

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

Injury No.: 02-014219

Employee: Lawana F. Rowland
Employer: Presbyterian Children Services
Insurer: Missouri Rural Services Workers' Compensation Insurance Trust
(self insured trust)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged February 5, 2002
Place and County of Accident: Alleged Saint Francois 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.

On October 17, 2005, the administrative law judge issued an award in this matter. On November 5, 2005, employee filed an Application for Review. On January 4, 2006, employee filed her brief. On January 20, 2006, employer filed its brief and its motion to strike employee's brief or, alternatively, to dismiss employee's appeal. We deny employer's motion. We have considered employee's brief to the extent it pertains to matters of record. We have disregarded matters not of record as is our custom.

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 17, 2005, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued October 17, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22nd day of February 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Lawana F. Rowland Injury No. 02-014219

Dependents: N/A

Employer: Presbyterian Children Services

Additional Party: Second Injury Fund

Insurer: Missouri Rural Services Workers' Compensation Insurance Trust (self insured trust)

Hearing Date: August 5, 2005 Checked by: JK/kh

SUMMARY OF FINDINGS

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? February 5, 2002
5. State location where accident occurred or occupational disease contracted: Saint Francis 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? Self Insured Trust
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Employee was attempted to control a resident of the Farmington Children's Home, when the resident kicked the employee on the back of her left leg slightly above the knee.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: left knee
14. Nature and extent of any permanent disability: none
15. Compensation paid to date for temporary total disability: \$1,349.70
16. Value necessary medical aid paid to date by employer-insurer: \$12,052.26
17. Value necessary medical aid not furnished by employer-insurer: None
18. Employee's average weekly wage: \$472.39

19. Weekly compensation rate: \$314.93
20. Method wages computation: By agreement
21. Amount of compensation payable: None
22. Second Injury Fund liability: claim dismissed
23. Future requirements awarded: None

FINDINGS OF FACT AND RULINGS OF LAW

On August 2, 2005, the employee, Lawana F. Rowland, appeared in person and by her attorney, Gary Sanquinet, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Paul Huck. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about February 5, 2002, the Presbyterian Children Services, doing business as Farmington Children's Home, was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self-insured employer through the Missouri Rural Services Workers' Compensation Insurance Trust.
2. The employer had notice of the employee's accident.
3. The employee's claim for compensation was filed within the time allowed by law.
4. The employee's average weekly wage was \$472.39 and her rate of compensation is \$314.93.
5. The employer furnished medical aid in the amount of \$12,052.26.
6. The employer paid temporary total disability benefits totaling \$1,349.70. These payments covered 4 2/7 weeks from August 26, 2002 through September 24, 2002.

ISSUES:

1. Accident
2. Medical causation
3. Additional medical aid
4. Nature and extent of permanent partial disability

SUMMARY OF THE EVIDENCE:

At the time of her accident, the employee, Lawana Fay Rowland, was employed as a childcare worker by Farmington Children's Home. The employee's accident occurred when she was kicked by a female resident in the lock down unit. The medical records indicate the employee was kicked in the back of her leg slightly above her left knee.

Both the employee's testimony and the medical records confirm the employee had a significant history for bilateral knee complaints and treatment. Dr. John Wagner performed a lateral release on both of the employee's knees sometime in the mid 1980's. On December 18, 2001 the employee saw Dr. Wagner with complaints of pain and swelling in her left knee. The employee advised Dr. Wagner that she had tripped over a piece of carpet at work. She told Dr. Wagner that after a few weeks, she discussed her injury with her employer, and they indicated since there was no sign of trauma, they would not accept it as a workers' compensation case. The employee did not file any claim for the 2001 incident (Employer's Exhibit 1).

Dr. Wagner's records from December 18, 2001, indicate the employee was experiencing swelling in her left knee every evening, and this had been going on for a long time. The employee also told Dr. Wagner that she had previously been advised that she had evidence of osteoarthritis. An MRI taken on November 7, 2001 showed sclerososis of the medial tibial plateau. Dr. Wagner concluded that the employee had chondromalacia that "may have been triggered a bit by her incident at work, and then will resolve". Dr. Wagner prescribed Naprosyn, and scheduled the employee for a two-month follow up (Employer's Exhibit 1).

