

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

Injury No.: 00-034896

Employee: Stephen G. Reece
Employer: K. B. Hart Electric, Inc.
Insurer: Federated Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged March 23, 2006
Place and County of Accident: Alleged St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 October 5, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued October 5, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Stephen G. Reece

Injury No. 00-034896

Dependents:

Employer: K. B. Hart Electric, Inc.

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund

Insurer: Federated Mutual Insurance Company

Hearing Date: June 21, 2005; finally submitted 7/21/05

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

Checked by: KD:bf (by df)

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: 3/23/00
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee suffered a fall off of a ladder while working as an electrician.
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: Right knee and low back
14. Nature and extent of any permanent disability: See award.
15. Compensation paid to-date for temporary disability: \$8,822.80
16. Value necessary medical aid paid to date by employer/insurer? \$10,874.92
17. Value necessary medical aid not furnished by employer/insurer? n/a
18. Employee's average weekly wages: \$842.18
19. Weekly compensation rate: \$561.45/\$303.01
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

The issues as to medical causation, future medical care, permanent disability and temporary total disability are found in favor of the employer and insurer. See award.

22. Second Injury Fund liability: The claim as against the Second Injury Fund is denied. See award.

TOTAL:

23. Future requirements awarded: See award.

Said payments to begin and to be payable and be subject to modification and review as provided by law.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Stephen G. Reece

Injury No: 00-034896

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

Dependents:

Employer: K. B. Hart Electric, Inc.

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund

Insurer: Federated Mutual Insurance Company

Checked by: KD:bf (by df)

The claimant, Mr. Stephen G. Reece; the employer and its insurer, K B Hart Electric Inc. and Federated Mutual Insurance Company; and the State Treasurer, as Custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered in to certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. The parties acknowledge that the issues to be resolved at hearing are as follows:

Medical causation;
Future medical care;

Temporary total disability;
Permanent disability; and
Liability of the Second Injury Fund

Mr. Reece appeared at hearing and testified on his own behalf. The claimant further submitted the deposition testimony of Drs. Raymond Cohen and Jay Liss, and of Mr. James England. The employer and insurer submitted the deposition testimony of Dr. Marvin R. Mishkin.

EXHIBITS

The hearsay objection of the Second Injury Fund to Claimant's Exhibit H was sustained at hearing. The hearsay objection made to Claimant's Exhibit Y was also sustained, offer of proof made. The following exhibits are in evidence:

Claimant's Exhibits

- A. Certified medical records of SSM Corporate Health
- B. Certified medical records of St. Joseph Health Center
- C. Medical records of Anthony J. Berni, M.D.
- D. Certified medical records of St. Joseph Health Center (right knee)
- E. Certified records of St. Charles Sports & Physical Therapy, Inc.
- F. Certified medical records of Northwest Internist (Dr. Bonsanti)
- G. Certified medical records of DePaul Health Center (MRI)
- I. Operative report of Dr. James T. Merenda (back)
- J. Certified medical records of James T. Merenda, M.D.
- K. Certified medical records of James T. Merenda, M.D.
- L. Certified medical records of Pain Management Services (Dr. Smith)
- M. Report of Richard M. Di Valerio, M.D., dated 9/05/02
- N. Certified medical records of St. Louis Medical Clinic (Dr. Di Valerio)
- O. St. John's Mercy Medical Center MRI dated 9/20/02
- P. St. Luke's Hospital Cervical MRI dated 7/03/02
- Q. Certified medical records of Neurosurgical Associates (Dr. Polinsky)
- R. Certified records of St. Charles Sports & Physical Therapy
- S. Certified medical records of St. Peters Bone & Joint Surgery
- T. Barnes-Jewish St. Peters Hospital operative note date 8/12/99 (left knee)
- U. Deposition of Dr. Raymond Cohen taken on 3/3/05
- V. Deposition of Dr. Jay Liss taken on 12/10/04
- W. Deposition of James England taken on 9/23/04
- X. Letters from Jeffrey P. Gault to Mr. E. Thomas Liese

Employer and Insurer's Exhibits

- 1. Original Claim for Compensation in Injury Number 00-04896
- 2. Amended Claim for Compensation dated 2/9/01
- 3. Amended Claim for Compensation in Injury Number 00-034896 dated 9/11/02
- 4. Amended Claim for Compensation in Injury Number 00-034896 date stamped 8/11/04
- 5. Deposition of Marvin R. Mishkin, M.D. taken on 3/09/05

Second Injury Fund Exhibits

No offers made on behalf of the Second Injury Fund.

