

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

Injury No.: 99-038527

Employee: Sandra J. Pruett
Employer: Bleigh Construction Company
Insurer: Liberty Mutual Fire Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 13, 1999
Place and County of Accident: Hannibal, 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 November 28, 2005. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued November 28, 2005, 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 25th day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Sandra J. Pruett

Injury No. 99-038527

Dependents:
Employer: Bleigh Construction Company
Additional Party:
Insurer: Liberty Mutual Fire Insurance Co.
Hearing Date: June 14, 2005,
October 12, 2005.

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

Checked by: HDF/cs

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?
4. Date of accident or onset of occupational disease: April 13, 1999.
5. State location where accident occurred or occupational disease was contracted: Hannibal, 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:
Fell and twisted/injured left knee.
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:
14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability: \$96,762.87.
16. Value necessary medical aid paid to date by employer/insurer? \$74,492.33.
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$562.67 ttd, ptd/\$294.73 ppd
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$1,890.00.

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning February 27, 2004, for Claimant's lifetime.

22. Second Injury Fund liability: N/a.

TOTAL:

23. Future requirements awarded: Future medical.

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 (other than future medical) hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sandra J. Pruett

Injury No: 99-038527

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Bleigh Construction Company

Additional Party

Insurer: Liberty Mutual Fire Insurance Co.

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on June 14, 2005, and October 12, 2005. Additional exhibits inadvertently removed at the time of the trial were submitted by November 14, 2005.

The parties stipulated that on or about the 13th day of April, 1999, the claimant was in the employment of Bleigh Construction Company; the claimant sustained an injury by accident; the

accident arose out of and in the course of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Liberty Mutual Insurance Company; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; the rate of compensation on the date of accident was \$562.67 per week for temporary total and/or permanent total disability benefits, \$294.73 per week for permanent partial disability benefits; temporary disability benefits have been paid to the claimant to date in the amount of \$96,762.87, those payments being made through February 26, 2004; medical aid has been provided in the amount of \$74,492.33.

The issues to be resolved by hearing include 1) the causation of the injuries alleged, 2) the liability of the employer/insurer for past medical treatment, 3) the liability of the employer/insurer for past temporary total disability benefits from and including February 27, 2004, forward, 4) the nature and extent of permanent partial disability (permanent total disability is alleged), 5) the liability of the Second Injury Fund, 6) the liability of the employer/insurer for future medical treatment, and 7) the liability of the employer/insurer for mileage expenses.

FINDINGS OF FACT

The claimant, Sandra Pruett, was 46 years old as of the date of the hearing. Ms. Pruett graduated from high school and holds an associates degree from a trade school. Ms. Pruett has also trained with H & R Block and has held a real estate broker's license. Ms. Pruett has worked in sales, fertilizer delivery and doing secretarial work.

Ms. Pruett last worked on April 13, 1999, for Bleigh Construction Company (Bleigh), when, while removing a form from a concrete "invent," she knelt down and heard a loud pop in her left knee. Ms. Pruett immediately felt pain in her left knee and was unable to stand. Ms. Pruett received treatment for her left knee, including surgeries with Dr. Bieniek and, later, with Dr. Hertel (twice) for a total of three left knee surgeries. After her second surgery with Dr. Hertel in September of 2002, Ms. Pruett was using a full left leg brace and crutches when she fell in her garage, hitting her right knee on a metal stake. Ms. Pruett had three surgeries on her right knee with Dr. Hertel or his partner, Dr. George. Eventually, Ms. Pruett's right kneecap was removed. Ms. Pruett was discharged from Dr. Hertel's care in February of 2004.

Currently, Ms. Pruett receives her medications, Lasix, Lorazepam and Lodine, for water retention, anxiety and pain, respectively, from her family physician, Dr. Hevel. Ms. Pruett has been paying for these prescriptions herself.

Ms. Pruett testified to feeling depressed and moody since her accident.

Ms. Pruett offered an exhibit (R) as evidence of mileage/travel expenses, but said that not all charges reflected on the exhibit remained unpaid by the employer/insurer. There was no objection to the admission of this exhibit and it is considered part of the record in this case.

