

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

Injury No.: 01-037858

Employee: General Parker  
Employer: Alston Power Integrated, Incorporated  
Insurer: American Zurich Insurance Company,  
TPA Gallagher Bassett Services  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Dismissed)  
Date of Accident: April 20, 2001  
Place and County of Accident: Franklin County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 15, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Gary L. Robbins, issued January 15, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

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John J. Hickey, Member

Attest:

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Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge erred in finding that employee failed to satisfy his burden to show that his left knee injuries were medically causally related to his work accidents in 2001. Claimant's medical expert, Dr. Musich, opined that the two work accidents in 2001 were a substantial factor in the cause of employee's left knee problems. Even employer/insurer's medical expert, Dr. Nogalski, believed employee's left knee problems were the result of the work accidents as demonstrated by his 1% permanent partial disability rating for those injuries. Dr. Nogalski stated that "it looks like 1 percent of the permanent partial disability would be attributable to his two claimed injuries in 2001 . . . ." Thus, the undisputed evidence shows that employee's left knee injuries were medically causally related to his April 20, 2001, and December 6, 2001, work accidents.

The administrative law judge also erred in finding that there was no evidence apportioning separate percentages of disability between the two left knee injuries. Dr. Musich's expert medical opinion that employee's left knee surgery was related to his work injury is more credible than the contrary opinion of Dr. Nogalski. Dr. Musich opined that as a result of the two work accidents in 2001, employee suffered 30% permanent partial disability of the left knee. I agree that Dr. Musich did not apportion the 30% disability finding between the two separate injuries. However, Dr. Nogalski did provide credible evidence that employee suffered permanent partial disability of 7% solely as a result of the left knee surgery. Therefore, employee should have been awarded 7% permanent partial disability for his December 6, 2001, work injury and 23% permanent partial disability for his April 20, 2001, work injury.

Furthermore, since employee's need for left knee surgery was caused by the December 6, 2001, work accident, I would award employee past medical expenses in the amount of \$16,673.13. Finally, I would award employee 5 and 3/7 weeks of temporary total disability benefits at the stipulated rate of \$628.90. This is for the time period between his surgery (February 19, 2004), through the date he was released to return to work (March 29, 2004).

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny employee benefits.

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John J. Hickey, Member

# FINAL AWARD

Employee: General Parker

Injury No. 01-037858

Dependents: N/A

Employer: alston Power Integrated, Incorporated

Additional Party: Second Injury Fund

Insurer: American Zurich Insurance Company, TPA Gallagher Basset Services

Hearing Date: November 1, 2007

Checked by: GLR/kh

## SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease? April 20, 2001
5. State location where accident occurred or occupational disease contracted: Franklin 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: The employee struck his left knee against a piece of steel scaffolding.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Left knee
14. Nature and extent of any permanent disability: None
15. Compensation paid to date for temporary total disability: \$0
16. Value necessary medical aid paid to date by employer-insurer: \$85.06
17. Value necessary medical aid not furnished by employer-insurer: Non-issue
18. Employee's average weekly wage: Not determined

19. Weekly compensation rate: \$599.96 per week for TTD. \$314.26 per week for PPD.

20. Method wages computation: By agreement

21. Amount of compensation payable: \$0

22. Second Injury Fund liability: N/A

22. Future requirements awarded: None

Said payments shall be payable as provided in the statement of the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

No attorney fees are awarded in this case.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On November 1, 2007, General Parker, the employee, appeared in person and by his attorney, D. Andrew Weigley for a hearing for a final award in three cases: 01-037858, 01-044871, and 01-151550. The employee dismissed 01-044871 in its entirety. The employee also dismissed the Second Injury Fund in the remaining two cases. The Second Injury Fund was not represented at trial. Its attorney, Maria W. Campbell, represented the employer-insurer at the hearing. Venue in 01-037858 was properly in Franklin County, Missouri. Venue in 01-151550 was properly in St. Louis County, Missouri. The parties specifically requested and agreed to venue in Jefferson County, Missouri. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by American Zurich Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Alston Power Integrated, Incorporated and was working under the Workers' Compensation Act.
3. On or about April 20, 2001, the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's claim.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total, permanent total and death is \$599.96 per week. His rate for permanent partial disability is \$314.96 per week.
7. The employer-insurer paid \$85.06 in medical aid.
8. The employer-insurer paid \$0 in temporary total disability benefits.

