly if employee had told the doctor about his left knee injury, Dr. Wolfe would have mentioned it rather than to express that he was "at a loss" to explain the synovial mass. *Transcript*, page 3035. For these reasons, we find the testimony from employee and his wife lacking credibility on the question whether he injured his left knee in the January 2002 accident, and on the question whether employee told treating physicians about any such injury.

In rendering his opinion that employee sustained a left knee injury in the January 2002 accident, Dr. Swaim acknowledged that he was not aware of the actual specific mechanism of injury employee alleged as to the left knee, and he in fact didn't know whether employee was supposed to have twisted the knee, or fell on it directly, or whether employee caught himself when he fell. (Here, at least, Dr. Swaim seemed to acknowledge the lack of consistency in the varying accounts of the January 2002 accident—elsewhere, we note that the doctor seemed reluctant to entertain questions about the inconsistent treatment records). In Dr. Swaim's words: "All I know is there's an incident, there's knee pain, and it goes from there." *Transcript*, page 2010. In the context of this case, where medical causation of employee's left knee condition is the subject of considerable dispute, Dr. Swaim's lack of confidence as to the mechanism of injury makes it difficult for us to credit his causation opinion. Dr. Koprivica acknowledged that there was a "definite conflict" between what employee told him and the history of injury employee provided to Dr. Wolfe, and agreed that he found the contradiction "significant." *Transcript*, page 148.

After carefully reviewing the testimony from each of the experts, we find Dr. Ritchie more credible than Drs. Koprivica and Swaim. We find that employee's work was not a substantial factor in causing any left knee injury or disability. We find that employee sustained a non-displaced fracture of the left 2nd toe in the accident on January 11, 2002, and no further injury or medical condition.

Employee died on July 16, 2007, from a pulmonary embolism he suffered in the hospital while receiving treatment for a left leg fracture he sustained while transferring from his wheelchair on June 27, 2007. Employee was using a wheelchair due to problems with his back, right hip, and left leg. The parties dispute whether employee's fall while transferring from the wheelchair was related to his injuries stemming from the January 2002 accident. Drs. Koprivica and Swaim premised their opinions that employee's death was caused by the January 2002 accident on their assumption that the accident caused a left knee injury which, in turn, caused employee's left leg to give out during the transfer. But we have found that employee did not suffer any left knee injury as a result of that accident. It follows that employee's death was not causally related to that accident.

Employee's expert, Dr. Koprivica, opined that employee's left 2nd toe healed completely with no resulting permanent disability. We credit this opinion and so find. Employee did not miss any work related to the left 2nd toe injury. Employee did not provide testimony to establish the amount of any claimed past medical bills related specifically to the left 2nd toe injury.

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Conclusions of Law

Accident

The parties dispute whether employee sustained an accident. We have found that on January 11, 2002, employee was out delivering pizzas for employer when he tripped on a piece of broken sidewalk. The language of § 287.020.2 RSMo applicable to this claim defines “accident” as follows:

The word “accident” as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

Employee’s stumbling on a broken sidewalk is clearly encompassed within the foregoing definition. We conclude that employee met his burden of proving he sustained an accident for purposes of the foregoing section.

Medical causation

The parties dispute the question of what injuries, if any, employee sustained in the January 2002 accident. The version of § 287.020.2 RSMo applicable at the time employee sustained his injury sets forth the standard for medical causation and states as follows:

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable because work was a triggering or precipitating factor.

We have found Dr. Ritchie the more credible expert and have adopted his opinion and found that employee’s work was not a substantial factor in causing any left knee injury or disability. On the other hand, we have found that employee sustained a left 2nd toe fracture as a result of the accident.

Accordingly, we conclude that employee’s left 2nd toe injury was clearly work related and that work was a substantial factor in causing employee to sustain that injury, but that employee’s left knee condition and related sequelae were not clearly work related and that work was not a substantial factor causing these medical conditions or any related disability.

Temporary total disability, permanent partial disability, past medical, and death benefits

We have determined that employee suffered only a left 2nd toe injury in the accident of January 11, 2002. We have found that employee did not miss any work related to that injury, that the injury healed with no resulting permanent disability, and that employee’s death was not causally related to the January 2002 accident. Accordingly, employee is not entitled to any temporary total disability, permanent partial disability, or death benefits.

