

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

Injury No.: 03-009329

Employee: Cynthia Rogers
Employer: Dillard's
Insurer: Fidelity and Guaranty Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: January 4, 2003
Place and County of Accident: St. Louis 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 March 24, 2006. The award and decision of Administrative Law Judge Cornelius T. Lane, issued March 24, 2006, 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 29th 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: Cynthia Rogers

Injury No.: 03-009329

Dependents: N/A
Employer: Dillard's
Additional Party: Second Injury Fund
Insurer: Fidelity and Guaranty Insurance
Hearing Date: February 3, 2006

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

Checked by: CTL: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: January 4, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant slipped and twisted her left knee at work.
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: Left knee
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Cynthia Rogers Injury No.: 03-009329

17. Value necessary medical aid not furnished by employer/insurer? \$43,386.69
18. Employee's average weekly wages: \$615.38
19. Weekly compensation rate: \$410.27/\$234.12
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

21 weeks of temporary total disability benefits	\$8,615.67
80 weeks of permanent partial disability by Employer	\$27,200.00

22. Second Injury Fund liability: Yes

120 weeks of permanent partial disability from Second Injury Fund \$8,418.00

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$70.15) payable by SIF for 80 weeks
and thereafter \$410.27 per week for Claimant's lifetime

TOTAL:

23. Future requirements awarded: Future medical as provided in the Award

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:

Jeffrey Gault

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Cynthia Rogers	Injury No.: 03-009329
Dependents:	N/A	Before the
Employer:	Dillard's	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Fidelity and Guaranty Insurance	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: CTL:tr

PREFACE

A hearing was held in the above-mentioned matter on February 3, 2006. Claimant, Cynthia Rogers, was represented by Attorney Jeffrey Gault. The Employer and Insurer were represented by Attorney Patricia Musick. The Second Injury Fund was represented by Assistant Attorney General Christen Frazier.

ISSUES

1. Temporary total disability;
2. Past medical expenses;
3. Future medical treatment;
4. Whether Claimant's knee replacement was medically causally related to the January 4, 2003 accident;
5. Permanent partial/total disability; and

6. Liability of the Second Injury Fund.

STIPULATIONS

1. Claimant's average weekly wage was \$615.38;
2. The PPD/TTD rate was \$410.27/\$340.12;
3. Claimant was an employee of Employer on or about January 4, 2003;
4. Employer was insured by ESIS under the workers' compensation law;
5. Employer has paid no temporary total disability to Claimant; and
6. Employer has paid no medical payments for Claimant's injury of January 4, 2003.

EXHIBITS

The following exhibits were offered and admitted into evidence in Injury Number 02-147100 and Injury Number 03-009329:

Claimant's Exhibits:

- A. Riverbend Physicians (1998-2003)(Dr. Green)
- B. Neck MRI/Twin Rivers MRI
- C. Dr. Sheehan (neck surgery)
- D. Christian Hospital (neck surgery)
- E. Alton Memorial 3-12-03 (1st knee surgery)
- F. Dr. Reid (1st and 2nd knee surgery) including 1993 elbow surgery
- G. Health South (knee replacement physical therapy and billing)
- H. Memorial Medical Center (3rd knee surgery)
- I. Dr. Strege (office records for 3rd knee surgery)
- J. Jersey Community Hospital (1996 left shoulder surgery)
- K. Schultz Family Chiropractic (1997 back)
- L. Dr. Arbaugh (psychiatrist)
- M. Riverbend Chiropractic (2002 back)
- N. Dr. Cohen January 23, 2006 deposition
- O. Mr. England February 24, 2005 deposition
- P. Dr. Shrank billing for December 26, 2002 MRI
- Q. Dr. Sheehan billing for January 27, 2003 neck surgery
- R. Christian Hospital billing for January 28, 2003 neck surgery
- S. Dr. Shrank billing for February 26, 2003
- T. Memorial Hospital billing for March 12, 2003 knee surgery
- U. Memorial Hospital billing for August 6, 2003 knee surgery
- V. Memorial Hospital billing for August 31, 2004 knee X-rays
- W. Memorial Hospital billing for September 30, 2004 knee X-rays
- X. Memorial Hospital billing for October 13, 2004 knee surgery
- Y. June 27, 2003 letter from Claimant's Attorney Jeffery Gault to Employer's Attorney Patricia Musick regarding treatment for Claimant's knee injury.
- Z. July 2, 2003 letter from Employer's Attorney Patricia Musick to Claimant's Attorney Jeffery Gault.
- AA. July 28, 2003 letter from Claimant's Attorney Jeffery Gault to Employer's Attorney Patricia Musick.
- BB. August 6, 2003 letter from Employer's Attorney Patricia Musick to Claimant's Attorney Jeffery Gault.