Ms. Pruett offered Exhibit U into evidence as a record of her bill for services provided by accredited nurse aid Gail Ann Failor Rothweiler. There was no objection to the exhibit and it is thus admitted as part of the evidence in this case. The total bill is \$1,890.00 for services from October 28, 2002, through November 29, 2002. Dr. George's records reflect that he operated on Ms. Pruett's right knee on October 24, 2002, at which time Ms. Pruett was in a left knee brace as the result of her most recent left knee surgery. Ms. Pruett was put in a right knee brace after surgery on October 31, 2002. The left knee brace was removed and Ms. Pruett started on "active quad exercises." The right knee brace was discontinued on December 12, 2002. In addition, Dr. Hertel addressed Ms. Pruett's need for home health care as the result of both knee injuries by letter of January 16, 2003, in which he stated that Ms. Pruett would have need of care immediately following her discharge from St. Luke's Hospital "due to the recent repair of the ACL on the left and the fracture of the patella on the right."

Likewise, Ms. Pruett offered Exhibit V into evidence as a record of prescription expenses for medications prescribed for her knee injuries in this case which she has paid.

Currently, Ms. Pruett complains of swelling in her left knee and looseness, as if the graft is starting to loosen. Ms. Pruett wears a brace on her left knee when walking, especially if she is descending a rocky area. In her right knee, Ms. Pruett has pain about 95 percent of the time as well as weakness and lack of stability.

Since 1999, Ms. Pruett has attempted work in convenience stores. Ms. Pruett worked a total of six weeks in the convenience stores and said she could not handle the work due to the swelling in her legs and back pain. Ms. Pruett has also done some tax preparatory work since 1999. Ms. Pruett

testified that she is no longer mentally able to engage in tax preparatory work.

In 1991, Ms. Pruett injured her back in a work-related accident which she settled based on 15 percent permanent partial disability of the "mid back." Prior to April 13, 1999, according to Ms. Pruett, she made an almost complete recovery from her injury to her back, suffering only occasional "twinges" or muscle spasms; Ms. Pruett took Advil for these conditions.

Dr. Wayne Stillings, physician and board certified psychiatrist, testified by deposition that he evaluated Ms. Pruett on August 2, 2004. Dr. Stillings found Ms. Pruett to be unable to work, to be permanently and totally disabled, from a psychiatric standpoint. Dr. Stillings opined that Ms. Pruett's diagnoses of "mood disorder due to injuries to both knees," "pan disorder associated with both psychological factors and a general medical condition due to injuries to both of her knees," and "major depressive disorder severe, with paranoia" are attributable to her knee injuries resulting from the April 13, 1999 accident.

With regard to future medical treatment, Dr. Stillings recommended psychotherapy to manage Ms. Pruett's pain in her knees and her depression and pharmacotherapy, including anti-depressants, a sleep aid, an anti-inflammatory agent and a non-narcotic analgesic. Dr. Stillings felt that the psychotherapy and pharmacotherapy were important to prevent deterioration of Ms. Pruett's mental condition, not necessarily to improve it.

During cross-examination, Dr. Stillings admitted that other stressors in Ms. Pruett's life, other than the pain from her knees, such as financial problems, a child in Iraq, a grandchild out of wedlock, were not made known to him.

Dr. David Volarich, D.O., testified by deposition twice and stated that he saw Ms. Pruett on July 18, 2001, and on June 17, 2004. Dr. Volarich diagnosed Ms. Pruett as follows:

First, internal derangement left knee in the form of a torn anterior cruciate ligament and torn medial meniscus, status-post three separate surgical repairs including two separate ACL reconstructions.

Second was trip and fall on 10/23/02 causing right patellar fracture status-post three separate surgical repairs culminating in patellectomy which is complete removal of the patella.

Third was aggravation of thoracolumbar syndrome.

Dr. Volarich opined that Ms. Pruett's accident on April 13, 1999, which occurred when Ms. Pruett bent down to pick up the concrete form and felt a pop in her left knee as she attempted to stand caused the torn ACL and torn medial meniscus with three attendant surgeries. Dr. Volarich felt that it was the left knee injury which caused the fall resulting in the right knee injury with three attendant surgeries. Finally, Dr. Volarich opined to an aggravation of Ms. Pruett's back syndrome as the result of her lower extremity injuries.

Dr. Volarich opined to permanent disability as the result of the April 13, 1999 accident as follows: 60 percent of the left knee, 60 percent in the right knee, 5 percent of the back. Dr. Volarich also opined to previous disability of 25 percent of the body at the T-12 level of the spine.

With regard to additional medical treatment, Dr. Volarich felt that Ms. Pruett would require:

narcotics and non-narcotic medications including the non-steroidal anti-inflammatory drugs, muscle relaxants, physical therapy including bracing, as well as similar treatments as directed by the standard of medical practice for the symptomatic relief of her complaints.