The parties dispute employer’s liability for past medical bills. Section 287.140 RSMo provides, in relevant part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such

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medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Employee did not provide any evidence to establish the amount of the claimed past medical bills related specifically to the left 2nd toe injury. Employee's wife testified that Medicare and Medicaid paid for the costs of employee's treatment, but she did not specifically identify the costs associated with treatment related to employee's left 2nd toe injury. Employee's Exhibit Q is a bill from Cox Medical Center, but there is no evidence linking these charges to any treatment employee required for his left 2nd toe injury. Employee's Exhibit R and S are Notices of Liens filed by the Missouri Department of Social Services, MO HealthNet Division. These documents include what appear to be lists of charges attributable to various healthcare providers. The charges are set out in a summary fashion and are not enlightening as to the costs specifically incurred for treatment necessitated by employee's left 2nd toe injury. The medical experts who testified for employee did not opine as to what treatments and bills were related to the left 2nd toe injury, nor did they offer any opinion as to the reasonableness thereof.

It was employee's burden to show what doctor visits and treatments were related to the work injury and what bills were incurred as a result. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111 (Mo. 1989). We conclude employee failed to meet his burden of proving he is entitled to past medical expenses related to his left 2nd toe fracture.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee failed to demonstrate that his work was a substantial factor causing employee's left knee condition or disability, or his death in 2007. Accordingly, the claim for benefits is denied.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued October 28, 2010, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 1st day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: James Murphy, deceased

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 award and decision of the administrative law judge is correct and should be affirmed.

As the majority notes in its decision, there is some uncertainty surrounding the question of what happened when employee tripped and fell while delivering pizzas for employer in early January 2002. Some of the treatment records fail to mention employee's left knee pain following that injury, and others provide contradictory indications as to the proper date of the accident. But in evaluating this matter, we must keep in mind that the law requires only that employee establish the elements of his claim by a reasonable probability, and that employee does not have to prove his case based on absolute certainty. *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 138 (Mo. App. 2002). "Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Tilley v. USF Holland Inc.*, 325 S.W.3d 487, 494 (Mo. App. 2010) (citation omitted). And because this is a claim arising under the pre-2005 version of the Missouri Workers' Compensation Law, any doubts that we have should be resolved in favor of awarding compensation:

The Workers' Compensation Law should be interpreted in a liberal manner in favor of the employee. Questions regarding the right of the employee to benefits must be resolved in the injured employee's favor.

Avery v. City of Columbia, 966 S.W.2d 315, 320 (Mo. App. 1998) (citations omitted).

Although employer contests the issue of accident, employer's argument is mostly limited to attacking employee's memory as to the specific date of the incident. Previous courts have faced similar arguments and responded disapprovingly: "As an example of inconsistent statements the employer cites the difference in dates as to when this accident occurred as given by the claimant prior to trial and upon trial. ... The 'inconsistencies' upon which the employer relies do not have the strength it seeks to impart to them as they do not directly negate the fact this accident did cause claimant's injury." *Pate v. St. Louis Independent Packing Co., etc.*, 428 S.W.2d 744, 752 (Mo. App. 1968). The same can be said here. The fact employee can't remember whether he fell on January 11 or 14, 2002, is no reason to deny employee's claim and if we have doubts they should be resolved in employee's favor.

It seems to me that quibbles such as a discrepancy as to the specific date of accident are a prime example of where the clear and unmistakable public policy preference set forth above should guide our decision making process. I agree with the administrative law judge that employee's testimony, sworn and cross-examined, and set forth in the two depositions which we have on record, is a better source to determine what happened in the accident than the hearsay accounts of attending physicians and the various other unknown medical personnel who happened to have filled out the emergency room intake charts or other medical records that fail to mention employee's

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left knee injury. I find that employee did fall on his left knee in the accident. I find that he did tell the treating physicians about his knee pain following the accident.

I also agree with the administrative law judge that Drs. Koprivica and Swaim are more persuasive than Drs. Mankowitz and Ritchie. As noted by the administrative law judge, Drs. Mankowitz and Ritchie fail to explain why, if employee's left knee problems really were related to his problems with gouty arthritis stemming back to 1999, employee did not experience the same problems with his right knee in 2002. It's uncontested that employee's problems in 1999 affected both knees and then resolved. It's further uncontested that employee only had problems with his left knee following the accident in January 2002. Especially important here is the fact that Dr. Koprivica took x-rays of both of employee's knees. The x-rays revealed almost a total loss of the lateral compartment with bone on bone in the left knee. The right knee was essentially normal. This evidence strongly suggests, at least to me, that Drs. Koprivica and Swaim are correct and that employee did sustain an acute traumatic injury to the left knee when he fell on the broken sidewalk, that all of employee's treatment and disability was due to that injury, and that ultimately, his death was also a product of that injury when employee's left knee buckled while transferring from his wheelchair.

