

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

AWARD

Employee: Larry Shelton Injury No.: 06-080998
Dependents: N/A Before the
Employer: Levy Restaurant **Division of Workers'**
Compensation
Additional Party: Second Injury Fund (Open) Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: New Hampshire Insurance Company
Hearing Date: July 13, 2010 Checked by: JED:sr

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 14, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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 fell as bottom of escalator while performing banquet set-up.
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
14. Nature and extent of any permanent disability: 40% PPD of the right knee
15. Compensation paid to-date for temporary disability: \$2,860.67 (15 weeks)
16. Value necessary medical aid paid to date by employer/insurer? \$21,497.14

Employee: Larry Shelton

Injury No.:

06-080998

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: Disputed

19. Weekly compensation rate: \$376.55 PPD rate

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

64 weeks of permanent partial disability from Employer	\$24,099.20
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22. Second Injury Fund liability: Open

TOTAL:	\$24,099.20
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23. Future requirements awarded: Yes (see narrative 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:

John J. Larsen, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Larry Shelton	Injury No.: 06-080998
Dependents:	N/A	Before the
Employer:	Levy Restaurant	Division of Workers'
Additional Party:	Second Injury Fund (Open)	Compensation
Insurer:	New Hampshire Insurance Company	Department of Labor and Industrial
Hearing Date:	July 13, 2010	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED:sr

This case involves a compensable right knee injury resulting to Claimant with the reported accident date of August 14, 2006. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is a party to this claim but remains open for a determination of liability at a future date. Both parties are represented by counsel.

Issues for Trial

1. medical causation/attribution;
2. nature and extent of permanent partial disability; and,
3. future medical expenses.

FINDINGS OF FACT

Claimant's Testimony

Claimant, age 61, was employed as a bar tender/caterer for Employer when he fell at the bottom of an escalator and hyperflexed his right knee. Claimant performs banquet services, particularly bars. Claimant has other employment requiring him to be on his feet, including that as a school teacher and as referee/umpire for amateur sporting events.

Claimant reported his injury and first treated with BarnesCARE where x-rays revealed severe degenerative joint changes including spurring and sclerosis. The tibial femoral joint showed marked degenerative change. Dr. Anderson examined Claimant on September 19, 2006 after a recent twist while walking. An injection was recommended.

Claimant testified about his physical activity surrounding his routinely high number of sporting events he officiated. Claimant refereed basketball and baseball. He frequently had two or more games per day on the weekend and games throughout the week. He fully explained the running and pivoting and squatting and scissors movements.

Treatment

On October 11, 2006 he saw Dr. Haupt who recommended surgery. Patient preference led to referral to Dr. Kramer who first saw Claimant on November 20, 2006 and performed surgery on February 16, 2007 for partial medial menisectomy, lateral menisectomy, articular cartilage and debridement generally, including the ACL. Post-surgery the right knee was aspirated and injected on March 21, 2007 and again on April 7, 2007. Knee swelling and pain continued. Dr. Kramer prognosed knee replacement. Claimant was off work for 15 weeks.

Dr. Kramer noted on April 30, 2007 that claimant reported that he had little discomfort prior to the reported injury. Dr. Kramer released Claimant July 14, 2007 with rather severe limitations of sitting standing in periods no longer than twenty minutes (notwithstanding the fact this may be suitable for teaching in a traditional classroom setting).

Claimant underwent a right knee surgery in 1997 for right medial meniscus tear, chondromalacia of the patella, trochlea, medial femoral condyle lateral tibia plateau and posterior cruciate ligament injury. A prior 1995 right knee arthroscopic surgery is in evidence but apparently undocumented and undisputed. Claimant underwent a series of right knee injections in November-December 2003. In January 2004, Dr. Anderson noted Claimant had a prognosis for knee replacement surgery

Opinion Evidence

Dr. Volarich

Claimant offered the deposition of Dr. Volarich as Exhibit A. Dr. Volarich reviewed the treatment record including the prior record. He examined Claimant on June 8, 2009 and noted Claimant had asymmetric muscle bulk with notable right thigh and right calf atrophy. Quad strength was 2.5 out of 5 and right calf strength was 4.5 out of 5. Right knee flexion was 90/140, crepitus was 2 out of 4, patellar mistracking was 1 out of 4, mild various deformity from medial compartment collapse and hyperemia. (The left knee was also examined.) Dr. Volarich embraced the diagnoses of the surgeon. He assigned a thirty-five percent PPD of the right knee relative to the reported injury and twenty-five percent PPD of the right knee pre-existing the reported injury.