### **ISSUES**

1. Medical Causation-Whether the employee's injury was medically causally related to his accident of April 20,

2001?

2. Permanent Partial Disability-Whether the employer-insurer is liable to pay permanent partial disability benefits?

## **EXHIBITS**

The following exhibits were offered and admitted into evidence:

### Joint Exhibits

1. Medical records Unity Corporate Health-April 24, 2001.
2. Medical records St. John's Mercy Hospital-Washington, Missouri
3. Medical records Unity Corporate Health-December 8-28, 2001.
4. Medical records Edward Schlafly, Jr., M.D.
5. HealthSouth records-January 25-October 15, 2002.
6. Medical records St. Alexius Hospital-February 9, 2002.
7. Medical report of James Walentynowicz, M.D.-March 15, 2002.
8. Medical records Eric Washington, M.D.-July 15 and August 5, 2002.
9. Medical records Northland Mid-America Orthopedics-February 12 and 20, 2003.
10. Medical records Forest Park Hospital and Clayton R. Perry, M.D.
11. Medical records Julian Mosley, M.D.-January 23, 1998-April 14, 2005.

### Employee's Exhibits

- A. Medical bill Clayton R. Perry, M.D. PC/\$3,109.00
- B. Medical bills Forest Park Hospital/\$393.00 and \$13,171.13
- C. Deposition of Thomas F. Musich, M.D.

### Employer-Insurer's Exhibits

1. Deposition of Michael Nogalski, M.D.

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

### **STATEMENT OF THE FINDINGS OF FACT-**

The parties stipulated that the employee sustained work related injuries to his left knee on April 20, 2001 (Case Number 01-037858) and again on December 6, 2001 (Case Number 01-151550). The cases were not consolidated, but were tried at the same time. The parties requested and agreed to venue in Jefferson County, Missouri. In addition the employee dismissed Case Number 01-044871. The employee also dismissed the Second Injury Fund in Case Number 01-037858 and Case Number 01-151550.

General Parker, the employee has worked as a union boilermaker for the last nine to ten years. He is a certified welder. Generally his duties involved some form of welding at large industrial facilities.

The employee testified that he first injured his left knee on April 20, 2001 when he struck his knee against a piece of steel scaffolding. He promptly reported his accident to his employer, and was initially sent to Unity Corporate Health for medical care. Multiple physicians and medical providers treated the employee due to pain complaints with his left knee up to and through his second accident on December 6, 2001. The employee testified that he continued to have pain complaints in his left knee whether he was working or not. The employee received conservative care including work restrictions and physical therapy. Mr. Parker's description of his problems and his diagnoses have remained consistent. The employee always indicated that he struck his knee near and/or above the kneecap, and he always indicated that he had pain. The diagnoses given were generally for a contusion of the left knee-specifically of the quadriceps tendon. The employee also testified that in about October 2001 he saw his personal doctor, Dr. Julian C. Mosley concerning his knee, and that Dr. Mosley made referrals and prescribed some pain pills.

On December 6, 2001, Mr. Parker had another accident where he injured his left knee. On this occasion he testified

that he was welding in a sitting position and got up to go on break. He indicated that as he got up he struck his left knee against a piece of angle iron. He testified that he struck his knee in about the same spot, but more on top of the kneecap. He testified that he felt immediate pain and his knee started to swell. He again immediately reported this injury to his employer and he was again sent for medical care to Unity Corporate Health. The employee was off work and got medical care throughout December 2001. Again conservative care and x-rays were provided.

Due to continuing problems, the employee came under the care of Dr. Edward Schlafly Jr. in January 2002. Dr. Schlafly treated the employee conservatively, obtained an MRI, recommended physical therapy and released the employee to full duty as of February 18, 2002. The impressions from the February 9, 2002 MRI were reported as, "Visualized Quadriceps Tendon Appears Intact, ... Small Amount of Joint Effusion. Subtle Diffuse Increased Signal In the Posterior Horn of the Medial Meniscus ... Otherwise Unremarkable". Dr. Schlafly reported that the MRI was negative and diagnosed a left knee contusion with resulting quadriceps tendonitis. Mr. Parker testified that his knee did not improve despite his treatment.