I believe employee's dependent is entitled to employee's past due temporary total disability benefits, medical expenses, and death benefits. I would affirm the award of the administrative law judge. Because the majority has determined otherwise, I respectfully dissent from the decision of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: James Murphy (deceased) Injury No. 02-150563
Dependents: Ruth Lee Ann Murphy
Employer: A & M Pizza, Inc., d/b/a Domino's
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Missouri Chamber of Commerce c/o CCMSI
Hearing Date: July 29, 2010 Checked by: MEH

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: 1/13/2002
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MISSOURI
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
EMPLOYEE STEPPED OR TRIPPED IN A HOLE IN THE SIDEWALK, INJURING HIS SECOND LEFT TOE AND LEFT KNEE.
12. Did accident or occupational disease cause death? YES Date of death? 7/16/07
13. Part(s) of body injured by accident or occupational disease: LEFT LOWER EXTREMITY BODY AS A WHOLE
14. Nature and extent of any permanent disability: DEATH
15. Compensation paid to date for temporary disability: NONE
16. Value necessary medical aid paid to date by employer/insurer? \$284.49

Employee: James Murphy (deceased)

Injury No. 02-150563

- 17. Value necessary medical aid not furnished by employer/insurer? \$5,959.31
- 18. Employee's average weekly wages: \$211.23
- 19. Weekly compensation rate: \$140.82
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$5,959.31

115 1/7 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

Death benefits from Employer beginning July 17, 2007, for Claimant's lifetime.

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:

weekly differential (0) payable by SIF for 0 weeks, beginning N/A
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: DEATH BENEFITS

Said payments to begin immediately and to be payable and 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:

THOMAS CARLTON

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Murphy (deceased) Injury No. 02-150563
Dependents: Ruth Lee Ann Murphy
Employer: A & M Pizza, Inc., d/b/a Domino's
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Missouri Chamber of Commerce c/o CCMSI
Hearing Date: July 29, 2010 Checked by: MEH

The parties appeared before the undersigned administrative law judge on July 29, 2010, for a final hearing. The dependent appeared in person represented by Tom Carlton. The employer and insurer appeared represented by Scott Kelemetc. The Second Injury Fund appeared represented by Susan Colburn. Memorandums of law were submitted by August 27, 2010.

The parties stipulated to the following facts: On or about January 14, 2002, A & M Pizza, Inc., d/b/a Domino's was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Missouri Chamber of Commerce c/o CCMSI. On the alleged injury date of January 14, 2002, James Murphy was an employee of the employer. The employee was working subject to the Missouri Workers' Compensation Law. The employment occurred in Greene County, Missouri. The employee notified the employer of his injury as required by Section 287.420 RSMo. The employee's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the employee's average weekly wage was \$211.23, which is sufficient to allow a compensation rate of \$140.82 for temporary total and permanent partial disability compensation. No temporary disability benefits have been paid. The employer and insurer have paid medical benefits in the

amount of \$284.49. The attorney fee being sought is 25%. The parties further agree that employee's wife, Ruth Lee Ann Murphy, may be substituted as the proper party in place of the employee, James Murphy.

ISSUES:

1. Whether the employee sustained an accident which arose out of the course and scope of employment.
2. What is the proper date of the accident?
3. Whether the accident caused the injuries and disabilities for which benefits are being claimed.
4. Whether the employer is obligated to pay past medical expenses, including liens filed by Medicare and Medicaid.
5. Any temporary total benefits owed to the claimant.
6. The nature and extent of permanent disabilities, including permanent total disability and death benefits.
7. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Prior to the commencement of this hearing claimant's motion for substitution of party was sustained and Ruth Lee Ann Murphy was substituted in place of James Murphy who is deceased. Subsequent to the hearing, a conference call was held on August 13, 2010, with all parties. Claimant had filed an amended claim after the hearing record had closed. Claimant was requesting the record be reopened for the filing of this claim. The claimant's request was denied and the record was not reopened.

Ruth Lee Ann Murphy, the wife of the employee, testified live at hearing. James Murphy, hereinafter referred to as "employee," had been deposed twice before he died, on

September 29, 2003, and August 18, 2006. His deposition testimony was presented in the exhibits at hearing. Any reference to employee's testimony refers to testimony presented through these depositions.

