

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

Injury No. 09-095168

Employee: Timothy Pannell
Employer: Missouri Department of Corrections
Insurer: C A R O
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. Having read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Joint motion for payment of attorney's fees and expenses

We take administrative notice of the records of the Division of Workers' Compensation (Division) in this matter. Those records reveal the following circumstances with respect to employee's legal representation in this matter.

On or about July 8, 2011, employee's (then) counsel of record, Douglas L. Van Camp filed with the Division a "Motion to Withdraw at Request of Client." Therein, Mr. Van Camp indicated that employee had discharged Van Camp Law Firm, LLC, and Mr. Van Camp as his attorney in the case. Mr. Van Camp asserted a lien on past and unpaid attorney's fees in the amount of \$11,075.00 and for expenses in the amount of \$1,092.24.

On July 11, 2011, Ronald L. Edelman of Edelman & Thompson, LLC, filed his entry of appearance on behalf of employee.

On November 17, 2014, the Commission received from Edelman & Thompson, LLC, a "Joint Motion for the Payment of Attorney's Fees and Expenses" (Joint Motion). Therein, Van Camp Law Firm, LLC, and Edelman and Thompson, LLC, request that the Commission honor an agreement between the two firms that Edelman and Thompson, LLC, will pay Van Camp Law Firm, LLC, \$1,100.00 in attorney's fees and expenses at the conclusion of this matter.

We hereby recognize the Joint Motion. We approve payment of the attorney's fee awarded herein subject to the terms of the Joint Motion.

Employee: Timothy Pannell

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Permanent total disability

We defer to and adopt as our own the administrative law judge's determinations as to the relative persuasive value of the expert medical opinions on the topic whether employee's accident of November 24, 2009, is the prevailing factor causing any resulting medical condition or disability of the left knee. Absent any medical expert opinion that the immobilization and subsequent return to activity in connection with employee's June 2010 back surgery was the prevailing factor causing any identifiable pathology and associated disability of the left knee, we agree with the administrative law judge's finding that employee failed to meet his burden of proof with respect to the claimed left knee injury.

And, where both Dr. Stuckmeyer and Michael Dreiling included employee's current left knee disability and symptoms in their opinions regarding permanent total disability, we agree with the administrative law judge's (implied) finding that their opinions do not persuasively support a determination that employee is permanently and totally disabled as a result of the primary injury in combination with his preexisting conditions of ill-being. For this reason, we affirm the administrative law judge's award of permanent partial rather than permanent total disability benefits from the Second Injury Fund.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued February 28, 2014, is attached and incorporated by this reference.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable. We further approve payment of \$1,100.00 in attorney's fees and expenses from Edelman and Thompson, LLC, to Van Camp Law Firm, LLC, consistent with the terms of the Joint Motion for the Payment of Attorney's Fees and Expenses referenced in the body of this award.

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

Given at Jefferson City, State of Missouri, this 5th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

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

Attest:

Secretary

Employee: Timothy Pannell

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 am convinced that the decision of the administrative law judge should be modified to award permanent total disability benefits from the Second Injury Fund.

Setting aside, for the moment, employee's post-injury complaints referable to the left knee, let us consider the physical condition and employment prospects of this individual. Employee was 55 years of age at the time of the hearing before the administrative law judge; he graduated high school 39 years ago and has no further academic or vocational training; he has no typing or computer skills; he has a work history of performing basically unskilled labor jobs plus some supervisory work in food plants; he suffered a work injury on November 24, 2009, resulting in a low back injury requiring surgery that left him with a 20% permanent partial disability of the body as a whole; at the time of the November 2009 work injury, employee suffered from several seriously disabling preexisting conditions of ill-being including a prior low back work injury that settled for 5% permanent partial disability of the body as a whole but which, according to the administrative law judge, constituted a 10% permanent partial disability of the body as a whole, and which left employee with a chronic pain condition requiring the use of narcotic medication including Percocet, a left knee surgery for osteoarthritis and degenerative meniscal tears resulting in a 20% permanent partial disability of the left knee, a total right hip replacement resulting in a 35% permanent partial disability of the body as a whole, osteoarthritis affecting the left hip amounting to a 30% permanent partial disability of the body as a whole, and an anxiety condition dating back to the 1990s requiring medication and occasionally requiring employee to take as much as a week off work; he was terminated from his last employment in August or September 2010 owing to his physical inability to perform his normal duties, and hasn't worked anywhere since; he is receiving Social Security Disability and long term disability benefits as his sole source of income; he uses a sock-aid to put on his socks and wears moccasins because he can't reach his feet owing to pain in his back and hips; he has occasionally required the assistance of a cane for walking since a 2002 hip replacement; and he can only stand or sit for about 20 to 30 minutes at maximum before experiencing severe low back pain.

