

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge by Separate Opinion)

Injury No.: 00-085402

Employee: Cathryne Reid
Employer: Security Armoured Car Services, Inc.
Insurer: Reliance Insurance Co.
c/o MO Property & Casualty Insurance Guaranty Assn.
Date of Accident: July 31, 2000
Place and County of Accident: St. Louis, Missouri

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the March 31, 2005 award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Dr. Kleier's last name was misspelled "Klier" throughout the award and decision of the administrative law judge. For clarity, we note that all references to "Dr. Klier" refer to E.B. Kleier, Jr., M.D.

The administrative law judge identifies the date of injury of August 31, 2000 (introductory paragraph). The date of injury, as stipulated by the parties, is July 31, 2000.

The administrative law judge found that employee first treated with Dr. Kleier for her injury on August 1, 2005 (finding 6). Employee's testimony and the medical records of Dr. Kleier confirm that employee first treated with Dr. Kleier on the date of the injury, July 31, 2000.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued March 31, 2005, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 14th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

SEPARATE OPINION CONCURRING IN PART
AND DISSENTING IN PART

I respectfully dissent from the Commission majority's decision to deny employee workers' compensation benefits for her knee injuries. I believe employee has met her burden of proving the knee injuries are compensable.

The claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and the injury. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195, 198 (Mo.App. E.D.1990). The claimant does not, however, have to establish the elements of his case on the basis of absolute certainty. *Id.* It is sufficient if he shows them by reasonable probability. *Id.* "Probability means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Id.* at 198-99; *Ellis v. Western Elec. Co.*, 664 S.W.2d 639 (Mo.App.1984).

Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo. App. 1996).

"[A]ll doubts should be resolved in favor of the employee and in favor of coverage, but a claim will not be validated where some essential element is lacking." *Id.* at 223.

"[A]n injury is compensable when it is an unexpected result of the performance of the usual and customary duties of an employee which leads to physical breakdown or a change in pathology. *Wolfgeher*, 646 S.W.2d at 784; See also § 287.020.3." *Smith v. Climate Engineering*, 939 S.W.2d 429, 436 (Mo. App. 1996), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003) (citing *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781 (Mo.banc 1983)).

It has long been the rule in Missouri that an inherent weakness or bodily defect, such as degenerative joint disease, occurring in conjunction with an abnormal strain will support a claim for compensation. See *Johnson v. General Motors Assembly Division G.M.C.*, 605 S.W.2d 511, 513 (Mo. App. 1980). (citations omitted) (overturned on other grounds). To prove a compensable injury, employee must prove she experienced a change in pathology as a result of the fall. "The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a 'change in pathology.'" *Winsor v. Lee Johnson Constr. Co.*, 950 S.W.2d 504, 509 (Mo. App. 1997), citing *Rector v. City of Springfield*, 820 S.W.2d 639, 643 (Mo. App. 1991).

Employee testified credibly that she had no knee complaints before the fall. Employee testified credibly that she suffered right knee and right calf complaints within two weeks of the fall, which complaints she reported to Dr. Kleier. The right calf complaint appears in Dr. Kleier's records while the knee complaint does not.

Employee produced the expert medical testimony of Dr. Levy, offered within a reasonable degree of medical certainty, that employee's fall on July 31, 2000, was a substantial factor in causing her right knee condition. This opinion was supported by the reports of Dr. Volarich and Dr. Berkin. Dr. Levy credibly explained that chondromalacia generally develops after a trauma such as the one claimant suffered. Dr. Levy testified that employee's left knee condition was caused by employee favoring her right knee after the right knee became symptomatic. Again, this opinion was supported by the reports of Dr. Volarich and Dr. Berlin, who both attribute the left knee problems to abnormal weight-bearing. Employer/insurer produced no expert testimony to refute Dr. Levy's opinion. Employer/insurer produced no expert testimony at all.