The employee was born in 1956. He graduated from high school in 1974. In 1978 he received a three-year theology degree from Baptist Bible College in Springfield, Missouri. In the early 1990's, he also received an Associate of Science degree in a paralegal program at Phillips Junior College in Springfield, Missouri. After high school he worked as a crew member at McDonald's for three years. He worked at Litton Industries for four years. He also worked in retail, as a telemarketer, and as a lumber for several years. He worked at Loren Cook from 1991 to 1999 performing assembly activities.

The employee was married to Lee Ann Murphy on June 4, 1977. They remained married until his death on July 16, 2007. He had no other dependents. Mrs. Murphy has not remarried.

In 1999 the employee developed acute renal failure. He was hospitalized and put on dialysis. Related to his renal failure, the employee was diagnosed with gouty arthritis in both knees at this time. He also developed a deep vein thrombosis which resolved with treatment. In December 2000 he received a kidney transplant and his condition improved dramatically. The employee testified that the gout and swelling in his legs had all resolved after his transplant. His wife also testified that he had no further gouty attacks or swelling in his legs after the transplant.

As a result of his renal failure, the employee was deemed disabled and became eligible for Social Security benefits. Employee was given restrictions from heavy lifting and carrying. He testified he could not have returned to his prior positions.

The employee also had some complaints of low back pain that he received conservative treatment for in 2001.

In January 2002 the employee was working part-time for the employer delivering pizzas. His duties primarily involved packaging and transporting the pizzas but he would occasionally help with other general duties in the store. He was able to work in this position within his restrictions due to the kidney transplant. He also was able to work part-time and supplement his Social Security benefits.

On or about January 14, 2002, he was in the process of delivering a pizza. It was approximately 7:00 p.m. and was dark. He testified that he was hurrying to deliver a pizza and did not notice that the sidewalk was damaged, causing a hole. It was snowy and he did not notice the hole in the sidewalk. When he stepped into the hole, he described "I just fell straight forward and my knee and toe just kind of went down on the left side, because as I tripped, I kind of caught myself." Although he was limping and hurting, he continued to work the rest of the evening until 1:00 a.m. Employee testified that he was having a great deal of pain in his left toe up to his knee. He said his leg was swollen from the toes to his knee. When he returned to the store he reported the injury to Tony Davis, his supervisor, and Jason Sinco.

There is some inconsistency in the date of injury. Chiropractic records of Dr. Allen reflect employee was in his office on January 11, 2001, with a complaint of a broken left toe and pain in the knee. Employee testified that after he finished his shift he went to the emergency room at St. John's Hospital. The emergency room records reflect that he was seen in the early morning of January 14, 2002. This would suggest his injury actually occurred on the evening of the 13th. The employee testified that the injury could have occurred between the 11th and 14th of January.

The employer's report of injury states early January 2002. Steven Lawrence, comptroller for A & M Pizza, Inc., testified that he performs duties of human resources as well as accounting. He confirmed that the injury was reported in the first part of January as reflected in the

employer's report of injury. Tony Davis, the general manager of the Domino's store that the employee was working out of, testified by deposition. He testified that although he was general manager in January 2002, he does not recall the employee reporting the injury to him. He further said that he does not recall the employee complaining of his knee, but he does remember him complaining of his hip. He did not recall the last date Mr. Murphy worked.

In the emergency room, x-rays showed a questionable non-displaced fracture of the proximal phalanx of the second toe on his left foot. His toe was buddy wrapped and he was discharged. The employee and his wife testified that his toe was discolored and his knee was swollen.

On January 28, 2002, employee saw Dr. Jordan, his nephrologist. He reported a recent injury in which he fractured his second toe on the left foot. He also noticed pain in his left knee shortly after the fracture. On February 25, 2002, he also noted his toe fracture.

Mrs. Murphy testified that while employee's toe healed he continued to have problems with his knee. On March 25, 2002, St. John's Health Center performed a Doppler study venous exam of the left lower extremity for edema and pain in the left knee and lower leg. They found no evidence of deep vein thrombosis and evidence of an enlarged bursa with possible bursitis in the left knee. An MRI on April 4, 2002, showed a nodular peripheral enhancement of the synovium of the suprapatellar bursa with a large effusion.

On April 19, 2002, Dr. Wolf, an orthopedic surgeon, examined the employee. His assessment was a soft tissue mass, which he did not feel was a synovitis, or that it was communicating to the knee joint. He recommended removal and biopsy of the mass due to the employee's immune deficiency. On April 26, 2002, Dr. Wolf performed surgery to the left knee consisting of a lateral arthrotomy and synovectomy. A biopsy was taken and found to be benign.

Dr. Wolf saw employee ten days later. He was still complaining of swelling. He developed a hematoma. Dr. Wolf removed fluid on three occasions in May 2002.

