

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

Injury No.: 09-071564

Employee: Janice Simon
Employer: St. Louis County (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Findings of Fact

Medical causation

The Second Injury Fund argues that employee failed to meet her burden of proof as to the issue of medical causation. We disagree, and provide the following supplemental findings of fact pertinent to this issue.

The parties stipulated that employee sustained an accident on September 5, 2009. Although not specifically stipulated, there is no question but that the accident arose out of and in the course of employment: employee was engaged in her duties as a correctional officer, and was descending a staircase at the jail, when a sudden loud sound from the inmates caused her to pivot and experience the acute onset of right knee pain.

The Second Injury Fund relies on the opinion from Dr. Nogalski that employee's work injury is not the prevailing factor in causing her injury, need for surgery, or permanent disability. The Second Injury Fund, in its brief, stresses employee's alleged failure, when Dr. Nogalski evaluated her five days post-injury, to advise him that she'd twisted her right knee in the accident. But the medical records generated in the course of employee's treatment at the emergency room at St. Mary's Health Center *the day after* the accident reveal that employee consistently reported a twisting injury. Employee also credibly testified (and we so find) that she reported a twisting injury to her supervisor on the day of the accident. We believe that it is Dr. Nogalski's causation opinion, rather than employee's credibility, that is undermined by his failure (for whatever reason) to obtain and/or to record an accurate history of injury.

The Second Injury Fund, relying on the opinions from Dr. Nogalski, takes the position that employee's right knee condition is the product of preexisting degenerative

Employee: Janice Simon

- 2 -

conditions rather than a traumatic injury. But the records of Dr. Piontek, who provided care and treatment for employee's preexisting left knee problems during 12 visits and multiple phone calls from February 23, 2007, through October 10, 2008, contain no mention whatsoever of preexisting right knee complaints. We note also that employee was performing physically demanding work for employer prior to September 5, 2009, without any documented or apparent disability or need for medical care referable to her right knee.

When employee twisted her right knee on September 5, 2009, she heard a "horrible popping noise" and experienced the immediate onset of pain and swelling. *Transcript*, page 12 The next day, employee's symptoms were so severe that she went to the emergency room without even attempting to perform any work for employer, and received ongoing medical care that ultimately culminated in a right knee replacement.

We are persuaded that, as described by Dr. Volarich, employee sustained an acute change in pathology referable to her right knee as a result of her accident on October 5, 2009, which resulted in permanent disability, and which in combination with employee's preexisting disabilities, has rendered her permanently and totally disabled.

Conclusions of Law

Medical causation

We note that the administrative law judge did not specifically address the disputed issue of medical causation. Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We have adopted the administrative law judge's (implied) finding that Dr. Volarich persuasively opined that employee's accident on September 5, 2009, is the prevailing factor in causing employee's right knee injury. We conclude that the accident is the prevailing factor causing the resulting medical conditions of a torn medial meniscus and accelerated posttraumatic arthropathy of the right knee, as well as irreversible aggravation of underlying previously asymptomatic chondromalacia, and permanent partial disability to the extent of 25% of the right knee.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued April 30, 2013, is attached and incorporated by this reference.

Employee: Janice Simon

- 3 -

We approve and affirm 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 11th day of October 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Janice Simon

Injury No.: 09-071564

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: St. Louis County (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-insured (previously settled)

Hearing Date: February 26, 2013

Checked by: CTL

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: September 5, 2009
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 while working as a corrections officer was walking down stairs at the jail, heard a commotion behind her and she turned and twisted to the right and felt injury to her right knee.
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: 25% permanent partial disability of the right knee
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Janice Simon

Injury No.: 09-071564

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$403.44 permanent total disability
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

22. Second Injury Fund liability:

\$403.44 per week for Claimant's lifetime beginning 40 weeks after January 26, 2011

TOTAL:

TO BE DETERMINED

23. Future requirements awarded:

Said payments to begin 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: Thomas Kendrick

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Janice Simon

Injury No.: 09-071564

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: St. Louis County (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-insured (previously settled)

Checked by: CTL

PREFACE

A hearing was held in the above mentioned matter on February 26, 2013. The Claimant, Janice Simon, was represented by Attorney Thomas Kendrick. The Claimant's primary case against the Employer/Insurer was previously settled. The hearing was against the Second Injury Fund only which was represented by Assistant Attorney General Joye Hudson.