I tend to agree with the Commission majority that employee failed to meet his burden of proving that the primary work injury of November 2009 involved any injury to his left knee. But I disagree with the majority's determination that, even in light of the essentially uncontested facts I have just relayed, the record contains insufficient evidence to support a finding employee is permanently and totally disabled *regardless* of his left knee condition.

The primary confusion in this case appears to stem from the conflation of the related but separate issues of medical causation of employee's left knee condition on the one hand, and the nature and extent of permanent disability from which employee suffers on the other. As to the former issue, it is well-settled in Missouri that we are not permitted to substitute our lay opinions for those of the qualified medical experts on complicated issues of medical causation. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600

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(Mo. banc 1994). But as to the latter, we have always been permitted wide discretion to determine whether an employee is permanently and totally disabled. *Brashers v. Treasurer of the State as Custodian of the Second Injury Fund*, 442 S.W.3d 152, 155 (Mo. App. 2014).

As noted by the majority, both Dr. Stuckmeyer and Mr. Dreiling included employee's left knee condition in their opinions that employee is permanently and totally disabled. And why wouldn't they? Employee pursued his claim for compensation, in part, on a theory that he suffered a left knee injury as a result of the November 2009 accident. But the majority assumes that such inclusion by Dr. Stuckmeyer and Mr. Dreiling necessarily implies an *unstated* conclusion from these experts that employee is capable of competing for work in the open labor market if the work injury did not cause any injury to his left knee. I disagree with such a reading of the opinions from Dr. Stuckmeyer and Mr. Dreiling, as neither provided any indication that consideration of employee's left knee condition was *necessary* to their opinions regarding employability, and the Missouri courts have made clear that we are not permitted to make inferences from the silence of expert witnesses upon a particular topic. *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 735 (Mo. App. 2004).

Even if Dr. Stuckmeyer and Michael Dreiling had suggested the left knee condition was essential to their opinions regarding permanent total disability, we would still be entitled to find differently, because "[e]mployability is a matter within the Commission's expertise," *Stewart v. Zwiefel*, 419 S.W.3d 915, 918 (Mo. App. 2014), and "[t]he fact finder may reject all or part of an expert's testimony." *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 92 (Mo. App. 2004).

It appears to me that the Commission majority, while sympathetic to the plight of this seriously disabled individual, is operating under the mistaken impression that expert testimony is needed to establish that employee is permanently and totally disabled even if his left knee complaints are set aside. I disagree with such a proposition because, as I have demonstrated, it finds no support in the Missouri Workers' Compensation Law.

After resolving the issue of medical causation of employee's left knee complaints, the Commission majority should have separately considered the issue whether, given employee's condition as of the date he reached maximum medical improvement from the primary low back work injury, he was capable of competing for work in the open labor market. Because I am convinced that the answer to that question is no, and that employee was instead rendered permanently and totally disabled owing to the effects of the primary injury in combination with his preexisting conditions of ill-being, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Timothy Pannell

Injury No.: 09-095168

Dependents: N/A

Employer: Missouri Department of Corrections

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

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

Insurer: Central Accident Reporting Office

Hearing Date: December 12, 2013

Checked by: HDF/scb

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: November 24, 2009
5. State location where accident occurred or occupational disease was contracted: Randolph 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:
See award
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: Low back
14. Nature and extent of any permanent disability: 20% body
15. Compensation paid to-date for temporary disability: \$9,350.94
16. Value necessary medical aid paid to date by employer/insurer? \$38,175.43

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- 17. Value necessary medical aid not furnished by employer/insurer? Unknown
- 18. Employee's average weekly wages: \$553.15
- 19. Weekly compensation rate: \$368.77 for all benefits
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: 20% body = 80 weeks = \$29,501.60
- 22. Second Injury Fund liability: Yes. 14.33% body
57.32 weeks of permanent partial disability from Second Injury Fund = \$21,137.90
- 23. Future Requirements Awarded: None

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: R. Carl Mueller, Jr..