The employee continued to have swelling in the knee. Dr. Wolf recommended an arthroscopic examination of the left knee.

Dr. Wolf's records contain an off work slip from July 9, 2002, to August 6, 2002.

Dr. Wolf performed a second surgery on August 29, 2002. This surgery consisted of an arthroscopic examination of the left knee with shaving of articular cartilage of the medial femoral condyle and an open synovectomy. A biopsy taken at that time was benign.

The employee testified that he missed work from the date of the first surgery, April 29, 2002, until October 31, 2002. He returned to work for Domino's on Halloween. The employee had returned to work and continued to deliver pizzas for the employer. The employee testified that he had to follow up with his doctors regularly because of his renal issues and regularly told his supervisor Tony when he was going to the doctor and why.

Employee continued to follow up with Dr. Wolf. In his December 2002 note, Dr. Wolf notes aching and mild swelling in employee's knee. He also counseled employee concerning that he felt he would have some long-term difficulty with his knee secondary to his osteoarthritis. In March 2003 Dr. Wolf last saw the employee. He noted some swelling and recommended continued anti-inflammatory medication. The employee did not return to Dr. Wolf because he retired.

On January 30, 2004, Dr. Corsolini examined the employee on referral of the Disability Determination Office. He noted the employee's history of renal failure and transplant. Employee also reported a work injury resulting in two surgeries and persistent left knee pain. Dr. Corsolini determined that employee "most likely has advanced degenerative changes at the left

knee, and I would limit him to the sedentary category for that reason alone. His renal status will not change.”

On April 2, 2004, Dr. Brent Koprivica examined the employee. Dr. Koprivica found the employee had sustained a left second toe fracture and permanent aggravating injury to the left knee. The toe fracture had healed and the left knee had resulted in him developing synovitis of the joint and a direct chondral injury from the fall. He further found that “the injury to the knee and the cartilage changes had led to progressive loss of the lateral compartment where there was now bone on bone.” His opinion was that the employee needed a total knee arthroplasty of the left knee. He testified that the “direct injury he had sustained historically on January 14, 2002, to the left knee and the subsequent two surgeries were a substantial factor in the need for total knee arthroplasty.” If the employee did not have the arthroplasty, Dr. Koprivica said he had a 50% permanent partial disability to the left knee. If the employee had the knee replacement surgery, Dr. Koprivica said he would re-evaluate him when he was at maximum medical improvement.

On September 13, 2004, Dr. Joseph Richie examined the employee for purposes of a second opinion regarding his left knee. The employee complained of pain every day with complaints while ambulating. X-rays showed advanced degenerative changes. He testified that when he examined the employee he had no significant deformity of the knee and no significant swelling. He did have a lot of pain to palpation around the knee. Standing x-rays of employee’s knee showed advanced degenerative arthritis of the knee. Dr. Richie testified that the employee had joint space narrowing, in several places appeared to be bone on bone. He said “overall his x-rays’ appearance were those that were, quite frankly, of a person who’s had other treatments and failed and would be ready for a total knee replacement.” Dr. Richie was of the opinion that he had a pre-existing arthritic condition and the fall in 2002 “in no way had any impact on the development of the osteoarthritic changes that he occurred in his knee.”

The employee had continued to see Dr. Jordan for his renal issues. In September 2005 and January 2006, Dr. Jordan's records reflect employee stated he was having left knee pain, he needed a knee replacement and that he was pursuing this as a workers' compensation claim. On April 10, 2006, Dr. Jordan's records reflect employee was now in a wheelchair. He noted the employee had a lot of swelling in his knee and a lot of pain when he walked. Otherwise he was doing well.

The employee continued to work for Domino's until October 2005. In his August 2006 deposition he testified that during the last couple of weeks he was working he was falling down. He said he would lose balance and his hip would "go out" or his knee would buckle. He testified that at that time he began using crutches and stopped working. He then began using a wheelchair. The employee's wife testified that he began using a wheelchair in 2005 because his left knee would buckle and he would fall. She said although he had occasional back and right hip complaints, he never needed the chair for his back, it was for his knee. Mrs. Murphy said that the employee had back problems off and on before 2002. He did not have right hip problems before 2002. She said that his back and right hip did not interfere with him walking. Rather, it was his left knee buckling that prevented him from walking. Mrs. Murphy also testified that she accompanied her husband to most of his doctors' appointments.