ISSUES

1. Whether Claimant's incident of September 5, 2009 caused Claimant's right knee injury.
2. Nature and extent of the liability of the Second Injury Fund.
3. Nature and extent of permanent partial disability; partial or total disability

STIPULATIONS

1. On September 5, 2009, Claimant was an Employee of Employer.
2. Employer received proper notice of the claim.
3. The average weekly wage for Claimant was sufficient to result in a temporary total disability rate of \$403.44 and permanent partial disability rate of \$403.44.
4. Employer did not pay any temporary total disability to Claimant nor did the Employer pay any medical benefits.

EXHIBITS

Claimant's Exhibits:

- A – Stipulations
- B – Records of St. Mary's Hospital
- C – Records of St. Luke's Hospital
- D – Records of Cardiology Diagnostics
- E – Records of Dr. Tucker
- F – Records of St. Joseph Hospital West
- G – Records of Dr. Shisko
- H – Records of Dr. Piontek
- I – Records of Chesterfield Surgery
- J – Records of St. Luke's Hospital
- K – Records of Dr. Stein
- L – Deposition of Dr. Volarich
- M – Deposition of Mr. England

Claimant's exhibits were all accepted into evidence.

Second Injury Fund's Exhibit:

- I – Deposition of Dr. Nogalski

Second Injury Fund Exhibit I was accepted into evidence.

FINDINGS OF FACT

1. The Claimant, Janice Simon, was 66 years of age and has been unemployed since she last worked for Employer on January 26, 2011.
2. Claimant began working for the Employer as a corrections officer in 2003. As a corrections officer, she indicated that she did cell searches, pat downs, oversaw medication for prisoners, oversaw the laundry and took inmates to see their visitors.
3. Claimant testified that on September 5, 2009 she was walking down stairs when she heard a loud noise behind her and she turned her body to the right in a quick manner and as she turned she felt a pop in her right knee and felt pain. She immediately told her supervisor what occurred, but did remain at work. Claimant returned to her home and the next morning, September 6, 2009, she had pain in her right knee and had inability to put weight on the leg. Claimant testified her sister drove her to work where she had her sister run in and got the authorization and paperwork from Captain Reed to obtain medical treatment. Claimant was sent to SSM St. Mary's Health Center for medical care.
4. At St. Mary's Health Center, Claimant complained of pain, swelling and tenderness in her right knee as a result of the twisting event to her right knee while walking down the steps at work. X-rays were ordered at the hospital and it was the impression that the Claimant had a fracture of the right lateral femoral condyle as a result of her twisting

injury and lateral pain and a possible avulsion fracture from the lateral collateral ligament.