The employee hired legal counsel. Counsel referred the employee for care with Dr. James Walentynowicz. Dr. Walentynowicz saw the employee on one occasion on March 15, 2002. Dr. Walentynowicz reviewed medical records, examined the employee and gave a diagnosis of multiple contusions of the left knee involving the quadriceps insertion. The doctor said if Mr. Parker did not want more physical therapy then he was at MMI. He rated the employee as having a ten percent permanent partial disability of the left lower extremity due to both accidents, based on persistent pain and weakness. Dr. Walentynowicz reported that he could not tell how much disability applied to each accident.

Mr. Parker's private physician, Dr. Mosely referred him to Dr. Eric D. Washington. Dr. Washington first saw the employee on July 15, 2002. Dr. Washington's assessment was "1. Left knee tenosynovitis. 2. Status post left knee strain/contusions". Dr. Washington saw the employee one other time on August 5, 2002. He assessed "Internal derangement of the knee", and as Mr. Parker had pain of over a year, he suggested an arthroscopic evaluation. At that time the employee said that he would like to have surgery.

Dr. Roush saw the employee on February 12, 2003, as Dr. Washington had closed his office and left the St. Louis area. Mr. Parker received an injection in his knee. He reported that the injection did not help. Mr. Parker was working during the period. Dr. Roush sent a letter to Dr. Mosley dated February 12, 2003. In that letter among other things, he stated that, "there is more focal tenderness at the lateral joint".

Dr. Clayton Perry was the next physician to treat the employee. He saw the employee on February 13, 2004, and reported that the employee had internal derangement that did not show up on the MRI. He suggested arthroscopic surgery and performed such a surgery at Forest Park Hospital on February 19, 2004. The preoperative diagnosis was of a torn meniscus left knee. Dr. Perry's surgical record reported "Postoperative Diagnoses: 1. Central tear of lateral meniscus. 2. Hyalinized fat pad". Dr. Perry's bills amount to \$3,109.00. The bills from Forest Park Hospital are for \$393.00 and \$13,171.13. Dr. Perry released the employee to full duty on March 29, 2004.

The employee testified that while this surgery did help, it did not give him total relief. At trial he testified that he was doing ok, but he is not as good as he was after surgery. He testified that he does not take medication for his knee, is working, but does have pain and swelling.

Mr. Parker's attorney sent him to be evaluated by Dr. Thomas F. Musich. Dr. Musich saw the employee on one occasion on September 27, 2004. He testified by deposition on December 12, 2005. Dr. Musich testified that he took a history from the employee, reviewed medical records, performed a physical examination, and prepared a report of his findings. He testified that he was not a treating physician, he is a family physician, he is not an orthopedic physician, he has never done a knee surgery and he only knows what the employee told him and what is contained in the files.

Dr. Musich discussed the findings of the MRI and testified that the MRI showed a small joint effusion and a subtle diffuse increased signal of the posterior horn of the medial meniscus. He further testified that the terms of the MRI usually indicate there is some kind of inflammatory process that could be because of a tear, or it could be because of soft tissue swelling. Dr. Musich testified that MRI's are not 100%.

Dr. Musich opined:

1. "It's my opinion based on a reasonable degree of medical certainty that General Parker suffered acute trauma, adversely affecting his left knee on two separate occasions in 2001 during the course and scope of his employment as a union boilermaker".
2. "It's my medical opinion that the work trauma of 2001 is a substantial factor in the development of acute left knee pathology that eventually required surgical intervention and has resulted in chronic residual complaints".
3. "It is my medical opinion that the work traumas of 2001 have resulted in a permanent partial disability of 30% of the lower extremity at the knee level".
4. "It's also my medical opinion that the patient's persistent left knee symptoms would benefit from additional home physical therapy and strengthening".
5. "I found no significant preexisting disability referable to this gentleman's left knee before April, 2001".