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Timothy Pannell

Injury No: 09-095168

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Missouri Department of Corrections

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

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

Insurer: Central Accident Reporting Office

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on December 12, 2013.

The parties stipulated that on or about November 24, 2009, the claimant, Timothy Pannell, was in the employment of the Department of Corrections of the State of Missouri (Corrections). Mr. Pannell sustained an injury by accident; the accident arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was self-insured and administered through the Central Accident Reporting Office. The employer had notice of the injury. A claim for compensation was timely filed. Mr. Pannell's average weekly wage at the time of accident was \$553.15; the corresponding compensation rate is \$368.77 for all benefits.

Temporary disability benefits have been paid in the amount of \$9,350.94, representing 27 weeks and three days of benefits paid through October 1, 2012. Medical aid has been provided in the amount of \$38,175.43.

The issues to be resolved by hearing include 1) the cause of the injury to the left knee, 2) the nature and extent of permanent disability, 3) the liability of the Second Injury Fund, 4) the liability of the employer for future medical treatment, and 5) the liability of the employer for past temporary disability benefits from October 2, 2012 forward, noting that the amount due through the date of hearing, a period of 166 weeks and five days, is \$61,479.23.

FACTS

The claimant, Timothy Pannell, was 55 years old as of the date of hearing. On November 24, 2009, while Mr. Pannell was employed by Corrections as a corrections officer, he was called to assist at a fight and slipped on a wet floor. Mr. Pannell described the fall as "like the splits". Mr. Pannell described some back pain immediately but testified that he finished the two to three hours remaining in his shift. Mr. Pannell said that the pain was in his mid back and increased during his 50-mile drive home after his shift. Mr. Pannell received conservative medical treatment, including treatment with epidural steroid injections with Dr. Jeffries, until he was seen by Dr. Choma on May 5, 2010. Dr. Choma operated on Mr. Pannell's back on June 1, 2010.

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Mr. Pannell returned to light duty work at Corrections, shredding paper and then, eventually, walking with a cane, returned to work inside the prison. On June 28, 2010, Mr. Pannell mentioned left knee pain to Dr. Choma; prior to this time, according to Mr. Pannell, he had been on light duty and taking Percocet as well as muscle relaxers and reclining. The physical therapy note of Paul Lane dated October 8, 2010, reflects that Mr. Pannell started physical therapy for his back on July 7, 2010, as recommended by Dr. Choma.

Mr. Pannell saw his family physician, Dr. Chase, with anxiety regarding his continued employment. Dr. Chase noted Mr. Pannell's worsening anxiety and depression as well. Dr. Chase and Dr. Burdin noted Mr. Pannell's prescription for Percocet through March 12, 2010, and again on October 27, 2010. Dr. Chase's notes of October 4, 2010 state "direct trauma reports having a job with trash company in the past where he jumped out of a trash truck all day, most recently breaking up fights at the prison and he has gotten kicked. history of prior knee surgery 2005, orthoscopic. (sic)" (Chase report 10.4.10)

In early 2011, Mr. Pannell saw Dr. Coyle and Dr. Doll regarding ongoing low back pain. Neither physician opined that Mr. Pannell's complaints were attributable to the November 24, 2009 accident. Dr. Coyle described the left sided low back pain as "probably of discogenic origin at L4-5." (Coyle letter 2.23.11) Dr. Doll noted that Mr. Pannell's MRI study revealed "multilevel degenerative disk disease and no residual disk herniation at L2-3 on the right." (Doll letter 5.24.11)

Mr. Pannell described a medical history which included a total right hip replacement in February of 2002 and surgery on his left knee in 2005. Dr. Main performed left knee arthroscopic surgery on March 30, 2005, with a partial medial meniscectomy and debridement. The post-operative diagnoses included osteoarthritis of the left knee, a degenerative meniscal tear and a grade 1 MCL sprain. In addition, Mr. Pannell described a work-related back injury in January of 2007. An x-ray report dated February 22, 2007, describes "degenerative disk seen at the 3 last lumbar levels with diffuse disk bulge at L3-4. Annular tear high intensity zone seen at L4-L5 indicative of a (sic) annular tear." (Samaritan Hospital 2.26.07)

Mr. Pannell testified at the December 12, 2013 hearing that he has recently had a left hip replacement.