In August 2006, the employee testified that he had swelling in the knee after standing or sitting a couple of hours. He also said that it put pressure on his right hip and back. He described the swelling in his left leg from the knee to the foot. He said that it happened when he was sitting.

James England, a certified vocational rehabilitation counselor, performed a record review at the request of the Second Injury Fund and issued a report on March 2, 2007. Mr. England testified that he found Mr. Murphy was a good candidate for primarily sedentary jobs and that he

could return to work. He said that it was not uncommon for businesses to accept someone working in a wheelchair. In addition, he also found the employee had the academic ability to update his skills or acquire new skills.

On March 7, 2007, Wilbur Swearingin, a certified vocational rehabilitation counselor, examined the employee. He testified to witnessing the employee. He said the employee was not capable of bearing weight on his left leg. He further testified that he found the employee was not capable of living by himself. He said that if it wasn't for his wife providing essential personal care, he could not live independently. He testified that he found the wheelchair he was using inadequate as the employee was not able to propel the chair on his own and he had no independent ability to move himself. He found that the employee had conditions that would be vocationally disabling and that rose to a level of a hindrance or obstacle to employment before 2002. He concluded that the employee was "not employable; that is, capable of performing the work duties of an occupation in the open labor market." He found this was due to a combination of his prior pre-existing impairments and those resulting from his knee injury.

On June 27, 2007, the employee and his wife were at their church. He needed to use the bathroom and she wheeled him into the bathroom and was present the whole time he was in the bathroom. She said that he was attempting to transfer from the chair to the toilet. He grabbed the bar and began to transfer. His left knee buckled and he fell. She specifically testified that she saw his left knee buckle. When the employee fell, he fractured his left leg.

An ambulance transferred the employee to St. John's Hospital. He was diagnosed with comminuted fractures of the distal tibia and fibula. Dr. Scott McMurray performed a closed manipulation under anesthesia and casting with a knee immobilizer. Employee remained hospitalized for five days and was transferred to Christian Healthcare: Republic, a nursing home, on July 2nd. Mrs. Murphy testified that she visited her husband daily. On July 16, 2007, when

she visited him he was not acknowledging her. She told the CNA that was assisting him that something was wrong. The employee became nonresponsive and an ambulance was called. He died on the way to the hospital.

The employee had suffered a pulmonary embolism. The Death Certificate states his cause of death as pulmonary embolism due to fractured left leg.

Dr. Koprivica issued a subsequent report on May 1, 2008, and testified again after the employee's death. In his opinion, the condition of the employee's knee was end stage and the use of the wheelchair was appropriate due to his inability to stand and walk for an extended period of time. He also found that the fall in 2007 that resulted in the fracture was a substantial factor as to why he developed a deep vein thrombosis and the subsequent pulmonary embolism. He also found that the employee fell in 2007 due to residuals from the 2002 work injury. When asked in cross-examination if this was a leap in terms of causation, Dr. Koprivica said, "I don't believe so. The reason he was in the wheelchair was because of the nature of the disease in his knee, that the 2002 injury is what led to that." He specifically said that the renal failure and the back pain did not put him in the wheelchair. He said that although gouty attacks can put someone in a wheelchair, those are temporary. He said there was nothing in the records to show the employee was having a gouty attack. He said a gouty attack can be treated and once treated it is no longer a problem.

Dr. Truett Swaim, an orthopedic surgeon, performed a records review and issued a report in December 2009. His conclusion was that "the occupational injury of 2002 caused or was a substantial contributing factor to cause Mr. Murphy to develop a left knee arthritis which caused or was a substantial contributing factor to cause Mr. Murphy to fall, resulting in a left leg fracture with the complication of pulmonary embolus and death from the pulmonary embolus." Dr. Swaim testified that "because he's got a condition that causes a transfer of weight and then a

transfer of balance, then there's a --- there's a culpability of the left knee condition causing the right leg to give way anyway." He found the major factor causing Mr. Murphy to be in the wheelchair was his left knee. Dr. Swaim concluded "within a reasonable degree of medical certainty there was an injury that was attributed to the occupational incident which did cause some left knee problems with ambulation, necessitating a wheelchair, and then did have a correlation and some culpability with his falling later, fracture, and death."

On cross-examination, Dr. Swaim commented on the cartilage damage in employee's knee. He said "within a reasonable degree of medical certainty it would be my testimony that the accident either caused all of the cartilage damage, or aggravated --- increased the cartilage damage enough that it became a symptomatic state."