Employer's Exhibits:

1. May 24, 2005 Deposition of Dr. John Wagner
2. Worker's Compensation Accident Investigation Report of Mary Helen Hoekstra, prepared by Claimant.

Second Injury Fund Exhibits:

I. February 4, 2005 Deposition of Cynthia Rogers.

FINDINGS OF FACT

1. Claimant started working at Dillard's, the Employer, in the year 1998 and worked in various capacities and on January 4, 2003, the date of her knee injury, was a sales manager in the furniture department.
2. On January 4, 2003 Claimant slipped on some plastic and her left leg got stuck between a sofa and an armoire and her knee twisted and she felt immediate pain.
3. Claimant, after said injury, felt pain and went to see her personal physician, Dr. Green, on January 9, 2003. Dr. Green performed various tests and the MRI that was taken showed that Claimant sustained a horizontal tear in the posterior arm of the medial meniscus.
4. Dr. Green referred Claimant to Dr. Reid who performed arthroscopic surgery on March 12, 2003.
5. Claimant, after the arthroscopic surgery, continued to have knee complaints and Dr. Reid performed injections on three different occasions in order to relieve the pain. After the injections, Claimant was still having problems with her left knee with pain. Dr. Reid performed a left total knee replacement on August 6, 2003.
6. Claimant never returned to work after the March 12, 2003 knee replacement surgery.
7. Claimant continued to have a great deal of problems with her left knee after the knee replacement. Dr. Stregge performed a third knee surgery on October 13, 2004.
8. Claimant, in her capacity as a manager of the furniture department and various other positions she held before the date of January 4, 2003, knew that if one sustained an injury she had to make a report of injury and further in order to have the injury to be paid for by the Employer/Insurer that she had to come under the care of an Employer selected doctor.
9. Claimant's attorney did notify Employer's attorney with regard to the scheduled knee replacement with Dr. Reid, Claimant's own physician, which was scheduled for August 6, 2003. The Claimant's attorney contacted the Employer's attorney with regard to medical treatment on June 27, 2003 and the Employer's counsel responded and indicated that she would be unable to authorize treatment until she obtained certain medical records and Claimant's counsel provided medical records to the Employer's attorney on July 20, 2003. Employer's attorney was out of town and did not receive the Claimant's medical records until August 6, 2003, which was the same day Claimant had scheduled surgery with Dr. Reid.
10. Claimant is entitled to temporary total disability from the time of the arthroscopic surgery on March 12, 2003 until the knee replacement of August 6, 2003, to wit: 21 weeks at \$410.27 for a total of \$8,615.67.
11. Claimant in the treatment of her left knee selected her own doctor to perform various procedures and the knee replacement without the authorization of the Employer/Insurer.
12. Claimant's injury of January 4, 2003, while at work did cause injury to Claimant's knee necessitating the various operations and knee replacement that Claimant had to undergo.
13. Employer's liability for permanent partial disability to Claimant's left knee extends not only to the meniscus tear but also to the knee replacement.
14. Claimant testified that she has been unable to work since March 11, 2003 because she is unable to sit, stand or perform any work duties and that because of her knee injury she is unable to walk or stand for any period of time and is unable to kneel or bend. Claimant testified she feels that she is unable to work and is totally disabled because of her primary injury of the knee and her previous disabilities.
15. Claimant's preexisting disabilities prior to the injury of January 4, 2003 include a neck fusion, left shoulder injury and surgery, low back treatment where she was seen by a chiropractor because of back pain and problems lifting and sitting, previous colitis, a 1999 right elbow surgery which causes her problems in lifting,

depression, and previous breast cancer and chemotherapy.

16. Dr. Cohen, a neurologist, testified very credibly that Claimant's January 4, 2003 work injury to the knee caused Claimant's medial meniscus tear and her total knee joint replacement and revisions and felt that she had sustained a 80% permanent partial disability at the level of the left knee as a result of the January 4, 2003 injury. Dr. Cohen further testified that Claimant's preexisting disability of 30% permanent partial disability of the left shoulder, 25% of the right elbow, 20% of the body as a whole of the lumbar spine, 20% of the body as a whole for depression, and 25% of the body as a whole for bowel syndrome. Dr. Cohen testified that as a result of the Claimant's preexisting conditions combined with her primary work injury relating to the left knee create an overall disability greater than their simple sum and that due to the combination of disabilities that Claimant is permanently and totally disabled and not capable of gainful employment. Dr. Cohen further testified that the work related injury of January 4, 2003 was a substantial factor in causing the need for each of the three knee surgeries.
16. James England, a vocational expert, testified very credibly that it was his opinion that Claimant would not be able to sustain any jobs in the long run due to the combination of medical problems, to wit: preexisting condition as combined with the neck and knee injuries that render Claimant unable to sustain employment rendering her totally disabled.