Dr. Volarich specifically noted that braces would be beneficial to Ms. Pruett when she is in a situation which could be stressful to her knees

Dr. Volarich did not find Ms. Pruett to be permanently and totally disabled as the result of her April 13, 1999 accident. With regard to permanent disability resulting from the April 13, 1999 accident and pre-existing disability to the back, Dr. Volarich stated that Ms. Pruett should seek out

vocational assessment because “I knew that she couldn’t get back to heavy labor work.”

With regard to Ms. Pruett’s pre-existing back injury, Dr. Volarich stated that the history he was given indicated that the back injury occurred on September 26, 1991. Dr. Volarich stated that Ms. Pruett was not hospitalized for the back injury, but that Ms. Pruett was put in a brace, given physical therapy and “eventually sent . . . back to work.”

Mr. James England, rehabilitation counselor, testified by deposition that he evaluated Ms. Pruett on January 31, 2002, and on March 1, 2005. Mr. England stated that given only Dr. Hertel’s limitations, Ms. Pruett would not be able to return to construction work, but could engage in “accounting clerk, bookkeeping.” However, given the restrictions imposed by Dr. Volarich and Dr. Stillings, Mr. England felt that Ms. Pruett could not engage in “work activity or go out and work day in and day out and actually get the job done.”

With regard to his own impression of Ms. Pruett, Mr. England offered the following:

I felt just the impression that she made on me would be something that would not be viewed positively by a prospective employer. She came across when she was in here as very tired, physically uncomfortable and really kind of -- The word I use was frazzled emotionally, but I mean there were some just obvious problems that were observable when she was in here as far as the interaction between the two of us. So I think that would be problematic. But I think even more important, if she was experiencing the combination of problems with the physical and the emotional together, I didn’t see how she would be able to go in and sustain activity in a work setting.

During cross-examination Mr. England admitted that it was Dr. Stillings’ psychiatric diagnosis that led to his opinion that Ms. Pruett was unemployable. Mr. England also stated that he was unaware of Ms. Pruett’s work preparing over 200 tax returns in 2004. Mr. England was aware of two short-term work experiences which Ms. Pruett attempted with convenience stores in 1999. Mr. England was aware of no attempts which Ms. Pruett had made to return to work since 2003 other than bookkeeping out of her home for a family friend.

Mr. England further stated, during cross-examination by counsel for the Second Injury Fund, that Ms. Pruett’s 1991 back injury left Ms. Pruett without permanent restrictions.

Dr. Stacey L. Smith, M.D., psychiatrist, testified by deposition that she is a board certified psychiatrist and that she examined Ms. Pruett on April 22, 2005. Dr. Smith opined that Ms. Pruett’s injury of April 13, 1999, was a substantial cause in her diagnosis of depression. Dr. Smith also cited family stressors and lack of structure as the result of not working as contributing to Ms. Pruett’s depression. Dr. Stacy described treatment as “straight forward.”

Dr. Ronald Hertel, board certified orthopaedic surgeon, testified by deposition that he initially saw Ms. Pruett for her left knee injury on April 11, 2000. When Dr. Hertel saw Ms. Pruett, she had had an anterior cruciate ligament repair on the left knee performed by Dr. Bieniek. Dr. Hertel diagnosed the ACL ligament tear as well as a patella femoral mal-alignment. On December 12, 2000, Dr. Hertel performed an arthroscopic lateral release on the left and took out a torn portion of the left medial meniscus. Dr. Hertel released Ms. Pruett in May of 2001, with a 25-percent disability and restrictions “involving no repetitive climbing, prolonged standing or walking . . . able to sit or stand at will, and not capable of returning to her regular job as a laborer.” Dr. Hertel, however, opined that Ms. Pruett was capable of a return to other employment.

Dr. Hertel next saw Ms. Pruett about a year later, on May 28, 2002, and again on June 5, 2002, at which time Dr. Hertel found a “total disruption of the continuity of the ACL graft that was previously inserted. And it was my opinion that the findings were the result of attenuation of the graft from the initial episode which occurred on April 13, 1999 requiring the ACL repair. The graft was attenuated. At that time, it was my opinion twisting of the knee resulted from a complete dissolution of a thin graft.”

Dr. Hertel went on to repair the dissolution of the ACL graft on September 17, 2002, using the right patellar tendon for the graft.

On October 23, 2002, Ms. Pruett was seen by Dr. Hertel’s associate, Dr. George, after she fell on her right knee sustaining a “transverse fracture of the right patella with significant displacement.” Dr.