FINDINGS OF FACT AND RULINGS OF LAW

The claimant is 56 years old, and has been employed for over thirty years as an electrician, performing mostly industrial and commercial electrical work. The work performed by Mr. Reece included climbing ladders, getting under floors, and often involved overhead reaching to install conduit and lighting. Mr. Reece worked out of a union hiring hall, and could spend anywhere from a matter of weeks or years with the same employer.

Mr. Reece suffered a fall on 3/23/00 while installing lights and conduits at the site of new dorm room construction at Lindenwood College in St. Charles, Missouri. Claimant recalls that he fell from the second or third rung of his ladder

after it collapsed, and testified that while unable to recall what part of him struck the ground, he does recall falling against either the ground or a wall.

Claimant recalls suffering from knee and back pain, and reporting the accident that same day to his foreman. Mr. Reece recalls that he was sore but was able to finish his shift. Claimant testified that he had pain in his back and leg that made it difficult to sleep that night, and was subsequently referred by his employer to SSM Corporate Health.

Medical records from SSM Corporate Health (Claimant's Exhibit A) indicate that the claimant first treated for his complaints on 3/27/00. The claimant was returned to limited duty, no stair climbing or squatting, for what was diagnosed as a right knee strain. Physical therapy did not improve his condition, and an MRI taken on 4/10/00 (Claimant's Exhibit B) was interpreted as revealing a tear and degenerative change of the posterior horn of the medical meniscus. There is nothing in the medical record of SSM Corporate Health to document any history of complaint or treatment with respect to a low back complaint.

Claimant was then referred to Dr. Berni for an orthopedic evaluation of the right knee. On 4/26/00 Dr. Berni performed surgery for posterior medial and lateral meniscus tears, and for chondromalacia of the patella femoral joint and medial femoral condyle. Claimant followed up with Dr. Berni thereafter, and received physical therapy and a series of cortisone shots for complaint of knee pain. In his note dated August 3, 2000, Dr. Berni notes, in part: "I have discussed the risks concerning his knee pain. I feel that this is mostly due to his arthritis at this point, this has certainly been flared up by his injury and whether or not he is in a rapidly progressive phase of his arthritis is unclear to me..... Again, the chondromalacia/arthritis changes in his knee have been occurring over a long period of time during which he was fairly asymptomatic" (Claimant's Exhibit C). Mr. Reece was off of work and receiving temporary total disability benefits from 3/24/00 through 7/11/00. In May of 2000, while off of work following his knee surgery, Mr. Reece filed his original claim for compensation, alleging injury to his right knee and leg (Employer and Insurer's Exhibit No. 1).

Claimant relates that he complained of back pain and of weakness in his legs, but recalls that Dr. Berni would only treat as to his knee. The first documentation to suggest that Mr. Reece had back complaints is not a treatment record, but rather is in a letter dated 10/10/00 from Jeffrey P. Gault, counsel to Mr. Reece, requesting that the employer provide treatment for back complaint that claimant relates to his fall on 3/23/00 (Claimant's Exhibit X).

The first documented treatment related to the low back post the 3/23/00 accident is contained within the records of the claimant's personal physician, Dr. Bonsanti. On or about 12/1/00 the claimant was complaining of low back pain, and was referred for x-ray of the lumbar spine. An x-ray of the lumbar spine taken at DePaul Health Center on 12/01/00 was interpreted as showing "INTERSPACE NARROWING AND HYPERTROPHIC DEGENERATIVE OSTEOARTHRITIC CHANGES". The study further noted "There is almost complete loss of the L4-5 interspace with some eburnation of the opposing bony surfaces and hypertrophic bony overgrowth at the anterior margin of the L4-5 vertebral bodies." Dr. Bonsanti also referred the claimant for an MRI of the lumbar spine, performed on 1/20/01 at DePaul Health Center (Claimant's Exhibit G). The MRI was interpreted as follows:

1. DEVELOPMENTAL SHORT PEDICLE STENOSIS.
2. FACET JOINT DEGENERATIVE CHANGE L4-5 WITH ENDPLATE HYPERTROPHY AND RELATIVELY MARKED REDUCTION IN HEIGHT OF THE L4-5 DISC SPACE.
3. NO FOCAL DISC PROTRUSION IDENTIFIED. NO NERVE ROOT OR FORAMINAL COMPRESSION IDENTIFIED.