Dr. Swaim commented on the gouty arthritis condition the employee had in 1999. He found "it resolved quickly with prednisone. He was put on allopurinol. So if you make a -- a logical deduction is that the reason for that was because he had uremia related to his acute kidney failure on -- chronic kidney failure at that time, uremia resulted in a gouty attack acutely. He was treated properly, put on allopurinol, and I don't see in the record that there was another incident. So that's not a scenario where you've got an arthritic condition that just keeps going on." He also found that the blood clot was related to the 2007 fall. He said the likelihood of it being due to his kidney condition was even less because he was on blood thinners.

Dr. Keith Mankowitz, a cardiologist, performed a records review. In his deposition he stated that he was not making any orthopedic conclusions, rather he was giving an opinion based on his "internal medicine training and experience and impression from reviewing an inflammatory condition." His report is dated December 16, 2008. Dr. Mankowitz concluded that the employee had a pre-existing arthritic condition in his knees dating from 1999 and his subsequent knee problems appeared to be related to an inflammatory arthritis. He testified that

the fall in 2002 had no relation to the subsequent knee problems he had. He further testified that he believed the fall in 2007 was probably related to generalized instability. He said “you know, most people who fall and have an injury to the knee, it’s not going to cause them to have a significant instability five years later.” Dr. Mankowitz said he does not know the reason the employee fell in 2007. He does find that the fall in 2007 led to the blood clot which led to the pulmonary embolism and death. .

The employer and insurer denied treatment for the knee. Medicare and Medicaid paid the bills. A lien is filed by Medicaid in the amount of \$1,147.36. A lien is filed by Medicare in the amount of \$3,833.46. Employer paid directly to Cox Medical Center \$978.49. Mrs. Murphy testified that the employee’s burial expenses totaled \$7,995.00.

After carefully considering all of the evidence, I make the following findings:

1. Whether the employee sustained an accident which arose out of the course and scope of employment.

The version of Section 287.020.2 RSMo in effect at the time of this injury defines an accident as “an unexpected or unforeseen identifiable event or series of events happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.” In order for an injury to arise out of and in the course of employment, Section 287.020.3(2) RSMo requires that it be reasonably apparent under all the circumstances that work was a substantial factor in causing the injury, that it followed as a natural incident of work, it can be fairly traced as the proximate cause, and it does not come from a hazard or risk unrelated to the employment.

I find that the employee sustained an accident in January 2002 when he stepped in a hole in a defective sidewalk causing the employee to break his toe and injure his left knee. This was clearly an unexpected or unforeseen event producing at the time objective symptoms of an injury when he experienced pain and swelling in his toe and knee. I further find that this accident arose out of the course and scope of employment as the employee was traveling this sidewalk en route to delivering pizza to a customer as part of his duties as a pizza delivery driver for Domino's Pizza.

2. What is the proper date of the accident?

I find that the evidence is clear that the accident occurred in early January 2002, somewhere between January 11th and 14th. The testimony of the employee is that he went to the emergency room at the end of his shift and the records show he went there in the early morning hours of the 14th. The only record that states a date certain is the chiropractic record stating the 11th. All the evidence leads me to conclude, by the totality of the circumstances, that the accident actually occurred on the 13th. There is no evidence that any other accident occurred on the 13th or 14th other than the one pled in this claim. I further determine that this difference of a few hours is not significant enough to affect the compensability of this case and that it is sufficient to determine that the accident occurred on or about January 14, 2002, the date that has been consistently, if mistakenly, relied on by all the providers and experts in this case.

3. Whether the accident caused the injuries and disabilities for which benefits are being claimed.

Section 287.020.2 RSMo requires work to be "a substantial factor in the cause of the resulting medical condition or disability." If the injury causes death, the employer and insurer shall pay weekly death benefits to the total dependents of the deceased employee. "Death" is defined in Section 287.020.4 RSMo as "death resulting from such violence and its resulting effects occurring within three hundred weeks after the accident."

The issue presented in this case is whether the accident of January 2002 was a substantial factor causing a series of events culminating in the fall and fracture of employee's left leg and the pulmonary embolism causing his death in July 2007.

In evaluating the expert medical testimony in relation to the evidence as a whole I find Dr. Koprivica's and Dr. Swaim's testimony more credible than that of Dr. Richie and Dr. Mankowitz. The employee testified that he had knee pain very shortly after the accident and that he was having knee pain when he went to the emergency room. The medical records reflect a history of pain given to Dr. Jordan two weeks later. Although the employee had a history of gouty arthritis, these resolved after he received treatment and had his transplant, as they should according to the testimony of Dr. Koprivica and Dr. Swaim. On the other hand, Dr. Richie and Dr. Mankowitz found that his knee condition was the result of long-standing degenerative arthritis from 1999 at the time he had the gouty arthritis, although he had these complaints only after the fall and he did not have similar problems in the right knee. No one disputes that the embolism was a result of the leg fracture and that it was the cause of the employee's death.