Mr. Pannell said that his 2009 back injury and subsequent injuries are not enough to keep him from being able to work, but that it is a "combination of everything" which has made him unemployable.

Dr. James Stuckmeyer, orthopedic surgeon, testified by deposition that he evaluated Mr. Pannell on September 27, 2011, and prepared a report pertaining thereto on October 12, 2011. Dr. Stuckmeyer opined to a permanent disability of 25 percent of the body referable to the accident of November 24, 2009, referable to the lumbar spine and the disc herniation at the L2-3 level, which was the subject of an operative procedure by Dr. Choma. Dr. Stuckmeyer did not opine with regard to the need for any additional medical treatment for Mr. Pannell's low back injury of November 24, 2009. In addition, Dr. Stuckmeyer opined to a 30 percent permanent disability of the left knee as the result of the November 24, 2009 accident. Dr. Stuckmeyer

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further opined that Mr. Pannell would need a “left total knee arthroplasty” to cure and relieve Mr. Pannell’s chronic knee condition. Dr. Stuckmeyer assessed preexisting permanent disability at 10 percent of the body referable to the lumbar spine, 20 percent of the left knee, 35 percent of the right hip, and 30 percent of the left hip. Dr. Stuckmeyer opined that a 20 percent “augmentation factor” should be applied as the result of the combination of preexisting disabilities with current disabilities.

During cross-examination by counsel for the employer, Dr. Stuckmeyer admitted that when he saw Mr. Pannell, “his overall condition was consistent with degenerative arthritis of the left knee.”(Stuckmeyer depo p29) Dr. Stuckmeyer went on to say that Mr. Pannell “had preexisting disability in the left knee, and as a direct, proximate, prevailing factor of this accident, he took a preexisting degenerative condition and made it significantly symptomatic.” (Stuckmeyer depo p30) Dr. Stuckmeyer described the accident of November 24, 2009, as involving “enough additional microtrauma and subtle changes” to make the left knee symptomatic.

Counsel for the Second Injury Fund elicited testimony from Dr. Stuckmeyer that Mr. Pannell was able to perform the job duties of a corrections officer prior to November 24, 2009, without limitations associated with his hips, left knee, or low back. Dr. Stuckmeyer admitted that any complaint of left knee pain or effusion by Mr. Pannell isn’t documented until June of 2010, seven months subsequent to the date of the accident in question.

Dr. Stuckmeyer relied heavily on the findings of Dr. Michael Snyder, who saw Mr. Pannell around October of 2010, and issued two reports pertaining thereto. Dr. Snyder was of the opinion that Mr. Pannell injured his left knee when he injured his low back in November of 2009. Dr. Snyder described the injury as a twist of the back and the left knee. Dr. Snyder described Mr. Pannell as having left knee pain at the time of the accident. Dr. Snyder acknowledged that Mr. Pannell had underlying arthritis in the left knee and “probable meniscal pathology ... based on his physical exam and his current symptoms.” (Snyder letter to Van Camp) Dr. Snyder recommended an MRI to determine meniscal pathology and structural damage, before he could recommend treatment.

Dr. Choma’s records reflect his treatment of Mr. Pannell from May 5, 2010, through November 27, 2010. Dr. Choma performed a microdiscectomy at the L2-3 level on Mr. Pannell on June 1, 2010. The notes of Dr. Choma’s post-operative visit with Mr. Pannell on June 28, 2010, reflect Mr. Pannell’s complaints of left knee pain and swelling; Dr. Choma notes that he would like to “initiate physical therapy for functional stabilization and lumbar range of motion”; Dr. Choma’s notes further reflect that he is switching Mr. Pannell to “over-the-counter nonsteroidal anti-inflammatory drugs on a p.r.n. basis for pain.” (Choma report 6.28.10) In a July 28, 2010 addendum to the June 28, 2010 record, Dr. Choma opined that Mr. Pannell’s left knee complaints are not the result of his original work injury. On November 27, 2010, Dr. Choma attributed a permanent disability of ten percent of the body to Mr. Pannell’s work-related back injury. Dr. Choma went on to state that he did not expect Mr. Pannell to have additional problems related to his work-related lateral disc herniation with radiculopathy, although he predicted that Mr. Pannell would continue to exhibit functional deficits in excess of those attributable to the work injury.