The claimant made repeated requests for treatment from the employer prior to an evaluation by Dr. Merenda on or about 2/20/01. Dr. Merenda reviewed the MRI, performed an examination, and determined that surgery was necessary to address what he believed to be multiple levels of stenosis with degenerative disc disease (Claimant's Exhibit J). Dr. Merenda attempted to treat complaints of thigh pain by means of steroid injection, performed by Dr. Smith at St. John's Mercy Medical Center on 3/08/01, and again on 3/29/01. On 4/05/01 the claimant was given a Medrol Dosepak, and was to consider whether he would opt for a third injection. On 5/10/01 Dr. Merenda performed a repeat examination, and noted as follows:

He is neurologically intact today but is quite miserable with pain. His x-rays show autofusion of L4L5, which I probably didn't appreciate on his previous x-rays and this, is where he is most stenotic. I think with this in mind, I will probably offer him just an L3-4 laminectomy without a fusion because I think he is stable enough as it is.

Mr. Reece acknowledged at hearing that he returned to work after his recovery from knee surgery, working as an electrician for about a year, from August of 2000 to July of 2001. Claimant recalls that he first worked for Bob Wright Contracting, acknowledging that there was no light duty, but further recalling that he avoided having to perform work on ladders. Mr. Reece recalls that he also worked for Benson Electric, as foreman on a job at Missouri Baptist Hospital. Mr.

Reece also recalls working at West County Mall, and suffering from a loss of leg strength to the extent that he was unable to get himself up off the floor. In February of 2001, Mr. Reece filed his first amended claim for compensation in the matter, identifying "right knee and leg, and back" as the parts of the body injured by his fall on 3/23/00.

Claimant made several more requests for treatment from the employer prior to having a back surgery performed by Dr. Merenda on 9/04/01. Dr. Merenda performed a decompressive laminectomy from L3 to L5 as per his earlier note on 5/10/01. Claimant had follow up evaluations with Dr. Merenda, who released the claimant for a return to work on 11/12/01 with a 25 pound lifting restriction.

Claimant has not attempted a return to work since his back surgery. On or about September 13 of 2002, the claimant filed a second amended claim in the matter, to allege permanent total disability (Employer and Insurer's Exhibit No. 3).

On 6/26/02 Mr. Reece had a physical examination performed by Dr. Richard M. Di Valerio, a specialist in Rheumatology at Saint Louis Medical Clinic. In his report, Dr. Di Valerio notes, in part, the following history:

This is a nice gentleman who had had back surgery for lumbar spinal stenosis and degenerative disk disease. His back is improved, although he still has some back pain without radicular symptoms. He also has had pain in his neck which radiates into both shoulders and upper arms. He has intermittent dysesthesias without weakness in his upper extremities... (Claimant's Exhibit N)

Dr. Di Valerio ordered a cervical MRI, and also wanted blood work done for a suspected inflammatory arthropathy such as rheumatoid arthritis.

An MRI taken at St. Luke's Hospital on 7/03/02 was interpreted by Dr. Di Valerio as showing disc herniation at C3-4 and C4-5, as well as other areas of disk bulging and foraminal stenosis. On 8/21/02 Dr. Di Valerio met with Mr. Reece and documented complaints of "significant neck and shoulder pain as well as right upper extremity radicular symptoms." Dr. Di Valerio prescribed physical therapy, cervical traction, Vioxx, and Flexeril for cervical disk herniation.

On 7/08/02 Mr. Reece had an evaluation performed by Dr. Polinsky, a neurosurgeon, at the request of Dr. Di Valerio. Mr. Reece complained as to his neck and upper extremities, and also as to chronic low back pain with some discomfort radiating into his legs. Dr. Polinsky offered certain conservative measures for treatment of the claimant's neck pain, and also recommended physical therapy for the neck and low back. (Claimant's Exhibit Q).