The employer-insurer sent the employee for evaluation by Dr. Nogalski. Dr. Nogalski saw the employee on one occasion on June 12, 2006. He testified by deposition on March 7, 2007. Like Dr. Musich, he took a history from the employee, reviewed medical records, performed a physical examination and prepared a report of his findings. He testified that he is a board certified orthopedic surgeon who specializes in knee and shoulder surgeries. He also testified that for the last ten to twelve years he generally has seen eighty to one hundred patients a week, and has typically performed five to fifteen surgeries a week. He guessed that between thirty to forty percent of those surgeries would have been knee surgeries.

Dr. Nogalski provided a diagnosis for Mr. Parker's 2001 knee injuries. He testified that Mr. Parker sustained a contusion to his upper knee around the quadriceps tendon or upper kneecap area.

He further opined that the employee's left knee surgery performed by Dr. Perry was not reasonably required to cure or relieve the effects of either of the employee's knee injuries. He testified, "It's based upon Mr. Parker's description of his injury as well as in the early reports of his injury from his evaluators. It also takes into consideration the findings that Dr. Perry identified in the knee. And this is compared to his claimed injury which is well above the areas in question that were treated by Dr. Perry in his knee arthroscopy". Dr. Nogalski discussed factors he used in making this opinion. He testified that, "Mr. Parker's injury was essentially that of a bruise or contusion to the top of his kneecap or quadriceps tendon. That would not be something that would cause the pathology that was observed by Dr. Perry within the knee". He also testified, "Mr. Parker's reported injury and area of concern was in the quadriceps tendon and the superior or upper kneecap area. This is well away from at least, five to six inches away from the fat pad and also away from the lateral meniscus. Additionally, his evaluators did not identify fat pad tenderness, nor did they identify lateral joint line pain to suggest that there was a symptomatic meniscal problem".

Based on his physical examination of the employee, Dr. Nogalski testified that:

1. the employee had tenderness which is subjective
2. the only objective findings were the portal sites from the surgery that had healed
3. the employee appeared to have some slight tightness of his iliotibial band which is fairly common
4. the McMurray test was negative
5. there was no loss of motion
6. there was no loss of quadriceps strength
7. the employee needs no additional care.

Dr. Nogalski provided a final rating. His opinion was, "Given that he had undergone an arthroscopy it appeared he had a 7 percent permanent partial disability of the left lower extremity at the level of the left knee. And given the dispute in this matter, it looks like 1 percent of the permanent partial disability would be attributable to his two claimed injuries in 2001 which would be essentially that of a contusion".

During cross-examination, Dr. Nogalski agreed that the history that the employee gave him was consistent with the history that was provided to all medical providers, and that there is no suggestion that the employee injured his knee off the job. He also testified that it is reasonable if a patient complains of knee pain for over one year, even with a negative MRI, to go to an arthroscopic evaluation to see if there is some internal derangement. Dr. Nogalski further

testified that based on his exam he does not agree that there was an injury to the lateral meniscus, but agreed that it is possible that an MRI would not pick up all lateral tears. He agreed in this case the MRI did not suggest a tear of the lateral meniscus.

Dr. Nogalski was asked about and discussed the hyalinized fat pad. He testified that is a rare term that means that there is some type of fibrous or hyaline type tissue, which can be like a cartilage like tissue. He indicated that to him the term would be one to imply there is some type of thickening of the fat pad or tissue that would be sitting way below the patella at the joint lining-below the kneecap. Anatomically he testified that this is five inches away from the area where the employee claimed he was struck-“It’s in an area remote from the claimed injury”. He went on to state that many patients over forty to fifty are going to have thickened fat area if they have worked on their legs in the past. He said that would not mask the important findings in the MRI.

Dr. Nogalski was asked, “Can a torn lateral meniscus cause chronic pain and swelling and physical complaints like the type Mr. Parker complained of since 2001?” His answer was, “No I don’t think that they correlate”. He further testified that a torn lateral meniscus does not cause the same type of complaints that Mr. Parker complained of since 2001. He stated that the employee did not have symptoms in the lateral meniscal region to correlate with his injury or general complaints. He went on to testify that a finding from the February 12, 2003 Northland Orthopedic records was of a focal tenderness at the lateral joint-suggests a lateral meniscal problem, but indicated that this is two years after the claimed injury. He testified that if someone has a lateral meniscal tear you would anticipate pain complaints to the outside of the knee.