Dr. Volarich opined Claimant will require additional treatment and pain management. He further testified Claimant will require a right total knee arthroplasty when pain symptoms become intractable. Dr. Volarich stated the need for replacement was due to the combination of injuries and arthritis but primarily the arthritis. He further stated that the last injury (and treatment) definitely accelerated the need for replacement.

Dr. Haupt

Employer offered the deposition of Herbert Haupt, M.D., an orthopedic surgeon (deceased) as Exhibit 1. Dr. Haupt examined Claimant and recommended surgery. He stated that it was Claimant's degenerative arthritis that was the basis for Claimant undisputed need for total knee replacement some time in the future. He emphasized Claimant prior surgical record

and advanced degenerative condition that was best represented by the end-stage degenerative medial compartment collapse. He further noted Grade IV chondromalacia from Dr. Kramer's surgical report. He believed Claimant's degenerative joint disease, rather than the reported injury, was the basis for the knee replacement. However, on cross-examination, he admitted the primary purpose of replacement is pain relief. He agreed that the point of pain intolerance was the time for replacement. He also acknowledged that Claimant also had new symptoms on the lateral aspect of his knee.

Dr. Ralph

Employer offered the deposition of Michael Ralph, M.D., an orthopedic surgeon, as Exhibit 2. Dr. Ralph reviewed Claimant's extensive treatment record and prepared a report. He prepared another report after he reviewed the radiographic images. Dr. Ralph opines that Claimant's case was typical and predictable, including instances such as Claimant with new partial tears of the ACL. He strongly believed that the injury was simply another incident in Claimant's already determinable, i.e. pre-accident, need for a knee replacement. On cross-examination he acknowledged preparing his report without physically examining Claimant, without reviewing the radiography and without consulting any of the treating physicians.

RULINGS OF LAW

Future Medical Expense

Section 287.140 Mo.Rev.Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment...as may reasonably be required...to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathis v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). While conclusive evidence is not required, evidence which shows only a mere possibility of the need for future treatment will not support an award. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997). An employee is not entitled to future medical treatment for a possible disability resulting from some other cause. Breyer v. Howard Construction, 736 S.W. 2d 78, 82 (Mo. App. SD 1987).

Here, the treating orthopedist expressed his opinion that the need for an arthroplasty was accelerated as a result of the reported injury. Neither of Employer's experts discussed the surgeon's opinion that the reported injury accelerated the need for replacement. Dr. Volarich, while not a surgeon, gave thorough consideration of the entire treatment record, including the course of symptomatology, with the result that his opinions are better reasoned. He admitted that the degenerative arthritis was the main cause for any knee replacement, it was the reported injury that changed the symptomatology to disabling and thus accelerated its need.

Dr. Ralph's testimony was essentially a statistical probability argument. This argument surely has value in other applications. Here, the individual circumstances are considered and weighed. The additional trauma and the imposition of severe permanent restrictions by the treating surgeon on a previously pain-free, active knee belies the suggestion that arthroplasty does not flow from the reported injury in this case.

Permanent Partial Disability

Claimant was extremely active prior to the reported injury despite his surgical record on the right knee. Prior to the reported injury he worked unrestricted. Claimant is currently on a sit-stand limitation of twenty minute periods. Most jobs will not permit such restriction. Claimant underwent two prior surgeries, extended injection therapy and had had discussions about knee replacements; these discussions in no way curtailed his activity at work or home. The record suggests Claimant demonstrates an *overall* PPD loss of approximately two-thirds of the right lower extremity at the level of the knee. The injury and resulting surgery from the reported accident suggest current PPD of forty percent of the right knee.

Conclusion

Accordingly, in the first case herein, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a forty percent PPD of the right knee. In addition, Employer shall be responsible for future medical care and treatment of Claimant's right knee symptoms, including but not limited to, prescription drug expenses and surgical interventions (including arthroplasties).

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge

A true copy: Attest:

Division of Workers' Compensation