Prior to her return visit with Dr. Wagner, the employee had her accident on February 5, 2002, that is the subject of this claim. Following the kicking incident, the employee emphasized that this time, she reported her accident.

The employer initially authorized treatment with Nurse Practitioner Susan Nesbit and Dr. Edward Dumontier at the Parkland Health Clinic in Farmington. The medical records from Parkland Health Clinic dated February 8, 2002 indicated that the employee gave a history of being kicked in the knee, and complained of "continued edema and pain of knee" (Employer's Exhibit 4).

The employee told Nurse Nesbit about her October accident in which she had tripped on the carpet, but stated that "overall she was starting to do better until the recent episode" (Employer's Exhibit 4). The employee also reported that she had tried someone else's Vioxx, and it worked better than Naprosyn. The employee was diagnosed as having a left knee contusion and treated with a knee immobilizer and a prescription for Vioxx. The employee was allowed to return to work, but was advised not to work in the lock down unit. (Employer's Exhibit 4).

In a follow up visit on February 15, 2002, the employee stated she was feeling better. Nurse Nesbit encouraged the employee to attend her physical therapy sessions, and recommended that she continue to use the immobilizer and Vioxx (Employer's Exhibit 4).

Records from Farmington Sports and Rehabilitation Center indicate the employee had physical therapy for her left knee on February 18, 2002, February 28, 2002 and March 7, 2002. The employee was then referred to Dr. William Harris, who is an orthopedic surgeon in Farmington Missouri. Dr. Harris treated the employee conservatively for several months prior to recommending surgery. During this time the employee continued to complain of pain and swelling in her left knee. Dr. Harris diagnosed the employee as having chondromalacia and synovitis of the left knee (Employer's Exhibit 6 and 7).

The operative report dated August 26, 2002 indicates a post-operative diagnosis of grade IV chondromalacia changes of the femoral groove and medial tibial plateau with grade III chondromalacia changes of the under surface of the patella with anterior patellofemoral synovitis with interarticular loose body (Employer's Exhibit 7). Dr. Harris' medical record of August 27, 2002 notes the employee had grade IV osteoarthritic changes and erosion down to the bone of the tibial plateau. Although the employee had synovitis, she did not have a meniscus tear (Employer's Exhibit 6).

After her surgery, the employee continued to see Dr. Harris on a periodic basis until April 8, 2003. During this time period, the employee continued to complain of pain and swelling in her left knee. Dr. Harris recommended a series of synvisc injections, but the employee showed only limited improvement (Employer's Exhibit 6).

On April 10, 2003, the employee was examined by Dr. Richard Rende, who is an orthopedic surgeon in St. Louis Missouri. Based on his examination and the x-rays taken of the employee's left knee, Dr. Rende concluded that the employee was suffering from "advanced degenerative arthritis with bone against bone in the medial joint space and significant narrowing of the patellofemoral joint space (Employer's Exhibit 8). Dr. Rende felt that the employee's degenerative arthritis was "of long standing duration". Although Dr. Rende agreed that the employee needed a knee replacement, he did not feel her need for a knee replacement was "in any way work related" (Employer's Exhibit 8). He added "it is my opinion that any aggravation of it by this kick clearly has come and gone, and I believe she is at her maximum medical improvement" (Employer's Exhibit 8). Dr. Rende gave the employee several permanent restrictions, but did not believe her restrictions "were the result of an on the job injury" (Employer's Exhibit 8).

During Dr. Rende's deposition testimony, he restated his conclusion that the employee's current complaints were caused by her osteoarthritis (Employer's Exhibit 9, page 6) and confirmed that he did not believe that her February 5, 2002 work incident was a substantial factor in causing the employee's need for a total knee replacement (Employer's Exhibit 9, page 7). Dr. Rende also noted that during the arthroscopic surgery there were no signs that she had suffered any acute damage or abnormality as a result of her February 2002 work incident (Employer's Exhibit 9 page 10). He then repeated that the reason the employee needed a total knee replacement was her grade IV bone on bone chondromalacia (Employer's Exhibit 9, page 11).