The Commission may not substitute an administrative law judge's personal opinion on the question of medical causation for the uncontradicted testimony of a qualified medical expert. See *Wright v. Sports Associated*, 887 S.W.2d 596, 600 (Mo. banc 1994). That is exactly what the Commission has done in this case by disregarding the uncontradicted opinion of Dr. Levy, which is bolstered by other medical reports, in favor of the administrative law judge's opinion.

The administrative law judge seems unduly persuaded by the absence of knee complaints in the medical records of Dr. Kleier during the brief period from July 31, 2000, through September 29, 2000. The Commission is not bound to accept as true matters asserted in medical records.

The Missouri Supreme Court has noted that entries in medical records should not be considered to be conclusive evidence. *Baugh v. Life & Casualty Ins. Co. of Tennessee*, 307 S.W.2d 660, 665 (Mo.1957). Rather, the *Baugh* court held the evidentiary value of medical records is to be weighed by the finder of fact, along with the other facts and circumstances, who may either believe or disbelieve the facts disclosed in the medical records. *Id.*

Schneider v. Ashburn/Schneider Painting, 849 S.W.2d 271, 274 (Mo. App. 1993). Certainly, then, the Commission is not bound to conclude the non-existence of matters simply because they are not referred to in the medical records. The other facts and circumstances in this case, specifically employee's credible testimony that she informed Dr. Kleier of her knee complaints on August 10, 2000, at the same time she reported her calf pain, convinces me that Dr. Kleier's records do not accurately and completely reflect the history employee provided to him.

I must comment on the deposition of Dr. Levy, which has come to the Commission for review with permanent marks throughout. (Claimant's Exhibit Q.) I reiterate my previously expressed opinion that the addition of any permanent markings or annotations to documents, records, or depositions after their entry in the official record is completely inappropriate. If this case is appealed to the Missouri Court of Appeals or the Missouri Supreme Court, I want the appellate judges to know that the markings were not made by any member of this Commission.

John J. Hickey, Member

AWARD

Employee: Cathryne Reid

Injury No.: 00-085402

Dependents: N/A

Before the
Division of Workers'
Compensation

Employer: Security Armored Car

Department of Labor and Industrial
N/A Relations of Missouri
Jefferson City, Missouri

Additional Party:

Insurer: Reliance Insurance Co. c/o MO Property &
Casualty Insurance Guaranty Assn.

Hearing Date: February 17, 2005

Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 31, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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 was walking in employer's coin room when she tripped and fell.
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 ankle
- 14. Nature and extent of any permanent disability: 2.5% PPD of right ankle
- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? \$999.59

Employee: Cathryne Reid Injury No.: 00-085402

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$408.49
- 19. Weekly compensation rate: \$272.33/\$272.33
- 20. Method wages computation:

COMPENSATION PAYABLE

21. Amount of compensation payable:

3.875 weeks of permanent partial disability from Employer	\$1,055.28
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22. Second Injury Fund liability: No

TOTAL: \$1,055.28

23. Future requirements awarded: None

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

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

Clement Burns

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Cathryne Reid

Injury No.: 00-085402

Dependents: N/A

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Employer: Security Armored Car

Additional Party: N/A

Insurer: Reliance Insurance Co. c/o MO Property & Casualty Insurance Guaranty Assn. Checked by: JED:tr

This case involves an ankle sprain, with subsequent disputed bilateral knee conditions, resulting to Claimant with the reported accident date of August 31, 2000. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund ("SIF") is not a party to this claim. Both parties are represented by counsel. Claimant proceeds pursuant to Hardship Petition.

