

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

Injury No.: 06-080998

Employee: Larry Shelton
Employer: Levy Restaurant
Insurer: New Hampshire Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have heard the oral arguments of the parties. We have reviewed the evidence and considered the whole record and we find 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 Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the October 18, 2010, 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.

Permanent Partial Disability Benefits

Dr. Volarich was the only expert to offer an opinion on the extent of the permanent partial disability employee suffered as a result of his work accident. Dr. Volarich believes employee sustained a 35% permanent partial disability of the right knee as a result of the work accident. We find this opinion credible. We modify the award of permanent partial disability due from employer/insurer to employee to 35% at the level of the knee.

Future Medical Care

The administrative law judge found that employer/insurer shall provide to employee a total knee replacement on the basis that the work accident accelerated the time when employee would need the knee replacement. The administrative law judge's ruling is consistent with the opinion of Dr. Kramer. But employee must prove more than that the work injury changed the timing of the need for medical treatment. Employee must prove that the work injury caused the need for the medical treatment.

Dr. Anderson believed employee could benefit from a knee replacement in 2003. Dr. Kramer believed that employee would have ultimately needed a knee replacement even if he had not suffered the work injury. Dr. Haupt testified that employee's pre-existing degenerative arthritis is the prevailing factor in causing employee's need for knee replacement. Dr. Ralph believes employee needs a total knee replacement but that it is not employer's responsibility to pay for it.

In December 2003, before the work injury, Dr. Anderson told employee his best option for relief of his right knee problems would be a knee replacement but employee wanted to wait. At most, the work accident and treatment accelerated the time at which employee would agree to the surgery. Our job is to determine if the work injury caused the need for surgery, not to determine what caused employee to agree to have the surgery.

¹ Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

Employee: Larry Shelton

“Future medical care must flow from the accident before the employer is to be held responsible....”² Employee’s need for a total knee replacement did not flow from the work accident. It flowed from his preexisting degenerative arthritis. In other words, the need for a knee replacement is not an “effect” of the work injury. See § 287.140 RSMo. Consequently, employer/insurer is not obligated to provide to employee a knee replacement.

The primary injury increased employee’s knee pain. Dr. Volarich and Dr. Kramer offered opinions that employee will need pain management to relieve the pain. Employee has established a reasonable probability that he will need pain management to relieve the effects of his injury. Employer/insurer shall provide to employee such pain management as is necessary to relieve him of the knee pain. This is so even if the treatment also relieves pain emanating from other conditions.³

Award

We modify the award of permanent partial disability. Employer/insurer shall pay to employee 56 weeks of permanent partial disability benefits (35% at the level of the knee).

We reverse the portion of the administrative law judge’s future medical award concluding that employer/insurer is responsible for providing to employee a total knee replacement. Employer is not so obligated. Employer/insurer shall provide pain management to relieve the effects of the injury.

In all other respects, we affirm the award of the administrative law judge.

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.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued October 18, 2010, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 25th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

² *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823 (Mo. App. 1995).

³ *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260 (Mo. Ct. App. 2004).

Employee: Larry Shelton

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. I believe the decision of the administrative law judge should be modified. I would modify the award to a temporary award directing employer/insurer to provide to employee the knee replacement surgery and I would defer consideration of employee's permanent disability and future medical care needs until he has recovered from the surgery.

For that reason, I respectfully dissent from the decision of the majority of the Commission to modify the award of the administrative law to reduce the benefits awarded in this case.

John J. Hickey, Member