On 9/20/02 Mr. Reece returned to Dr. Merenda for further evaluation. In his letter to Dr. Bonsanti, Dr. Merenda noted a history as follows: "As you know, he is an electrician who is about a year out from his decompression laminectomy L4 for stenosis. He did well after that until last month or two he has developed a lot of back and thigh pain again. (Claimant's Exhibit K). On 9/20/02 an MRI of the lumbar spine was taken at St. John's Mercy Medical Center (Claimant's Exhibit O). There is nothing in the medical records of Dr. Merenda to suggest whether he had the opportunity to review the MRI or to comment as to the findings. It is apparent from the letter to Dr. Bonsanti that Dr. Merenda believed that Mr. Reece had been diagnosed with psoriatic arthritis, and that the arthritis was affecting most of the claimant's joints.

MEDICAL CAUSATION

The claimant has the burden of proving all the essential elements of the claim for compensation. 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 the complained of condition and the asserted cause". Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

"A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence." (citations omitted) Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

Dr. Raymond Cohen testified at the request of the claimant with regard to the disability evaluation of Mr. Reece performed on 7/14/03. Dr. Marvin R. Mishkin testified at the request of the employer and insurer with regard to the disability evaluation of claimant that he performed.

Drs. Cohen and Mishkin disagree as to causation with respect to the meniscus tears found in the claimant's right leg, in large part because they have different understandings as to the history of meniscus injury to the right knee. Dr. Cohen notes that inasmuch as claimant denied any prior history of right knee complaint, the reference to right knee, as opposed to left knee, in the records of Dr. Matava (as contained in the records of St. Peters Bone & Joint Surgery, Claimant's Exhibit S) is an error. Dr. Cohen offers several justifications for supposing that the record of Dr. Matava contains a typographical error in referencing the right knee. For one, Dr. Cohen notes that other records support the possibility of such error, to the extent that the records of Dr. Spezia (Claimant's Exhibit S) indicate that claimant made the same complaints to Dr. Spezia to the left knee as are contained within the records of Dr. Matava as to the right knee. Further, Dr. Cohen supposes that if the pathology in the right knee had been old and pre-existing, Dr. Berni would have made a notation to that effect.

Dr. Mishkin also received a history from the claimant in which the claimant denied any prior history of injury or trauma to the right knee, but Dr. Mishkin nonetheless relies on the records of Dr. Matava, and concludes that the finding in the operative report of Dr. Berni as to a complex degenerative tear of the medial meniscus as well as grade 2 chondromalacia is consistent with symptoms as noted in 1998 by Dr. Matava. Dr. Mishkin further believes the records of Dr. Matava suggest that there was clinical evidence supporting the diagnosis of a torn medial meniscus.

Mr. Reece testified at hearing that he had no right knee problems prior to his accident on 3/23/00. When asked on cross-examination as to a history of treating with Dr. Matava for his right knee, Mr. Reece responded that he could not recall treating with Dr. Matava, and could not recall treating for right knee complaints in the summer of 1998.

The records of Dr. Matava indicate that on 6/9/98 Dr. Matava held a "New Patient Visit" with Mr. Reece. There are four separate references to "right" knee, and none as to the left. Claimant was given a prescription for medication, and was to start on a physical therapy program for what was believed by Dr. Matava to be a right knee meniscal tear. Claimant was to see Dr. Matava in 6-8 weeks for follow-up. Claimant returned to Dr. Matava on 8/17/98. The record of that visit, as contained within Claimant's Exhibit S, contains a section entitled **INTERIM HISTORY** that states "Stephen returns for evaluation of his right medial meniscus tear. He has less pain and with the use of non-steroidals and the physical therapy program. He has had occasional clicking but no locking." Mr. Reece was advised to continue his physical therapy and non-steroidal medications, and was to follow up with Dr. Matava in the event his pain increased, or if he developed mechanical symptoms. In the **IMPRESSION/DIAGNOSIS** section of his report, Dr. Matava indicates "Degenerative tear of the medial meniscus".