To counter the opinion of Dr. Rende, the employee offered a medical report and a deposition of Dr. Shawn Berkin. Dr. Berkin examined the employee on January 15, 2004. Based on his examination of the employee and his review of certain medical records, Dr. Berkin diagnosed the employee as having a left knee strain and chondromalacia (Deposition Exhibit 2, Employee's Exhibit A). Dr. Berkin further concluded that the employee's February 5, 2002 accident was a substantial factor in causing her left knee strain and an aggravation of her pre-existing chondromalacia and degenerative arthritis. Dr. Berkin agreed that the employee needed a total knee replacement, and felt that it was the February 5, 2002 accident that "has now required her to consider surgery for a total knee replacement" (Deposition Exhibit 1, Employee's Exhibit A).

In addition to his views on causation, Dr. Berkin also concluded that the employee had a 50% partial disability to her left knee that was caused by her accident at work. He then assigned an additional 20% permanent partial disability to her left knee for pre-existing conditions (Deposition Exhibit 2, Employee's Exhibit A).

During cross examination by the employer's attorney, Dr. Berkin agreed that he had only reviewed limited medical records (Employee's Exhibit A, Page 7). He also agreed that, at the time of her surgeries, the employee was found to have grade III and grade IV chondromalacia. Dr. Berkin further admitted that the employee's history was that she had been kicked on the posterior surface of her knee, and the surgery revealed no evidence of damage to the meniscus or ligaments (Employee's Exhibit A, page 9).

At the time of the hearing, the employee noted that prior to February 5, 2002 her left knee felt "terrific", with "no symptoms whatsoever". Immediately after her accident, the employee experienced pain and swelling, and she was still having those symptoms at the time of the hearing. As a result of those symptoms, the employee experiences problems at work, and has to limit her activities at home. The employee also has to restrict her participation in certain recreational activities.

At the conclusion of the hearing the employee requested an award requiring the employer to provide additional medical treatment. The employee believes she needs a total knee replacement, and feels that the employer should be responsible for that surgery.

Neither the employee's attorney nor the employer's attorney requested leave to file briefs on the disputed issues. After a post hearing discussion, the parties expressed an interest in trying to settle the claim, and the administrative law judge agreed to postpone writing the award for 30 days. As of September 30, 2005, however, no further communication has been received regarding a possible settlement.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Deposition of Dr. Shawn Berkin

Employer's Exhibits:

1. Medical records of Dr. John R. Wagner
2. Report of injury
3. Claim for compensation
4. Medical records of Parkland Health Clinic
5. Physical therapy records of Farmington Sports and Rehabilitation Center

6. Medical records of Dr. William K. Harris
7. Operative report
8. Medical report of Dr. Richard J. Rende
9. Deposition of Dr. Richard J. Rende

FINDINGS OF FACT AND RULINGS OF LAW:

Based solely on the employee's testimony at the hearing, it appeared that even though her need for additional medical treatment was not "work related", the employee might be entitled to some limited award of permanent partial disability. After reviewing the medical evidence, however, it does not appear that any of the employee's current complaints are related to her February 5, 2002 accident.

Under section 287.020.2RSMo, "an injury is compensable if it is clearly work-related". This section further provides that "an injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor". Numerous cases, however, have established that an accident that aggravates a pre-existing but non-disabling condition will not bar recovery, if the work related accident causes the condition to escalate to the level of disability. *Gennari v Norwood Hills Corporation*, 332 S.W. 2d 718, 722-723 (Mo 1959); *Weinbauer v Gray Eagle Distributors*, 661 S.W. 2d 652 (Mo App 1983); *Kelly v Banta & Stewd Construction*, 1 S.W. 3d 43, 48 (Mo App 1999).