Dr. Nogalski testified that lateral meniscus tears occur in the absence of a traumatic injury. He stated that lateral meniscal tears do not result from a frontal blow to the kneecap and are typically caused by twisting injuries, something that puts a torque or strain on the knee. He indicated that regarding lateral meniscal tears, the MRI would be right eighty to ninety percent of the time and wrong ten to twenty percent of the time. He testified that in order to accurately reflect the presence of a lateral meniscal tear requires some clinical correlation in order to make a diagnosis. Dr Nogalski testified that there was not any clinical correlation of a lateral meniscal tear in Mr. Parker’s case before his statement to Dr. Roush in 2003.

## **RULINGS OF LAW-**

### **Medical Causation and Permanent Partial Disability**

#### **Medical Causation**

It is the employee’s burden of proving all of the essential elements of the claim.

The burden of proof is on the claimant to prove not only that an accident occurred, and that it resulted in an injury, but also that there is a medical causal relationship between the accident, the injuries, and the medical treatment for which he is seeking compensation. **Dolan V. Bandera’s Café and Bar**, 800 S.W. 2d 163 (Mo. App. 1990). The employee has the burden of proving that there is a medical causal relationship between the accident, the injuries and the medical treatment for which compensation is being sought. **Griggs v. A. B. Chance Company**, 503 S.W. 2d 697 (Mo. App. 1973). In order to prove a medical causation relationship between the alleged accident and medical condition, the employee in cases such as this involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. **Brundige v. Boehringer Ingelheim**, 812 S.W. 2d 200 (Mo. App. 1991). It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. “Probable” means founded on reason and experience which inclines the mind to believe, but leaves room for doubt. **Tate v. Southwestern Bell Telephone Co.**, 715 S.W.2d 326, 329 (Mo. App. 1986). Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between complained of conditions and the asserted cause.” **Brundige supra; McGrath v. Satellite Sprinkler Systems, Inc.**, 877 S.W.2d 704, 708 (Mo. App. ED. 1994). The ultimate import of testimony of an expert concerning causation is to be drawn from all of the evidence. **Choate v. Lily Tulip, Inc.**, 809 S.W.2d 102, 105 (Mo. App. 1991).

It is the responsibility of the Court and hence the Labor and Industrial Relations Commission to evaluate and determine the credibility of medical witnesses. As **Hall v. Country Kitchen Restaurant**, 936, S.W. 2d 917 (Mo. App. S.D. 1997) pointed out:

“The decision to accept one of two conflicting medical opinions is an issue of fact for the Commission.” **Johnson v. Denton Const. Co.**, 911 S.W. 2d 286, 288 (Mo.banc 1995); see also **Duncan v. Springfield R-12 Sch. Dist.**, 897 S.W. 2d 108, 113 (Mo.App. S.D. 1995) (holding that “where the right to compensation depends upon which of two conflicting medical theories should be accepted, the issue is peculiarly for Commission’s determination”).

Medical causation is the most important issue in this case. The threshold issue is whether the employee’s injury was medically causally related to his accident. The expert medical evidence, pro and con, is provided by the medical testimony and medical opinions of Dr. Thomas Musich and Dr. Michael Nogalski. Neither doctor treated the employee. Both doctors were retained by counsel representing either the employee or the employer-insurer. Both doctors reviewed identical medical records in the formulation of their opinions.

When you compare qualifications, other than the fact that both of them are medical doctors, there is no comparison between the qualifications of the two doctors in cases where you are dealing with orthopedic surgeries such as the knee surgery that the employee underwent. Dr. Musich is a family practitioner, not an orthopedic surgeon who has never performed a knee surgery. On the other hand, Dr. Nogalski is a board certified orthopedic surgeon who specializes in knee and shoulder surgeries. More importantly Dr. Nogalski has performed hundreds if not thousands of knee surgeries. Dr. Musich’s medical opinion was, “It’s my medical opinion that the work trauma of 2001 is a substantial factor in the development of acute left knee pathology that eventually required surgical intervention and has resulted in chronic residual complaints”. Dr. Nogalski’s medical opinion was that the employee’s left knee surgery performed by Dr. Perry was not reasonably required to cure or relieve the effects of either of the employee’s knee injuries. He also stated that a torn lateral meniscus does not cause the same type of complaints that Mr. Parker complained of since 2001.