The records most contemporaneous with those of Dr. Matava are the treatment records of Dr. Spezia as to the left knee, within which the records of Dr. Matava are to be found. Dr. Spezia makes no mention of any prior history of complaint or treatment as to the right knee. However, in his note dated 6/28/99 as to the left knee, Dr. Spezia notes, "HE STATES THAT HE HAS SOME INTERMITTENT POPPING AND SNAPPING AND PAIN IN THE MEDIAL SIDE OF THE KNEE THAT HAS BEEN GOING ON FOR A YEAR NOW." Note that this history is consistent with the history of knee treatment being provided to Mr. Reece by Dr. Matava in June of 1998.

The claimant had an interview with James England, the vocational rehabilitation specialist, on May 25, 2004. The testimony of James England suggests to this fact finder that the history provided to Mr. England by Mr. Reece gave Mr. England cause to believe that the claimant had prior right knee treatment by Dr. Matava, and right knee complaints prior to the work injury on 3/23/00. After providing a history of the records that he reviewed, including as to the records of Dr. Matava as to the right knee, Mr. England was subsequently asked, "When you met with Steve, did you also ask him questions about his background and the medical treatment he had received?" (Claimant's Exhibit W, at page 26). When asked to relate that history, Mr. England, at page 27 of his deposition testimony, included the following medical history, which his testimony suggests was elicited by way of history from Mr. Reece: "In June of 1998 he saw Dr. Matava at Washington University for problems with his right knee. He received conservative treatment only, including medication and physical therapy and was able to go back to work."

Further, when asked a question as to whether pre-existing back and left knee conditions presented a hindrance or obstacle to employment, Mr. England responded as follows:

Well, I think the fact that he had the back problems but he has also had problems with his right knee and his left knee before that to me would certainly indicate the propensity for making it even more difficult for him to either bend or squat, which in the kind of work he did, I think, would be a hindrance to doing that type of work because it involves so much squatting and bending through the workday. (Claimant's Exhibit W at p. 53)

The testimony of the claimant's vocational expert is wholly inconsistent with the notion that the claimant had no prior right knee problems, or that the claimant was unable to recall having treated with Dr. Matava for a right knee condition. The testimony of Mr. England puts in serious doubt the "typo theory" espoused by Dr. Cohen in support of his theory as to medical causation with respect to the right knee. To the extent the weight of the evidence persuades that the reference to the right knee as contained in the record of Dr. Matava is not an error, and given the testimony of Mr. England as to history of complaint, the testimony of Mr. Reece as to the absence of any prior right knee complaints is found not worthy of belief. Further, the testimony of Dr. Mishkin as to medical causation with respect to the right knee is

found to be supported by the evidence, and to be more credible than that of Dr. Cohen. The issue as to medical causation with respect to the complaints of ill being as to the right knee is found in favor of the employer and insurer.

Drs. Cohen and Mishkin further disagree as to causation with respect to the claimant's low back complaints. The evidence, taken as a whole, supports the conclusion of Dr. Mishkin that the claimant suffered a prior back condition that was advanced, degenerative, and that the symptoms complained of by Mr. Reece prior to his surgery were consistent with pre-existing spinal stenosis and degenerative disease. The testimony of Dr. Cohen fails to persuade, as a matter of a reasonable probability, that the work injury suffered by Mr. Reece, falling off of two or three rungs of a ladder, was a substantial factor in the medical condition in need of treatment as to the low back.

Further, the testimony of Drs. Cohen and Liss fails to persuade that the claimant suffers from a depression that is work related. Doctor Cohen assumes that the work injury was the cause of the claimant's current complaints as to his low back and right knee, and that the claimant suffers from a chronic pain syndrome as a consequence of that injury. Further, the opinion of both as to causation with respect to a depression appears ill informed, inasmuch as there is nothing in the records to indicate whether either Dr. Liss or Dr. Cohen was aware that as early as June of 2002 Mr. Reece had been diagnosed as having multiple cervical disc herniations and foraminal stenosis; was complaining of right upper extremity radicular symptoms; and that in August of 2002 Dr. Di Valerio noted that the claimant suffered from "significant neck and shoulder pain". The claimant has failed to persuade that the involved work injury was a substantial factor as to the depression diagnosed by Drs. Cohen and Liss.