5. On September 10, 2009, Claimant was sent by her Employer to see Dr. Michael Nogalski. According to Dr. Nogalski's records of September 10, 2009, he examined the Claimant for right knee pain and the Claimant told the doctor that she was going down some stairs and she turned to one side and felt sudden pain and a pull in her knee. The doctor was of the impression that the Claimant had probable loose bodies in the knee and he could not make any clear findings suggesting an acute trauma to the right knee. Claimant said Dr. Nogalski told her that any further treatment would be with her private medical care. Dr. Nogalski felt that the September 5, 2009 claim by Claimant with regard to twisting her knee was not the prevailing factor in causing her knee condition.
6. Claimant went to see Dr. Jerome Piontek on September 11, 2009 for treatment of her right knee. Dr. Piontek injected the right knee with medication and ordered an MRI. Claimant had the MRI done on October 29, 2009 which revealed tears of the medial meniscus and lateral meniscus. Dr. Piontek performed right knee surgery on November 13, 2009 and repaired the torn medial meniscus. Dr. Piontek in May of 2010 did another surgery on Claimant's right knee.
7. It was not until September 2010 that Claimant returned to work but never returned to her regular job as a corrections officer. Claimant was on light duty and had to take breaks and would have to elevate her right leg. She is not able to do the walking and steps, which she normally did at work. Claimant as a result of her injury of September 5, 2009 still has problems with her right leg in that she has diminished strength, difficulty going up and down steps and she uses a walker. When she gets up, her right knee starts feeling better. She walks only for a limited period of time when doing housework or shopping.
8. Claimant was seen by Dr. Volarich on July 11, 2011 at the request of Claimant's attorney. Dr. Volarich examined the Claimant and took a history from her and reviewed the primary injury as well as the preexisting injuries and conditions. The doctor reviewed all of Claimant's medical treatment records and performed a physical examination. Dr. Volarich diagnosed Claimant as having internal derangement of the right knee status post surgery due to the tear as a result of the accident of September 5, 2009. The doctor rated permanent partial disability of Claimant's right knee at 65% due to the September 5, 2009 injury.
9. Dr. Volarich also testified as to the preexisting injuries:
 - a. On February 1, 2004, Claimant slipped on ice and landed on her extended left wrist and was seen by Dr. Tucker, who performed an open reduction internal fixation of her left distal radius. Claimant still had some problems with her left wrist. X-rays taken on March 9, 2004, showed early bone formation and she was referred back to physical therapy. On June 1, 2004, Claimant was complaining of left shoulder pain posteriorly since the injury and exam noted a positive Phalen's, but negative Tinel's at the wrist. Claimant was sent for a nerve conduction study on June 18, 2004, which showed severe carpal tunnel syndrome of the left and was diagnosed with left shoulder strain. Claimant continued under care and on August 3 of 2004 Dr. Tucker diagnosed healed fracture, improved carpal tunnel syndrome and a tendon sheath cyst. Claimant as of the time of

the hearing has continued to have tingling of her ring and small fingers on the left.

b. On June 6, 2005, Claimant saw Dr. Trimmer, a cardiologist, for cramping in her right lower extremity when walking. Claimant was noted to have lost pulse in her right lower extremity and was referred for blood flow studies. On June 20, 2005, she was noted to have total occlusion of the distal right superficial femoral artery, which was stented at that time. On December 17, 2008, Claimant was seen because she had decreased pulse in her right leg again and she had a second stent in place to improve blood flow. Claimant continued to be seen for her problems with chest pains on August 10, 2009; July 19, 2010 and January 3, 2011. As a result of her heart condition, she did lose time from work. Claimant took various medicines for her heart conditions and she noted because of the heart condition different problems in her legs, shortness of breath and problems walking.

c. On February 23, 2007, Claimant reported to Dr. Piontek that over time she developed pain in her left knee. He diagnosed her with synovitis and her knee was injected with cortisone. An MRI was performed which showed a complex tear of the posterior horn of the medial meniscus with a fusion and sprain of the MCL. Dr. Piontek on April 9, 2007 performed a left knee arthroscopic partial medial meniscectomy, as well as chondroplasty of the medial femoral condyle, lateral tibial condyle, medial tibial condyle and patella. Leading up to her primary injury of September 5, 2009, Claimant still had aches and pains as well as problems standing for any period of time.

10. Dr. Volarich testified that Claimant is permanently and totally disabled as a result of a combination of the September 5, 2009 work injury and the preexisting medical conditions.

11. On August 10, 2011, Claimant was seen by vocational rehabilitation expert James M. England, Jr. It was Mr. England's opinion after reviewing Dr. Volarich's and Dr. Nogalski's records that the Claimant would not be able to go back to her work activities and that, thus, Claimant is not employable in the open labor market and will remain totally disabled from a vocational standpoint.

RULINGS OF LAW

I find Claimant sustained a compensable injury on September 5, 2009. She sustained 25% permanent partial disability to her right knee as a result of that injury. Claimant is permanently and totally disabled as a result of the combination of the primary injury to the right knee and the preexisting injuries to her left knee, left wrist, and cardiovascular system. The parties agreed Claimant last worked January 26, 2011. The Second Injury Fund is liable for permanent total disability benefits of \$403.44 per week beginning 40 weeks after January 26, 2011. Claimant's attorney Thomas Kendrick is entitled to 25% of all payments for attorney's fees.

Made by: _____

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