Issues for Trial

1. medical causation, attribution and maximum medical improvement;
2. liability for unpaid medical expenses;
3. nature and extent of unpaid temporary total disability benefits;
4. nature and extent of permanent partial disability;

FINDINGS OF FACT

Dispositive Evidence

1. The applicable compensation rates are \$272.33 for both TTD and PPD benefits.
2. The parties stipulated that Employer paid \$999.59 in medical benefits and no TTD benefits.
3. Claimant was an employee of Employer on the reported accident date.
4. Claimant performed duties as a vault cashier counting money including heavy amounts of coin moved about on pallet jacks and skids.
5. Claimant reported falling backward onto buttocks and catching her right foot under the deposits cart she was handling. Claimant described the cart as weighing 300-500 pounds and over five feet tall and four feet deep.
6. Claimant continued to work and first treated her injury on August 1, 2005 with Dr. Klier and reported right ankle symptoms and was returned to work.
7. Claimant reported left knee complaints ten days later and Dr. Klier diagnosed a Baker's cyst. Claimant was again returned to work. Dr. Klier gave Claimant a flexeril prescription for her left knee symptoms.

8. Dr. Klier last treated Claimant on September 29, 2000. He anticipated no permanent disability.
9. Employer denied treatment for her left knee symptoms thereafter.
10. Claimant sought treatment privately with Dr. Sheperly who referred her for an orthopedic evaluation.
11. Claimant began working for the United States Department of Agriculture where she was paid \$11.38 per hour, or an increase of \$1.88 over Employer's wage rate.
12. Claimant underwent bilateral MRI diagnostics of both knees in April 2001 after a delay due in part to her pregnancy.
13. Claimant underwent arthroscopic debridement of the right knee one year later in August 2001 with Dr. Hawk. Dr. Hawk's post-operative diagnosis of chondromalacia was different from the pre-operative diagnosis of internal derangement.
14. Claimant was examined by her three non-treating, non-orthopedist physician experts to whom she gave accident and symptom onset histories that contrast with Dr. Klier's records and the Employer's Accident Report.
15. Claimant never made knee complaint to Dr. Klier. Her knee complaints first manifest after her Doppler test of the lower leg incidentally revealed a Baker's cyst at the knee.
16. In 2001, Claimant's Dr. Volarich recorded a history of twisted ankle and a twisted knee. Claimant reported to him that symptoms of the right ankle were resolved and he assigned no disability.
17. In 2003, Claimant's Dr. Berkin recorded the same history of twisting the right ankle and right knee and, with right ankle symptoms resolved, he assigned no PPD to the ankle.
18. The most recent assessment by Claimant's experts was that of Dr. Levy, in 2004, who testified on January 20, 2005 that Claimant gave a history of her leg being crushed under the vault with treatment including an MRI and arthroscopic debridement of the right knee. He did not comment upon lost time from work. He found the knee conditions work related.
19. Claimant's complaints at trial regarding her right ankle were *de minimis*.

RULINGS OF LAW

Nature and Extent of PPD – Right Ankle

Dr. Klier's notes reflect little in terms of positive findings upon final examination and release. Claimant's evidence was predominantly a presentation regarding her knee conditions. However, at trial she nevertheless agreed she had returned to work immediately and even upon terminating her employment she began work at the USDA soon afterward. Her range of motion was reported as full and no edema was noted. Nevertheless, the mechanism of injury was significant inasmuch as her foot appears to have been pinned and she fell which resulted in a recognizable four to six week recovery for a moderate sprain. Dr. Klier did not expressly note any permanent disability. The medical therapy record supports a finding of some minimum permanent partial disability of the ankle.

Medical Causation - Knees

Despite the compensability of the right ankle injury as reflected in Exhibits O and P, Claimant's evidence fails to prove that her knee conditions, and related treatment and disability, are work related. Several different bases compel a finding that her knee conditions are not the result of the reported accident.

Medical Records Complaints and Symptomatology

Treatment records of Claimant's reported accident reveal right ankle injury only. Claimant's right calf swelling and complaints of pain never materialized into deep venous thrombosis (DVT) or other complication. Dr. Klier's records do not reflect knee complaints in the two months he treated Claimant.