PERMANENT DISABILITY/FUTURE MEDICAL CARE

The expert medical testimony of Dr. Mishkin persuades that the claimant suffered from a degenerative and pre-existing condition of his right knee.

Claimant was able to return to work as an electrician post the repair of the medial and lateral meniscus tears of his right knee, avoiding work on ladders when possible. The evidence further persuades that the claimant, in addition to the meniscal tears, suffers from what Dr. Berni describes as "chondromalacia/arthritis changes in his knee have been occurring over a long period of time during which he was fairly asymptomatic". He further states, "I have discussed the risks concerning his knee pain. I feel that this is mostly due to his arthritis at this point, this has certainly been flared up by his injury and whether or not he is in a rapidly progressive phase of his arthritis is unclear to me".

Dr. Mishkin concludes that the claimant was at maximum medical improvement with respect to his right knee, and fails to opine on the subject as to the need for further treatment. Dr. Cohen talks in terms of the potential for the need for a knee replacement in the future, but fails to explain the cause and effect relationship between the involved knee injury and the need for such future treatment. In fact, the entire analysis of Dr. Cohen per his deposition testimony on the subject of diagnosis and causation fails to address the issue as to the degenerative and arthritic nature of the changes found in the claimant's right knee. The testimony of Dr. Cohen fails to persuade that further medical treatment is necessary to cure and relieve of the effects of the right knee injury suffered by Mr. Reece.

In the absence of proof that the claimant's ongoing back complaints are work related, the issue as to future medical care as to the back is found in favor of the employer and insurer. The testimony of Dr. Mishkin further persuades that the claimant has suffered no permanent partial disability to his right knee or to his low back as a result of the involved work injury.

TEMPORARY TOTAL DISABILITY

Section 287.020.7 defines "total disability" as the "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident". "Temporary total disability" is a judicial creation that is defined by case law and not by statute. See Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 820 (Mo.App 1995). Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. Vinson v. Curators of Univ. of Missouri, 822 S.W.2d 504, 508 (Mo.App. 1991) In determining whether an employee is totally disabled, the main issue is whether any employer, in the usual course of business, would reasonably be expected to employ the employee in the employee's present physical condition. Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo.App. 1996). A number of cases have acknowledged that a claimant can be totally disabled even if able to perform sporadic or light duty work. Minnick v. South Metro Fire Protection Dist., 926 S.W.2d 906, 909 (Mo.App. 1996); Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849 (Mo.App. 1995). "A nonexclusive list of other factors relevant to a claimant's employability on the open labor market includes the anticipated length of time until the claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the claimant will return to the claimant's former employment." Cooper v. Medical Center of Independence, 955 S.W.2d 570, 576 (Mo.App. W.D. 1997).

The parties acknowledged at hearing that temporary total disability benefits were at issue. The employer and insurer provided treatment for the involved injury, and paid 15 and 5/7 weeks of benefits during the claimant's recovery period. The parties have acknowledged that a total of \$8,822.80 in temporary total disability benefits have been previously paid, at the stipulated rate of \$561.45 per week, from 3/24/00 through 7/11/00. The claimant has failed to persuade that the involved work injury resulted in a period of temporary total disability for which benefits are due.

SECOND INJURY FUND LIABILITY

The liability of the employer for disability related to a work injury must first be determined before the liability of the Second Injury Fund, if any, can be determined. For example, if the last injury, considered alone, is the sole cause of a permanent and total disability, the employer shall be responsible for that liability, and the Second Injury Fund shall have no liability for the combination of disabilities that are pre-existing and work related. Section 287.220 RSMo; Vaught v. Vaughts, Inc., 938 S.W.2d 931 (Mo.App. S.D. 1997); Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

Second Injury Fund liability is premised on a finding that the involved work injury resulted in a disability that is permanent and partial in nature, Section 287.220 RSMo. In the absence of proof that the involved work injury resulted in any permanent and partial disability as to the low back or right knee, the claim as against the Second Injury Fund must be denied.

Date: October 5, 2005

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
Patricia "Pat" Secrest
Director
Division of Workers' Compensation