George performed “an open reduction and repair of a fracture of the right patella.” In April of 2003, Dr. Hertel took out pins and wires that Dr. George had inserted into Ms. Pruett’s right knee. Ms. Pruett continued to wear her knee immobilizer. In July of 2003, Dr. Hertel performed a patellectomy of Ms. Pruett’s right knee. Dr. Hertel opined that after September 11 of 2003, that Ms. Pruett “could return to work involving sitting or standing at will, but no prolonged standing or sitting.” Dr. Hertel’s evaluation of Ms. Pruett’s ability to engage in employment was not significantly different in February of 2004.

Dr. Hertel opined to a 40-percent permanent partial disability of the right knee as the result of Ms. Pruett’s April 13, 1999 accident and injury when he saw her in February of 2004.

During cross-examination, Dr. Hertel stated that the April 13, 1999 accident was a significant cause of Ms. Pruett’s need for the left lateral release he performed. Dr. Hertel stated that the left medial meniscal tear he found in June of 2002 was the result of the loss of continuity of the left anterior cruciate ligament, i.e., the lack of ACL stability can cause a meniscal tear with activity. Dr. Hertel connected this later left meniscal tear to the April 13, 1999 accident; he was not, however, as certain that the meniscal tear discovered during his first left knee surgery for Ms. Pruett was related to the April 13, 1999 accident.

Dr. Hertel also stated that Ms. Pruett required home health care assistance after her initial right knee surgery, although he did not specify for what period of time.

With regard to Ms. Pruett’s permanent disability in her left knee, Dr. Hertel opined that even after her surgical revision he found a 25-percent disability to the left knee.

Dr. Hertel found Ms. Pruett to be in no need of further medical treatment, with the exception of over-the-counter medications for knee pain.

APPLICABLE LAW

To be entitled to workers’ compensation benefits, the claimant has the burden of proving not only that the accident arose out of and in the course of his employment but also that the alleged injury or death was directly caused by the accident. Kerns v. Midwest Conveyor, 126 S.W. 3d 445, 453 (Mo. App. W.D. 2004). In other words, a claimant must establish a causal connection between the accident and the compensable injury. Id at 453.

The claimant has the burden of proving all essential elements of a claim, including causation. Grime v. Altec Industries, 83 S.W.3d 581, (Mo. App. W.D. 2002) citing Decker v. Square D. Co., 974 S.W.2d 667, 60 (Mo. App. W.D. 1998). The question of causation is one for medical testimony, without which a finding for the claimant would be based on mere conjecture and speculation and not on substantial evidence. Grime citing Jacobs v. City of Jefferson, 991 S.W.2d 693, 696 (Mo. App. W.D. 1999). The claimant bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. Jacobs at 696.

An employee is considered permanently and totally disabled if he cannot “competently compete in the open labor market given his condition and situation.” Messex v. Sachs Electric Co., 989 S.W.2d 206, 210 (Mo. App. 1999). He must be unable to return to any employment, not merely his former employment, Section 287.020.7, RSMo. (1986). The term “any employment” means any reasonable or normal employment or occupation. Phelps v. Jeff Wolk Construction Co., 803 S.W.2d 641, 645 (Mo. Ct. App. 1991). Therefore, the pivotal question to be answered is “whether an employer in the usual courses of business would reasonably be expected to hire the claimant in the claimant’s present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired.” Reiner v. Treasurer of State of Missouri, 837 S.W.2d 363, 367 (Mo. Ct. App. 1992). Further, Missouri law requires an inquiry into whether the employee can compete with other potential employees for a vacant position. Patchin v. National Super Markets, Inc., 738 S.W.2d 166, 167 (Mo. Ct. App. 1987); Laturno v. Carnahan, 640 S.W.2d 470,, 472-473 (Mo. Ct. App. 1982).

Missouri law also speaks to those injured workers who are not completely “bedridden,” stating:

[i]n our view, a claimant who is found by the commission to be “only able to work very limited hours at rudimentary tasks” is a totally disabled worker. Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert.

Grgic v. P & G Constr., 904 S.W.2d 464 (Mo. Ct. App. 1995), citing Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. Ct. App. 1990).

Section 287.220.1 provides as follows:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby 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 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.

When the last injury alone causes the employee to become permanently and totally disabled, then the employer is liable for permanent disability compensation under Section 287.200 RSMo. 2000 Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994), Kern v. General Installation, 740 S.W.2d 691 (Mo. App. 1994).

Under Missouri law, the administrative law judge must first determine the extent of the employer's liability for the last injury. Roller v. Treasurer of the State of Missouri, 935 S.W.2d 739, 740 (Mo. App. 1996). After making this determination, the administrative law judge next decides the

extent of the pre-existing disabilities. Finally, the administrative law judge determines whether the pre-existing disabilities combine with the primary injury to create permanent total disability. If the combination of these injuries makes the claimant permanently and totally disabled, then the Second Injury Fund is liable for disability compensation, but only after the employer has paid the compensation due for the disability resulting from the primary injury. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-178. However, as noted above, when the last injury alone causes the employee to become permanently and totally disabled, then the employer is liable for the permanent disability compensation for the employee.

