

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

Injury No.: 11-077076

Employee: Edward Palmer
Employer: South Metro Fire District
Insurer: Midwest Public Risk of Missouri
Additional Party: Treasurer of Missouri as Custodian
of 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 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 May 16, 2016. The award and decision of Administrative Law Judge Lisa Meiners, issued May 16, 2016, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 2nd day of December 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Edward Palmer

Injury No. 11-077076

Dependents: N/A

Employer: South Metro Fire District

Self-Insurer: Midwest Public Risk of Missouri

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

Hearing Date: April 19, 2016

Checked by: LM/lh

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: August 19, 2011.
5. State location where accident occurred or occupational disease was contracted: Jackson 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 fell on his left knee causing a direct impact injury while walking out of a fire scene.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Left and right knees, low back.
14. Nature and extent of any permanent disability: Permanent Total Disability.
15. Compensation paid to-date for temporary disability: \$59,139.11.
16. Value necessary medical aid paid to date by employer/insurer? \$44,388.14.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$811.73/\$425.19
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: The Employer is liable to Employee for weekly permanent total disability benefits of \$811.73 beginning April 10, 2013 and continuing for Employee's lifetime.
22. Second Injury Fund liability: No Second Injury Fund liability.

TOTAL: To be determined

23. Future requirements awarded: The Employer is liable to Employee for future medical care in order to cure and relieve the effects of the August 19, 2011 accident.

Said payments to begin as of the date of the award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Employee shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Employee: Steffanie Stracke

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Edward Palmer

Injury No. 11-077076

Dependents: N/A

Employer: South Metro Fire District

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FINDINGS OF FACT AND RULINGS OF LAW

On April 19, 2016, the parties appeared for hearing. Edward W. Palmer appeared in person and with counsel, Steffanie Stracke. The Employer South Metro Fire District through its insurer Midwest Public Risk of Missouri was represented by Kip Kubin. The Second Injury Fund was an additional party and represented by Eric Lowe.

STIPULATIONS

Regarding stipulations, both parties stipulated to the following:

- 1) That the Employer South Metro Fire District and its insurer Midwest Public Risk of Missouri was operating subject to Missouri's workers' compensation law on August 19, 2011;
- 2) That Mr. Palmer was their employee;
- 3) That Midwest Public Risk was their insurer;
- 4) That Mr. Palmer sustained an accident arising out of and in the course of his employment on August 19, 2011;
- 5) That proper notice was given;
- 6) That the claim was filed within the time allowed by law
- 7) That the compensation rates are \$811.73/\$425.19;
- 8) That the Employer provided 72.86 weeks of temporary total disability in the amount of \$59,139.11 of those benefits; and
- 9) That the Employer provided medical expenses in the amount of \$44,388.14.

ISSUES

The issues to be tried by this hearing are:

- 1) Whether Employee sustained any disability and, if so, the nature and extent of that disability;
- 2) Whether the Employer is liable to the Employee for future medical care in order to cure and relieve the effects of the August 19, 2011 accident; and
- 3) The liability of the Second Injury Fund.

Employee approximately 59 years old at the time of hearing spent his entire vocational career working as either an EMT or firefighter. He has worked the last 19 years for the South Metro Fire District in either the capacity of a firefighter, battalion chief and captain of the department. These particular job duties of the past 19 years are considered to be heavy physical labor in the open labor market.

The parties stipulated that while performing his job duties on August 19, 2011, Employee was walking out of a fire scene and his left foot caught in debris causing him to fall directly onto concrete striking the left knee. This accident was reported to his employer, and as such Employee in August of 2011 went through authorized medical care. He saw Dr. Peter Boylan of Concentra Medical Center where X-rays were taken that did not reveal any acute abnormalities. Dr. Boylan at Concentra diagnosed Employee with a left knee contusion and recommended continuation of regular duty status. Employee attempted to work full-duty status. However, in September of 2011, medical records revealed that patient had attempted to return to regular duty status but could not tolerate his work activities as a result of the left knee.

Due to Employee complaining of pain of the left knee with squatting, stepping and pivotal activity, an MRI was ordered. The MRI revealed meniscal tears with multi compartmental degenerative changes in subcortical sclerosis. At that time he was then sent to Dr. Lowry Jones. Dr. Jones felt Employee had sustained a direct impact injury of the left knee that caused patellofemoral cartilage injury, and a complex medial meniscus tear. On November 8, 2011, Dr. Jones performed a left knee arthroscopy with partial medial and lateral meniscectomy, a chondroplasty of the medial femoral condyle in the patellofemoral joint with excision of the inferior patellar spur. Dr. Jones diagnosed Employee with the following that he finds is the result of the direct impact injury of the left knee: Left knee medial meniscus tear, left knee anterior lateral meniscus tear, advanced grade 4 degenerative arthritis of the medial joint line, grade 4 trochlear lesion with grade 2 patellar articular lesion, and a large inferior patellar spur. Thereafter Employee had some improvement but continued with ongoing symptoms of swelling and stiffness, and had difficulty kneeling, squatting and climbing. Employee underwent physical therapy without much improvement. Dr. Jones then performed Orthovisc injections of his left knee. On February 4, 2012, Dr. Jones stated the Employee was not capable of performing all of his essential job requirements, and because of continued ongoing symptoms of left knee pain, he was referred to Dr. Robert Gardiner, an orthopaedic surgeon.