In the Court’s opinion, in determining the credibility of medical witnesses, the doctor’s opinions and more importantly the soundness of their opinions and the information their opinions is based on is just as if not more important that the medical witnesses underlying qualifications.

Dr. Musich gave no real rational or provided any credible explanation for his opinion. On the other hand, Dr. Nogalski provided his opinion and then explained the criteria that he used to reach his conclusions. The Court has already set out the doctors’ respective opinions and the basis for those opinions.

After a consideration of all of the evidence in the case, the Court specifically finds that the opinions of Dr. Nogalski are more credible than those of Dr. Musich. In this particular case, the qualifications of the doctors’ were a factor that the Court utilized in reaching its decision. When analyzing the facts in this case, the medical opinion of a board certified orthopedic surgeon who specializes in knee surgeries was deemed to be more credible than the opinion of a family practitioner who has never performed a knee surgery. More importantly, the Court found that the opinions of Dr. Nogalski were well founded and well reasoned given the information and medical history that was presented to him. The Court therefore specifically finds that the employee has failed to meet his burden of proof on medical causation. The Court further specifically finds that the employee’s injury, which caused surgical intervention, was not medically causally related to his accident. The Court further finds that the employee has not proven that there is a medical causal relationship between the accident, the injuries, and the medical treatment for which he is seeking compensation.

### **Permanent Partial Disability**

In these cases the employer-insurer has admitted that the employee had two separate injuries, one on April 20, 2001 and the second on December 6, 2001. While these injuries were consolidated for trial, they are separate and distinct cases and the parties asked that the Court prepare a separate final award in each case.

The Court has denied the issue of medical causation, but must provide a decision on whether the employee is entitled to recover any permanent partial disability in each case. Several doctors provided their opinions on this matter.

Dr. Walentynowicz rated the employee as having a ten percent permanent partial disability of the left lower extremity due to both accidents based on persistent pain and weakness. However, Dr. Walentynowicz testified that he could not tell how much disability applied to each accident.

Dr. Musich testified that, “It’s my opinion based on a reasonable degree of medical certainty that General Parker suffered acute trauma, adversely affecting his left knee on two separate occasions in 2001 during the course and scope of his employment as a union boilermaker”. “It’s my medical opinion that the work trauma of 2001 is a substantial factor in the development of acute left knee pathology that eventually required surgical intervention and has resulted in chronic residual complaints”. “It is my medical opinion that the work traumas of 2001 have resulted in a permanent partial disability of 30% of the lower extremity at the knee level”.

Dr. Nogalski testified “Given that he had undergone an arthroscopy it appeared he had a 7 percent permanent partial disability of the left lower extremity at the level of the left knee. And given the dispute in this matter, it looks like 1 percent of the permanent partial disability would be attributable to his two claimed injuries in 2001 which would be essentially that of a contusion”.

The Court has reviewed case law in order to determine whether the employee is entitled to and has presented convincing evidence meeting his burden and proving that he is entitled to an award of permanent partial disability for his accident of April 20, 2001 and in addition for his accident of December 6, 2001.

A party who claims benefits under the workers’ compensation law has the burden to prove that an accident occurred and that it resulted in injury. A claimant must show that a disability resulted and the extent of such disability. Proof of permanent disability requires reasonable certainty. The claimant must produce evidence from which it reasonably may be found that such injury resulted from the causes for which the employer would be liable. See **Griggs v. A. B. Chance**, 503 S.W.2d 697 (Mo App. 1973).