The statutorily prescribed formula found at Section 287.220 (RSMo. 2000) for determining Second Injury Fund liability for permanent and total disability clearly incorporates a medical causation component. The employer's liability must be determined first, and provides that the employer "shall be liable only for the disability resulting from the last injury considered alone and of itself." (Emphasis added). The statute then provides "if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent and total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. . ."

Applying this language, it is clear that if the last injury "considered alone and of itself" results in permanent and total disability, then the Second Injury Fund has no liability and the employer is responsible for the full permanent total disability benefits. Roller v. Treasurer of the State of Missouri, 935 S.W.2d 739 (Mo. App. 1996). Therefore, if one evaluates the last injury by itself and asks "if this were the only disability that the claimant had, would he be able to work," if the answer is "no," then the employer is responsible for the payment of the permanent and total disability benefits, notwithstanding the existence of pre-existing disabilities.

Section 287.140 RSMo. (1994) requires that the employer provide "such medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required . . . to cure and relieve [the employee] from the effects of the injury." It is unnecessary to show conclusive evidence to support a claim for medical care, rather, it is sufficient to show by a reasonable probability that additional care is needed. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995).

AWARD

Ms. Pruett has sustained her burden of proof that she injured her left knee as the result of her work at Bleigh. Ms. Pruett testified that it was while kneeling to remove a concrete form that her left knee "popped" and her course of treatment for the knee began. Ms. Pruett's right knee was injured while Ms. Pruett was recuperating from a left knee surgery and fell while she was using a left knee brace and crutches. Dr. Volarich and Dr. Hertel both testified credibly that Ms. Pruett's knee injuries were both caused by her work for Bleigh. Dr. Stillings and Dr. Smith both opined that Ms. Pruett's injuries to her knees resulting from the April 13, 1999 accident resulted in her depression. While Dr. Stillings found the knee injuries to be the sole stressor, Dr. Smith pointed to family stressors as well. The knee injuries and the depression sustained by Ms. Pruett are found to have been caused by her April 13, 1999 accident.

The claimant, Ms. Pruett, has sustained her burden of proof that she is entitled to payment of past medical bills from the employer/insurer, specifically the nursing care expenses in the amount of \$1,890.00. The prescription medications for which payment or reimbursement is sought are not supported by the medical records and are, thus, not awarded. The mileage expenses presented are similarly not awarded because Ms. Pruett testified that some of these had been paid but then failed to identify which trips remain uncompensated. The nursing care expenses are awarded. It is obvious from Dr. George's and Dr. Hertel's records that Ms. Pruett was immobile in the period following her right knee surgery and the ensuing nursing assistance is compensable.

The claimant, Ms. Pruett, has sustained her burden of proof that she is permanently and totally disabled from and including February 27, 2004, forward. Ms. Pruett testified with regard to her difficulty ambulating as the result of her knee injuries. Ms. Pruett testified about her mental condition, stating she was moody and depressed. Ms. Pruett's complaints are supported by her treating and evaluating physicians and psychiatrists, all of whom acknowledge the severity of Ms. Pruett's restrictions. Mr. England, the only vocational rehabilitation counselor who offered an opinion in this case, found Ms. Pruett to be permanently and totally disabled as the result of the April 13, 1999 left knee injury and its sequelae, including the right knee injury and the deterioration of Ms. Pruett's emotional health.

The Second Injury Fund is not liable in this case where the credible evidence points to no pre-existing disability which combines with the 1999 left knee injury, right knee injury and depression to cause Ms. Pruett's status as permanently and totally disabled. Rather, the evidence presented by the claimant in the form of Dr. Volarich's testimony, Dr. Stillings' testimony and Mr. England's testimony supports a finding of permanent and total disability against the employer/insurer.

The claimant, Ms. Pruett, has sustained her burden of proof that she is entitled to future medical care from the employer/insurer. Dr. Volarich testified credibly regarding Ms. Pruett's need for medication and physical therapy. Dr. Stillings testified regarding Ms. Pruett's future medical needs as well, citing medications to cure and relieve the effects of the knee injuries as well as psychotherapy and medications to manage Ms. Pruett's depression.

Date: November 28, 2005

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret
Patricia "Pat" Secret, *Director*
Division of Workers' Compensation