On April 9, 2012, Dr. Gardiner stated that the Employee was having progressive, severe and intolerable left knee pain and had less than a two block walking tolerance, and difficulty getting in and out of cars and climbing stairs. At that time, patient underwent a total left knee replacement. Eventually on April 10, 2013 Employee was released at maximum medical improvement as a result of the August 2011 injury. Dr. Gardiner, the authorized treating physician, placed the following permanent work restrictions: lifting and carrying less than 25

pounds maximum, alternate sitting and standing, no squatting, crawling, kneeling or climbing and no jumping tasks. As a result of the authorized treating physician's restrictions Employee could not return to his prior employment with the fire department.

As a result of the August 19, 2011 accident, Employee continues with left knee pain that increases with prolonged standing and walking. He has postural restrictions based on the left knee, such as standing tolerance less than 30 minutes and a walking tolerance of less than four blocks. His sitting tolerance is less than an hour and he needs to change positions by sitting and standing. Employee as a result of the August 19, 2011 accident is unable to squat, crawl, kneel or climb using the left knee. Employee since August 19, 2011, now has an altered gait that causes abnormal weight-bearing.

Employee testified, which I find credibly, that he protected the left lower extremity more than the right and now has an altered gait due to abnormal weight-bearing on the right lower extremity. He has also noticed increased grinding and pain of the right knee since the August 19, 2011 injury. Employee testified that he has intermittent mechanical low back pain from the altered gait. Employee testified that he no longer works around the house due to the left knee, the right knee and low back since August 19, 2011. He no longer mows, fishes or goes for walks like he did prior to the August 19, 2011 accident. Employee testified that he could not work on a sustained basis due to the effects of the August 2011 accident and restrictions of Dr. Gardiner. Employee testified his left knee, back and right knee have worsened since August 19, 2011. Employee also testified that prior to 2011 he was able to perform his job duties without hindrances and obstacles to his restrictions despite a 2007 right knee accident.

Indeed, Employee sustained a work-related injury on August 20, 2007, in which he received a 15 percent permanent partial disability settlement with his employer. The 2007 accident resulted in Employee undergoing an arthroscopy, anterior cruciate ligament reconstruction, partial medial and lateral meniscectomies and chondroplasties of the right knee. He was released without restrictions and continued performing his normal job duties up until August of 2011.

Employee testified and the medical records corroborate that Employee did not undergo medical care of his right knee between being released from care in 2008 and August 19, 2011. The evidence also reveals that Employee did not have prior problems of his left knee and low back that were a hindrance or obstacle to his condition. Although Employee on a few occasions prior to 2011 complained of left knee pain and an X-ray revealed some degenerative changes, Employee never underwent treatment of the left knee and continued to work without hindrances or obstacles prior to 2011.

Several doctors' opinions were admitted into evidence. The Employee presented the testimony and independent medical evaluation of Dr. Brent Koprivica. Dr. Koprivica found that the prevailing factor of the permanent left knee injury was the work injury of August 19, 2011. Dr. Koprivica also found that this injury served to aggravate and accelerate the underlying degenerative arthropathy of the left knee that was present prior to the injury of August 19, 2011. Dr. Koprivica found that there was no disability involving the degenerative joint disease of the left knee until sustaining the new internal derangement that occurred on August 19, 2011. Dr.

Koprivica also found based on the medical records and a physical examination that because of the August 19, 2011 work injury that Employee developed compensatory aggravation and acceleration of the degenerative process of the right knee with increased disability of the right knee. Dr. Koprivica opined that Employee's low back pain was a natural and direct complication of the August 19, 2011 left knee injury.

Dr. Koprivica recommended that medical care and treatment should be left open in order to cure and relieve the effects of the August 19, 2011 injury. He noted Employee would need ongoing medications to deal with the progression of post-traumatic degenerative changes as a result of the accident to both knees, as well as possible replacement of the arthroplasty of his left knee. Dr. Koprivica found that Employee sustained a 50 percent permanent partial disability of the left knee, 10 percent permanent partial disability of the right knee, and a 5 percent permanent partial disability body as a whole referable to the low back as a result of the August 19, 2011 accident. Dr. Koprivica found that Employee sustained a prior 15 percent permanent partial disability of the right knee that pre-dated the 2011 accident. Dr. Koprivica said he would defer to a vocational expert as to whether or not he is permanently and totally disabled, but that if it were found he was permanently and totally disabled he would base it on a pre-existing 2007 right lower extremity along with the last accident.