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Michael Dreiling, vocational consultant, testified by deposition that he evaluated Mr. Pannell on December 12, 2011, and authored a report dated December 13, 2011, pertaining to his evaluation. Mr. Dreiling opined that Mr. Pannell is unemployable in the open labor market as the result of his November 24, 2009 accident combined with his preexisting disabilities. Mr. Dreiling utilized Dr. Stuckmeyer's report which reflects the left knee complaints as part of the November 24, 2009 injury in determining Mr. Pannell's employability. Mr. Dreiling's review of Mr. Pannell's "perspective of injury" included his left knee complaints as well as his left hip. (Dreiling report)

Dr. Kevin Marberry, Assistant Professor of Orthopaedic Surgery, Sports Medicine and Arthroscopy, University of Missouri Health System, evaluated Mr. Pannell on November 8, 2010, and issued two reports pertaining thereto dated November 18, 2010, and January 6, 2011. Dr. Marberry stated that he believed that Mr. Pannell's "current symptoms of the left knee are related to a diagnosis of medial compartment arthrosis. While it is certainly likely that the patient may have developed an acute meniscal injury or worsening of medial compartment arthrosis, it is not likely that the prevailing factor related to patient's current condition is the work-related event of November 24, 2009." (2010 Marberry report p4) Dr. Marberry opined that Mr. Pannell had developed "loss of joint space and nearly bone-on-bone arthritis" since his meniscectomy in 2005. (2010 Marberry report p4) Dr. Marberry felt that the worsening knee pain was not the result of an injury on November 24, 2009, but could be the result of "relative immobilization" following Dr. Choma's 2010 surgery. (2010 Marberry report p4) On January 6, 2011, Dr. Marberry wrote that the exacerbation is a direct result of the immobilization and return to activity after the 2010 back surgery, that the exacerbation is temporary and that conservative treatment would be appropriate and that Mr. Pannell should reach maximum medical improvement from the left knee complaints three months after initiation of the conservative treatment he described.

Dr. Lyndon Gross of The Orthopedic Center of St. Louis evaluated Mr. Pannell on January 31, 2011, regarding his left knee. In his report of the same date, Dr. Gross found Mr. Pannell to have left knee degenerative joint disease. Dr. Gross noted Mr. Pannell's history of a 2005 left knee arthroscopy with partial medial meniscectomy and chondroplasty, patellofemoral joint and medial compartment, performed by Dr. Main. Dr. Gross opined that Mr. Pannell has continued to have degeneration of the left knee over the years, possibly aggravated by his immobilization after surgery followed by rehabilitation for his back. Dr. Gross recommended conservative treatment in the form of a "nonsteroidal anti-inflammatory, corticosteroid or viscosupplementation injection, and physical therapy to try to return him to his baseline with regards to his left knee." (Gross report p4) Dr. Gross also recommended temporary work restrictions of no squatting or kneeling until Mr. Pannell is returned to his baseline.

Dr. Gross saw Mr. Pannell again on February 24, 2011, and issued a report pertaining to his examination. Dr. Gross noted that Mr. Pannell had shown no improvement from the injection and physical therapy and recommended a unicompartmental or total knee arthroplasty. In a March 21, 2011 report Dr. Gross opined that it is the underlying degeneration of the left knee preexisting November 24, 2009, which is the cause of the need for the surgery recommended. Dr. Gross opined that the November 24, 2009 accident and injury did not accelerate or cause the need for the recommended knee replacement.

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Mr. James England, vocational rehabilitation counselor, board certified by the Commission on Rehabilitation Counselor Certification, testified by deposition that he generated a May 14, 2013 report after a review of the health related records of Mr. Pannell as well as Mr. Pannell's deposition. Mr. England opined that although Mr. Pannell would not be able to return to the majority of his previous work, he could engage in supervisory work as well as some security work, light assembly and packing, and some cashiering positions. Given Dr. Stuckmeyer's restrictions, Mr. England felt that some of the positions he enumerated would still be available to Mr. Pannell. Mr. England also felt that Mr. Pannell would be a candidate for learning additional computer skills through the Missouri Department of Vocational Rehabilitation.