RULINGS OF LAW

The Claimant is entitled to temporary total disability from March 12, 2003 when she underwent an operation for a torn meniscus and was unable to return to work after the said surgery and a knee replacement was performed on August 6, 2003. Thus, Claimant is entitled to temporary total disability for five months or 21 weeks at \$410.27 for a total of \$8,615.67.

It is my opinion that the Claimant is due temporary total disability from the date of March 12, 2003, the date of the operation for the torn meniscus, up through the date of Claimant's knee replacement surgery of August 6, 2003 which amounts 21 weeks at \$410.27 per week for a total of \$8,615.67.

Past Medical Expenses

Under §287.140 RSMo (2004), the employer has the right to control the medical care and to authorize physicians treatment of claimant. In this case, Employer did not have the opportunity to direct Claimant's care. Claimant obtained treatment on her own in choosing her own doctors and various procedures which she decided to have done. Claimant, in her position as a department head at Dillard's, the Employer, certainly knew that she would have the Employer make the decisions in her care if she was to be provided with care under the workers' compensation law. Claimant failed to inform Employer in obtaining all the treatment she received until the procedures were completed. Therefore, Employer is not liable for Claimant's past medical bills.

Future Medical Care

Section 287.140 RSMo (2000) requires the employer/insurer to provide "such medical, surgical, chiropractic, and hospital treatment as may be reasonably be required to cure and relieve (the employee) from the affects of the injury".

Future medical care can be awarded even though claimant has reached maximum medical improvement. See *Mathis v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo.App. 1996). Future medical treatment in a permanent partial disability award can be awarded. See *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. S.D. 2003).

Dr. Cohen testified on behalf of the Claimant and believed that the arthroscopic knee replacement and revisions were caused by the injuries Claimant received in her fall at work and further testified knee replacements wear out and a future knee replacement may be necessary. Wherefore, Employer is ordered to pay for any future medical care for the Claimant with regard to a future knee replacement, if necessary.

Permanent Partial Disability

Section 287.190 RSMo (2000) authorizes permanent partial disability awards and the amount of compensation to be awarded for permanent partial disability is determined by the Schedule of Losses found in §287.190.1. Permanent partial disability is one where the injury is permanent in nature and partial in degree. Dr. Cohen, who testified on behalf of the Claimant, felt that the Claimant sustained an 85% permanent partial disability of the knee with 80% due to the injury of January 4, 2003 and 5% preexisting. Claimant, having sustained an medial meniscus tear in the knee which required

arthroscopic surgery as well as a knee replacement and knee revision, certainly would require a find of 50% permanent partial disability of the left knee which amounts to 80 weeks at \$340.12 for a total of \$27,209.60 to be paid by the Employer for permanent partial disability.

Second Injury Fund Liability

In §287.220.1 RSMo (2000), the employer is only liable for the degree of percentage of disability which resulted from the last injury disregarding any of employee's disability prior to the primary injury. As a preexisting injury existing before the primary injury when combined with the disability resulting from the primary injury considered alone is deducted from the combined disability and the balance becomes the responsibility of the Second Injury Fund. See *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2002).

The Claimant had many previous existing disabilities prior to the January 4, 2003 primary injury, to wit: left shoulder, right elbow, low back, depression, and abdomen. Dr. Cohen testified that Claimant was permanently and totally disabled due to the combination of her many disabilities. Mr. England, a vocational expert, also testified Claimant is permanently and totally disabled due to the combinative effect of all her injuries and would be unable to be employable.

Claimant is awarded permanent total disability benefits against the Second Injury Fund over and above the 80 weeks of permanent partial disability paid for by the Employer for the knee injury. The differential pay for the 80 weeks of permanent partial disability from the date of maximum medical improvement, August 6, 2003, requires the Second Injury Fund to pay \$70.15 for those 80 weeks or \$5,612.00.

Date: _____

Made by: _____

Cornelius T. Lane
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Employee: Cynthia Rogers

Injury No.: 03-009329