Dr. Koprivica restricted Employee based on his current presentation in 2014 to occasional lifting or carrying to less than 25 pounds, avoiding squatting, crawling, kneeling and climbing types of tasks, the ability to change postures between sitting, standing and walking, and to recommend captive sitting intervals of one hour as a maximum, standing and walking should be limited to 30 minutes and that he would need to take a break and the opportunity to stop and sit as necessary, along with no jumping activities.

Another doctor, Dr. James A. Stuckmeyer, also performed an independent medical evaluation. Dr. Stuckmeyer found that the severity of the injury from August 19, 2011 accident in isolation alone caused Employee to be permanently and totally disabled in the open labor market. Dr. Stuckmeyer found the work restrictions based on the last accident alone of no prolonged standing, walking greater than tolerated with no kneeling, squatting, climbing, climbing stairs and no ladder climbing or walking on uneven surfaces along with the 25 pound lifting restriction is enough to cause permanent and total disability. Dr. Stuckmeyer also based his opinion of permanent total disability based on the commentary of both vocational experts Michael Dreiling and Terry Cordray.

The main issue to be resolved is whether Employee is permanently and totally disabled in the open labor market. Total disability means the inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. Sutton v. V. J. Cement Contracting Company, 37 SW 3d 803, p. 811 (Mo.App. 2000). The critical question becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition. Reese v. Gary and Roger Link, Inc., 5 SW2d 522, 526 (Mo.App. 1999).

I find Employee is permanently and totally disabled based on the last accident alone. I find Dr. Koprivica's restrictions relate to the last accident alone and disregard his ultimate

conclusion that Employee is permanently and totally disabled on an unrestricted prior right knee and the last accident. I also find as a result of the August 2011 accident that Employee sustained permanent disability of the left knee, has developed subsequent complaints and persistent pain of the right knee along with mechanical low back pain as a result of the August 19, 2011 accident. I make this finding based on Dr. Koprivica's opinion regarding medical causation.

I do not find Employee, although he settled a claim as a result of a 2007 accident, had a disability that combines with the last accident. I also find based on the authorized treating physician's restrictions that Employee is unable to work in the open labor market based on the last accident alone. Dr. Gardiner's restrictions are so severe that according to one vocational expert it would knock him down to only 1 to 2 percent of the open labor market and even then the likelihood is no employer would hire Employee in the open labor market.

Both vocational experts, Michael Dreiling and Terry Cordray, find that the restrictions placed by Dr. Gardiner and Dr. Koprivica are restrictions preventing Employee from working in the open labor market. Dreiling noted that because of the sit/stand options placed on Employee as a result of Dr. Gardiner and Dr. Koprivica that attempting to pursue entry level unskilled sedentary work is extremely difficult. Dreiling found that his work as a paramedic and firefighter in the open labor market does not provide transferable skills in the open labor market and that realistically he is unemployable in the open labor market. Dreiling also noted based on Dr. Gardiner's restrictions, the authorized treating physician, that it was not realistic based on those restrictions and his age that he could return to college or the open labor market. Likewise, Terry Cordray, the Employer's vocational expert, noted that he is not convinced Employee would be capable of working in the open labor market based on the work restrictions of Koprivica and Gardiner.

I find Employee was capable of doing all of his job requirements in a heavy demanding job up to 2011. I find based on the evidence presented, including Employee's credible testimony and medical records that Employee is unemployable in the open labor market based on the last accident alone. I find based on Dr. Koprivica's opinion that the August 19, 2011 accident was the prevailing factor in causing the left knee complaints as well as low back and right knee pain, and the restrictions he placed are based on the last accident alone. I also find that Employee is unemployable in the open labor market as a result of the last accident based on Dr. Stuckmeyer and the overall dialogue of both vocational experts' opinions.

The Employer is also liable to the Employee for future medical care in order to cure and relieve the effects of the August 19, 2011 accident. Employee has a joint replacement and therefore automatically receives open medical based on the Missouri Statute 287.140.8. However, Drs. Stuckmeyer and Koprivica also note that Employee is entitled to medications. The Employee will need ongoing medications to deal with the post-traumatic degenerative changes of the right and left knees as a result of the August 19, 2011 accident along with leaving medical open in order to cure and relieve the effects of the total knee arthroplasty.

As such, because I find the Employee unemployable in the open labor market based on the last accident alone, the Employer is liable to Employee for permanent total disability benefits in the weekly amount of \$811.73 beginning on April 10, 2013, the date of maximum medical

improvement, and continuing thereafter for Employee's lifetime. The Employer is also liable to Employee for future medical care treatment in order to cure and relieve the effects of that injury as a result of the August 19, 2011 accident.

An attorney's lien of 25 percent of all compensation awarded herein is awarded to Steffanie Stracke for necessary legal services rendered.

Made by: _____
Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation