

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

Injury No.: 09-001346

Employee: Jonna Niemeyer
Employer: Kozeny & McCubbin
Insurer: Hartford Accident & Indemnity Co.

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated September 3, 2009.

This award is only temporary or partial, 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 section 287.510 RSMo.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued September 3, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Jonna Niemeyer

Injury No.: 09-001346

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Bankers Lenders & Title

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Hartford Accident & Indemnity Co.

Hearing Date: July 6, 2009

Checked by: MDL

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: January 5, 2009
5. State location where accident occurred or occupational disease contracted: St. Louis 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 happened or occupational disease contracted:
Employee exited the elevator when it malfunctioned and caused Employee to trip and fall
12. Did accident or occupational disease cause death? No
13. Parts 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? \$9,001.79
16. Value necessary medical aid not furnished by employer/insurer? \$64,802.09

Employee: Jonna Niemeyer

Injury No.: 09-001346

- 17. Employee's average weekly wages: \$1,538.40
- 18. Weekly compensation rate: \$772.53/\$404.66
- 19. Method wages computation: Stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$64,802.09
Temporary total disability beginning on March 20, 2009 until such time as Claimant is found to be at maximum medical improvement	*
Future Medical Treatment pursuant to Award	
TOTAL	*

- DENOTES AN INDETERMINATE AMOUNT

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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: Mr. Daniel Walkenhorst

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jonna Niemeyer

Injury No.: 09-001346

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Kozeny & McCubbin

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Hartford Accident & Indemnity Co.
MDL

Checked by:

PRELIMINARIES

A hearing was held on July 6, 2009 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Jonna Niemeyer ("Claimant") was represented by Mr. Daniel Walkenhorst and Ms. Ellen Morgan. Kozeny & McCubbin and its Insurer Hartford Accident & Indemnity Co. were represented by Ms. Mary Flanagan-Dean. Mr. Walkenhorst requested a fee of 25% of Claimant's award.

The parties stipulated that on or about January 5, 2009 Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; and the claim was timely filed. The parties further stipulated to an average weekly wage of \$1,538.40 resulting in compensation rates of \$772.53 for temporary total disability ("TTD") benefits, and \$404.66 for Permanent Partial Disability ("PPD") benefits. Employer has paid no TTD benefits.

The issues to be resolved by hearing are whether Claimant sustained an accident arising out of and in the course and scope of employment on or about January 5, 2009; liability of Employer for past medical benefits of \$64,802.09; liability of Employer to provide future medical care; and whether Claimant is entitled to past TTD benefits from March 20, 2009, and until such time as she reaches maximum medical improvement.

FINDINGS OF FACT

Claimant works for Employer, a title company, as a supervisor. She is in charge of six people on her team. Employer processes foreclosures, and the work system is paperless. When employees' computers are down, they are unable to perform their jobs. The weather on January 5, 2009 was severe with snow and ice. Despite the weather, Claimant arrived at work on time at 6:00 A.M. Claimant was the first to arrive, and she logged in and made coffee. When Claimant arrived, the computers were down, and at approximately 6:30 A.M. she notified Employer's IT specialist by cell phone, and left him a message telling him the computers were down.

Shortly after 6:30 A.M., Claimant received a phone call from a co-worker inquiring if the office was open. Claimant informed her co-worker that the office was open. Another co-worker

called shortly thereafter to inform Claimant her car was stuck in a ditch, and her husband who tried to help get her out of the ditch, was also stuck in the ditch. Employer's office is located on the second floor of an office building. When it is dark outside, and the lights are on inside the office, it is impossible to see outside weather conditions. As a supervisor, Claimant was responsible for running the office, so Claimant decided to go downstairs to look outside to assess the weather conditions, so she could advise her co-workers. Claimant took her cell phone with her, because she was expecting a call from the IT specialist regarding the computer problems.

Claimant took the elevator down to the first floor to check on the weather. When the elevator stopped, it malfunctioned, and there was a height difference between the elevator and the floor, which caused Claimant to trip and fall, landing on her right knee.

Claimant treated with Dr. McMullin, an orthopedic surgeon. When Claimant first saw Dr. McMullin on January 8, 2009, he noted a prior right knee surgery in 1995 and a follow up knee surgery in 2004 for a meniscal debridement from which Claimant was doing very well prior to her fall at work on January 5, 2009. Dr. McMullin ordered an MRI on January 9, 2009 which revealed another tear of the posterior horn of the medical meniscus. On January 21, 2009, Claimant underwent a right knee arthroscopy for a large meniscal tear, and she continued to have significant pain and swelling post surgery. Due to continuing pain, on February 4, 2009, Dr. McMullin injected Claimant's knee.

When Claimant did not improve following her surgery, a second MRI was performed on March 5, 2009, which showed marked worsening of the osteoarthritis of the right knee with full-thickness, grade IV chondrosis of the medial femoral condyle, and also some significant changes in the medial tibial plateau. On May 8, 2009 Dr. McMullin performed a right total knee replacement. Claimant now has a baker's cyst behind the knee which may require additional treatment. Claimant incurred medical bills of \$64,802.09 in connection with this accident. Following the accident Claimant worked from home and was paid her full salary until March 19, 2009, but has not worked since March 19, 2009, because she is in too much pain.

Dr. McMullin opined in a letter to Insurer on April 1, 2009 that the prevailing cause for the need for the total knee replacement on March 20, 2009 was the work related injury of January 5, 2009. Employer did not obtain a medical opinion regarding medical causation, and medical causation was not raised as an issue at trial.

RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing and the application of Missouri law, I find:

Claimant's accident of January 5, 2009 arose out of and in the course and scope of employment. Section 287.020.3(1) states:

“In this chapter the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition

and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Section 287.020.3(2) states:

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

- (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."

Dr. McMullin's uncontroverted opinion is that Claimant's accident at work was the prevailing factor in causing her need for the total knee replacement surgery. Employer did not challenge Dr. McMullin's opinion.

The thrust of Employer's defense is that Claimant's use of the elevator that was not owned or controlled by Employer is a risk to which she would have been equally exposed outside of and unrelated to employment in her nonemployment life, and thus her accident which happened while using the elevator at work is not compensable. Employer relies upon the case of *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009) to support its position. This case is different from the *Miller* case. In *Miller*, the employee was simply walking briskly to his truck when he felt his knee pop. There were no defects in the road, and his work did not require him to walk briskly. Nothing, other than his walking briskly, caused his knee to pop. Everyone walks in non-employment life.

In the instant case, Claimant was performing a function of her job when she was injured. She was taking the elevator downstairs to check on weather conditions so she could report those conditions to the employees she supervised. She had her cell phone with her in case her IT specialist called, and she was not on a break. The elevator malfunction is what caused her to fall.

Employer's theory of defense, if followed to its logical conclusion, would mean very few work accidents would ever be compensable, and would render the Workers' Compensation statute virtually meaningless. For example, if a cook cut his finger at work while chopping onions, since people cook at home, and are equally exposed to knives in non-employment life, the accident would not be compensable. If an employee injured his back lifting boxes at work, and the employee also lifted boxes at home, in non-employment life, the accident would not be compensable. Interpreting the statute in the manner suggested by Employer would be ridiculous.

Employee was at work, was not on a break, and was performing her job duties when the elevator malfunctioned and caused her to trip and fall and injure her knee. The expert medical

evidence proves the accident which arose out of and in the course of her employment was the prevailing factor in causing the injury and the disability.

Because I find the accident arose out of and in the course of employment, Claimant is entitled to TTD benefits beginning on March 20, 2009, and until such time as she is found to be at maximum medical improvement. TTD benefits are intended to cover a reasonable healing period. Claimant has not been able to work since March 20, 2009, due to the pain in her knee. The medical records and Claimant's testimony establish she has a Baker's cyst on her knee, and she is in pain. There is no evidence Dr. McMullin released Claimant from treatment. As of May 26, 2009, Claimant was still treating for swelling and a Bakers cyst, and had not yet been released to return to work. Employer shall pay Claimant's TTD benefits until such time as Claimant is found by Dr. McMullin to be at maximum medical improvement.

Claimant is entitled to reimbursement for past medical expenses of \$64,802.09. Because Employer denied medical treatment for Claimant's total knee replacement surgery, Claimant was free to treat on her own. Employer did not challenge the reasonableness of those expenses. Employer shall also provide additional medical treatment as authorized by Dr. McMullin, until such time as Claimant is found to be at maximum medical improvement.

CONCLUSION

Claimant met her burden of proving her work accident of January 5, 2009 arose out of and in the course of her employment. Claimant is entitled to reimbursement for past medical expenses of \$64,802.09, TTD benefits from March 20, 2009 until such time as she is found to be at maximum medical improvement, and future medical treatment as directed by Dr. McMullin.

This award is subject to an attorney's lien in the amount of 25% in favor of Claimant's attorney Mr. Daniel Walkenhorst.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Issued by DIVISION OF WORKERS' COMPENSATION