Separately, Claimant never reported her treatment plan with Dr. Evans and Dr. Hawk. Claimant undertook her plan of action after September 2000. September is significant for two reasons: Dr. Klier's discovery of the Baker's cyst was communicated to Claimant in September and Claimant terminated her employment in September.

Surgical Report and General Orthopedics

The symptoms and debridement procedure are consistent with medical findings of abnormal weight bearing and degenerative changes generally embraced by all the experts. It is observed that these specific findings are equally consistent with lifelong obesity. It is axiomatic that substantial and chronic obesity increases musculoskeletal stress.

Four years after the reported accident, Claimant seeks additional medical benefits for her knees but does not provide the surgeon's records or opinion evidence for review. Today's demand for left knee surgery is exceedingly remote from the accident date and release from treatment sixty days later. Even the right knee surgery was a year later and was not related to the reported by accident or post-operative diagnosis.

Also, Claimant does not dispute that she did not report to Employer her plan of treatment with Dr. Evans or Dr. Hawk as referred by her private physician, Dr. Sheperly. In addition to prejudicing Employer, this is consistent with a belief that her knee problems were chronic and not work related. This prejudice is memorialized by Claimant's inaction in seeking relief under Chapter 287 during the four years since the reported accident.^[1]

Claimant's Proffered Experts: Qualification and Foundation

Of the several experts selected by Claimant, none of them are knee surgeons. See Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31 (Mo.App. 1992). None of Claimant's experts reconciled the absence of knee complaints in the treatment record with their ultimate opinions of medical causation. In addition, the ultimate opinions of Claimant's three experts on medical causation, do not integrate the surgeon's changed diagnosis from internal derangement to one of degenerative joint disease, specifically, patellar chondromalacia. Neither do any of the three challenge to surgeon's changed diagnosis. The surgeon did not testify. It must be remembered that these witnesses were offered to prove causation, not merely permanent disability.

Separately, Claimant's proffer seems to suggest a *plurality* argument that, as shown, lacks the probative value that testimony from a qualified expert surgeon would afford. Especially here, the subtleties of a pre-existing condition, together with no lost time and the surgeon's post-operative diagnosis of degenerative change, are extremely complex. Of course, chronic overweight body habitus further complicates any proof. This is Claimant's burden, not Employer's.

It must also be remembered that the histories given to the Claimant's experts (suggesting knee injury as a result of the reported accident) and integrated into opinion reports are not histories embedded in business records. The reports were prepared in anticipation of litigation and do not enjoy the reliability of business records.

Other Witnesses

In addition to contrast with the contemporaneous medical record, Claimant's trial testimony and history to her experts both contrast with that of Employer's two witnesses. Neither recalls knee complaints until after September 2000. September is significant for both Dr. Klier's inadvertent discovery of the Baker's cyst and Claimant's termination of employment. Both of Employer's witnesses answered spontaneously and in a straightforward manner. Despite Ms. Green's now supervisory status, her testimony was not emphatic and she admitted not recalling everything that happened; she volunteered that Claimant hired her and that they were conversant at lunchtime. The vice-president, Jill Schanzel, gave cogent testimony on procedure and contacts with Claimant. Both witnesses were persuasive and unimpeached.

While these witnesses' general lack of recall of any knee complaints initially from Claimant are not dispositive *per se*, their testimony corroborates the documentary evidence admitted in evidence. Again, the contemporaneous medical record and the accident report do not mention knee injury, or symptoms. Cross-examination of each covered accident details which issue is neither disputed by the parties nor excuse for Claimant's own admissions against interest.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a two and one-half percent PPD of the right ankle. No greater amount of PPD may be gleaned from the record as hand. Separately, Claimant failed to sustain her burden of proof with regard to medical causation of her bilateral knee conditions. No other benefits are awarded. The remaining issues are moot.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[\[1\]](#) Hardship Petitions are a recognized priority in law and practice in Missouri.