I find particularly helpful the testimony of Dr. Swaim that "the occupational injury of 2002 caused or was a substantial contributing factor to cause Mr. Murphy to develop a left knee arthritis which caused or was a substantial contributing factor to cause Mr. Murphy to fall, resulting in a left leg fracture with the complication of pulmonary embolus and death from the pulmonary embolus." He found that because of the knee injury, caused by the accident, the employee was in the wheelchair. He concluded "within a reasonable degree of medical certainty there was an injury that was attributed to the occupational incident which did cause some left knee problems with ambulation, necessitating a wheelchair, and then did have a correlation and some culpability with his falling later, fracture, and death."

Therefore, I find that the work-related accident which occurred when he fell on the sidewalk while delivering a pizza in January 2002 was a substantial factor in causing the injury and condition to the employee's knee. This knee injury resulted in two surgeries and a recommendation for a total knee replacement. As a result of his knee condition the employee developed increasing problems ambulating and bearing his weight, resulting in him ultimately using a wheelchair. I further find that on June 27, 2007, due to the instability caused from the work injury, while attempting to transfer from the wheelchair, his left leg gave away causing him to fall and fracture the distal tibia and fibula of his left leg. Ultimately on July 16, 2007, employee developed a pulmonary embolism as a result of the fracture which caused his death. Therefore, I find that the work related accident in January 2002 was a substantial factor in causing the employee's death on July 16, 2007.

4. Whether the employer is obligated to pay past medical expenses, including liens filed by Medicare and Medicaid.

A lien is filed by Medicaid in the amount of \$1,147.36. A lien is filed by Medicare in the amount of \$3,833.46. Employer paid directly to Cox Medical Center \$978.49. I find these amounts are fair and reasonable and incurred as a result of treatment to cure and relieve the employee of the effects of his work injury. I order the employer and insurer to pay the liens to Medicare and Medicaid directly in the amounts set forth above. I order the employer and insurer to pay the claimant \$978.49 as reimbursement for amounts previously paid by the employee.

5. Any temporary total benefits owed to the claimant.

The employee testified that he did not work from the date of his first surgery on April 29, 2002, until he returned on Halloween, October 31, 2002. The medical records and an off work slip from Dr. Wolf support this. Therefore, I find the employee was temporarily and totally disabled for 26 2/7 weeks from April 29, 2002, to October 30, 2002.

It is unclear when the employee last worked for the employer. The most specific date we have is October 2005. I find he was not at maximum medical improvement and was unable to compete in the open labor market at that time as his condition had deteriorated to the extent he could not bear weight on his left knee and a total knee replacement had been recommended. Wilbur Swearingin testified that the employee was totally disabled.

Because employee had not reached maximum medical improvement I find that his disability was temporary in nature and had not yet become permanent. Therefore, he was temporarily and totally disabled from the time he left his employment at Domino's and the date of his death. Because the exact date he left was not established clearer than "October 2005," I determine it is clear that the date of disability begins no later than November 1, 2005, and continued until his death on July 16, 2007, a period of 88 $\frac{6}{7}$ weeks.

6. The nature and extent of permanent disabilities, including permanent total disability and death benefits.

As a result of finding the employee's death a compensable work-related injury, I find that the employer and insurer are responsible for paying death benefits to employee's dependents under the law. The evidence clearly established that the claimant, Ruth Lee Ann Murphy, is the sole dependent of employee. Therefore, the employer and insurer shall pay the claimant weekly death benefits in the amount of \$140.82 from the time of his death, July 16, 2007, to the date of the hearing, August 29, 2010, for a total of 162 $\frac{5}{7}$ weeks of past due death benefits. The employer and insurer shall pay weekly death benefits from August 30, 2010, to Ruth Lee Ann Murphy as the sole dependent of the employee in the future according to law.

Mrs. Murphy testified that the employee's burial expenses totaled \$7,995.00. I order the employer and insurer to pay the claimant \$5,000 as burial expenses.

7. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

I find that the employee died as a result of his work injury prior to reaching maximum medical improvement on the January 2002 injury. Any permanent disability resulting from the last injury could not be determined made prior to his death. Therefore, I find there is no basis for liability by the Second Injury Fund.

Attorney for the claimant, Thomas Carlton, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Date: 10/28/10

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

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