In **Plaster v. Dayco**, 760 S.W.2d 911 (Mo. App. 1988), the employee had preexisting disability to her back and she reinjured her back at work. The employee had a rating of about 60% permanent partial disability for the overall back condition. There was no expert evidence as to what percentage of the 60% preceded the workers’ compensation injury. The Court held that it was the employee’s duty to offer sufficient expert testimony to prove the extent of the preexisting disability in order to determine what percentage of permanent partial disability is attributable to the job related injury which was the basis for the workers’ compensation claim. Failure to do so bars the employee from recovering permanent partial disability benefits.

In **Bersett v. National Supermarkets, Inc.**, 808 S.W.2d 34 (Mo. App. 1991), the employee had an injury to his right ankle. A week later, the employee injured his ankle again by pushing a cart. The employee only filed a claim on the first injury. The employee argued that the second alleged injury was a manifestation of the first injury and was not an injury. The Court found that the employee had sustained two injuries. The Court held that when there are two events, one compensable and one not compensable, which contribute to the alleged disability, it is the claimants burden to prove the nature and extent of disability attributed to the job related injury. The employee failed to present any evidence to exclude a finding that the non-compensable event did not cause some or all of the employee’s disability. There was no evidence to support a finding of a separate percentage of disability and no evidence to support a finding that none of claimant’s disability was attributable to a second non-compensable accident.

In **Goleman v. MCI Transporters**, 844 S.W.2d 463 (Mo. App. 1992), the Court held that it was the employee’s burden to prove the nature and extent of the disability attributed to the compensable injuries. The employee had two work related injuries to his low back. The employee filed a claim on the second low back injury. A doctor rated the employee’s permanent partial disability at 50% but did not differentiate between the two work injuries. The Court held that since the claim on the second injury was the only one being heard, the employee was only entitled to a recovery for the claim at issue. The Court held that the employee was not entitled to recover for the second injury where part or all of the disability was the result of the first accident. The Court held that it was the employee’s burden to prove the nature and extent of disability attributed to the compensable injury even though both injuries were work related and sustained while employed by the same company where separate claims were pending for each injury.

In this case, each case is potentially compensable at least to the extent that a bruise causes any permanent partial disability, as the medical providers were consistent in diagnosing at least a contusion of the left knee-specifically of the quadriceps tendon. As set forth in the above cases, the employee has the burden to prove the nature and extent of disability attributable to each accident or injury even though the employee had two subsequent work-related accidents and injuries while working for the same employer. The employee would also have the burden to separate any permanent partial disability caused by the surgical intervention from any permanent partial disability caused by each accident.

Dr. Walentynowicz's opinion was that he could not tell how much disability applied to each accident. The Court finds that Dr. Walentynowicz's medical opinion regarding the extent of disability was not sufficient for the employee to meet his burden of proof on either claim as set forth in the above cited Appellate cases. Dr. Musich's opinion gave an overall rating of 30%. He also does not separate out any disability that is applied to each accident. The Court finds that Dr. Walentynowicz's medical opinion regarding the extent of disability was not sufficient for the employee to meet his burden of proof on either claim as set forth in the above cited Appellate cases. Dr. Nogalski's opinion could be construed to separating out disability caused by the surgery but he did not separate disability caused by the two separate accidents that occurred in 2001. The Court finds that Dr. Nogalski's medical opinion regarding the extent of disability was not sufficient for the employee to meet his burden of proof on either claim as set forth in the above cited Appellate cases. This finding takes into consideration Dr. Nogalski's statement about a one percent disability.

Based on a review of all the evidence and case law, I find that the employee has failed to meet his burden of proof that he sustained permanent partial disability as a result of either the April 20, 2001 accident or the December 6, 2001 accident. The employee is therefore not awarded any permanent partial disability benefits.

### **Previously Incurred Medical Bills and Temporary Total Disability**

As the Court denied the cases on the issue of medical causation and did not order the payment of any permanent partial disability benefits, the issues of previously incurred medical bills and temporary total disability are moot and are not addressed by the Court.

### **ATTORNEY'S FEE**

No attorney fees are awarded in this case.

### **INTEREST**

No interest is due in this case.

Date: \_\_\_\_\_

Made by:

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Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Mr. Jeffrey W. Buker  
*Division Director*  
*Division of Workers' Compensation*