The employee's testimony that her left knee felt terrific immediately before her accident, and that she had no symptoms whatsoever is not credible. Dr. Wagner's records make it clear that a few weeks before her February 5, 2002 accident, the employee was experiencing pain and swelling in her left knee. Although the employee attributed these complaints to a tripping incident at work, the employee did not file a claim for compensation for that incident. The employee also advised Dr. Wagner that she had been experiencing swelling in her left knee every evening for a long time. She also acknowledged to Dr. Wagner that she had been advised that she had osteoarthritis. It is also significant that Dr. Wagner came up with the same diagnosis of chondromalacia in December of 2001 that is now the basis of her current need for a total knee replacement. To make matters more difficult for the employee, Dr. Wagner had not released the employee, and she was still scheduled for a follow-up visit at the time she had her February 5, 2002 accident.

The medical records after her February 5, 2002 accident also fail to support the employee's position. Although she gave a history of the "kicking" incident, her complaints were identical to those she made to Dr. Wagner on December 18, 2001. Three days after her accident the nurse practitioner noted the employee had "continued" edema and pain in the knee. The nurse practitioner prescribed Vioxx based on the employee's statement that she had borrowed someone's Vioxx and it had worked better than the Naprosyn prescribed by Dr. Wagner.

The medical records of Dr. Harris also fail to support the employee's claim that her current complaints and need for treatment are related to her February 5, 2002 accident. The operative report from Dr. Harris' arthroscopic surgery and Dr. Harris' medical records give no indication that the employee suffered any internal damage to her left knee as a result of her February 5, 2002 accident. She had no meniscus or ligament tears. Dr. Harris' records and the records of other treating physicians all indicate that the employee's complaints are the result of severe osteoarthritis or chondromalacia that pre-existed her February 5, 2002 accident.

It is significant to note that none of the employee's treating physicians gave any indication that they believed the employee's February 5, 2002 accident was a substantial factor in causing her pain, swelling, arthritis or her need for further treatment. Although Dr. Wagner felt the employee's complaints in December of 2001 "may have been triggered a bit" by her 2001 accident at work, no treating physician has ever suggested that her second work accident had any causal relationship to her current symptoms and need for additional treatment.

The employee's claim relies solely on the opinion by Dr. Berkin that her February 5, 2002 accident caused a knee strain and aggravated her pre-existing chondromalacia and degenerative arthritis. After reviewing all of the medical records, Dr. Berkin's theory that the employee's February 5, 2002 accident aggravated the employee's

condition and raised it to the level where it became disabling, is not credible. The medical records make it clear that the employee's left knee was swelling and painful for several months prior to her accident, and she was taking Naprosyn and Vioxx to relieve these symptoms. The evidence is unequivocal. The employee had severe chondromalacia and degenerative arthritis in her left knee prior to her February 5, 2002 accident, and this pre-existing condition was disabling.

In conclusion, the evidence supports a finding that the employee suffered an accident on February 5, 2002. Her accident, however, was not a substantial factor in causing either her current symptoms or her need for a total knee replacement. The medical evidence also fails to support a finding that the employee's accident aggravated her pre-existing chondromalacia and degenerative arthritis and raised it to the level where it became disabling.

Based on these conclusions, I find that the employee has failed to satisfy her burden of proof on the issue of medical causation. Although the employee clearly has a significant disability in her left knee and does need additional medical treatment, the evidence does not support a finding that either her permanent partial disability or her need for treatment is causally related to her February 5, 2002 accident.

Given this finding on the issue on medical causation, the employee's claim for additional medical treatment and any claim that she may have for permanent partial disability must also be denied.

In addition to her claim against the employer, the employee also filed a claim against the Second Injury Fund. Based on the finding that the employee has no permanent partial disability that is medically causally related to her February 5, 2002 accident, employees claim against the Second Injury Fund does not meet the threshold requirements of Section 287.220 RSMo, and must also be denied.

Date: _____

Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Pat Secret
Director
Division of Workers' Compensation