APPLICABLE LAW

RSMo Section 287.020.3 (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

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

(a) It is 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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

RSMo Section 287.220.1 There is hereby created in the state treasury a special fund to be known as the "Second Injury Fund" created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as

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state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

Treasurer of the State of Missouri v. Witte, et al, 2013 WL 5989277 (Mo.), for the proposition that once the Second Injury Fund's liability is triggered by a preexisting permanent partial disability that meets the threshold set forth in 287.220.1, all preexisting injuries must be considered in calculating the amount of compensation for which the Fund is liable.

AWARD

The claimant, Timothy Pannell, has failed to sustain his burden of proof that he injured his left knee in the accident of November 24, 2009. Mr. Pannell testified that he did not note pain in his left knee until some time after his back surgery, at least six months post accident. Mr. Pannell did not testify to any mechanism of injury to the left knee when he fell while responding to a call for assistance on November 24, 2009. The physician who opined that Mr. Pannell's left knee injury is causally related to the November 24, 2009 accident, Dr. Stuckmeyer, relied on Dr. Snyder who found that Mr. Pannell injured his knee at the time of and directly attributable to the November 24, 2009 accident. This is contradictory to Mr. Pannell's testimony at the hearing and the medical records completed at or near the time of the accident. The theory that Mr. Pannell proposes that the left knee symptoms only became noticeable after he became active after back surgery and was not as reliant on pain medication is not supported by the medical records, which indicate physical therapy did not start for several weeks after Mr. Pannell's initial left knee complaints to Dr. Choma. Mr. Pannell's use of prescription medications for back pain is less clear, but it is notable that Dr. Choma mentioned a switch to over-the-counter medications on June 28, 2010, contemporaneously with Mr. Pannell initial mention of left knee pain, not before. Finally, there is no evidence of any physical or structural change in Mr. Pannell's left knee after the November 24, 2009 accident or after the June 1, 2010 surgery for the low back which could constitute a factor in his development of left knee pain.

Mr. Pannell has sustained his burden of proof that he has a 20 percent permanent partial disability of the body referable to the lumbar spine as the result of his accident of November 24, 2009. This award is based on the complaints and limitations described by Mr. Pannell as well as the opinions of Dr. Stuckmeyer and Dr. Choma.

Mr. Pannell has sustained his burden of proof that the Second Injury Fund is liable for his increased permanent partial disability as the result of the combination of the November 24, 2009 low back injury and his preexisting disabilities to the left knee, the right hip and the left hip, and low back at the L3-4 and L4-5 levels. Mr. Pannell has proven that the November 24, 2009 low back injury and the preexisting disabilities to the left knee, both hips, and low back are each serious enough to cause a hindrance or obstacle to employment. The disabilities imposed on Mr. Pannell by his preexisting disabilities are 20 percent of the left knee, 35 percent of the right hip, 30 percent of the left hip, and 10 percent of the low back at the L3-4 and L4-5 levels. Given the severity of each of the disabilities noted and Dr. Stuckmeyer's recommendation regarding an "augmentation factor", I find that the synergistic effect or disability above and beyond the simple sum of the disabilities to the low back, the left knee, and the hips is 14.33 percent of the body.

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Mr. Pannell has failed to sustain his burden of proof that he is entitled to additional medical treatment for the accident and injury of November 24, 2009 where no physician recommended any additional treatment for the low back as the result of the November 24, 2009 accident. As noted previously Mr. Pannell has failed to prove that his left knee complaints are attributable to his November 24, 2009 accident and injury.

Finally, Mr. Pannell has failed to sustain his burden of proof that he is entitled to additional temporary total disability benefits beyond October 1, 2012, where there is no evidence that Mr. Pannell was unable to return to work as the result of his November 24, 2009 back injury beyond that date. When Dr. Choma released Mr. Pannell from treatment in November of 2010, he indicated that Mr. Pannell should experience no further problems as the result of the November 24, 2009 back injury. Dr. Stuckmeyer did not address Mr. Pannell's ability to return to work as the result of the low back injury; however, he did provide a rating of permanent disability with no recommendation regarding additional treatment. While other physicians have addressed Mr. Pannell's concerns regarding a return to work, these concerns have always been premised, at least in part, on Mr. Pannell's left knee complaints, his left hip pain, and his lower back pain due to degenerative disc disease, primarily at the L4-5 level.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation