

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

Injury No.: 07-084243

Employee: Jeffrey Taylor
Employer: Corporate Interiors, Inc.
Insurer: State Automobile Mutual Insurance Co.
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.

Discussion

Although it can be implied from the result reached by the administrative law judge, her award is silent with regard to which experts she found to be credible. We write to make clear that we find the opinions of Dr. Volarich and James England to be credible on the issue whether employee is permanently and totally disabled owing to a combination of his primary injury and preexisting conditions of ill. Specifically, we credit Mr. England's testimony (and so find) that employee is permanently and totally disabled because his lower extremity problems referable to the primary injury limit him to sedentary work, and because Dr. Volarich's restrictions referable to employee's preexisting upper extremity disabilities will prevent employee from successfully competing for even most sedentary jobs. We further credit Mr. England's testimony (and so find) that "[t]here is simply no reason for an employer to pick [employee] over virtually any other candidate" given employee's presentation, which includes a pronounced limp.

Second, we note that the administrative law judge failed to resolve the question whether employee's preexisting right knee condition constituted a hindrance or obstacle to employment or reemployment. We conclude that it did. The very facts of this case demonstrate that employee's preexisting right knee condition had the potential to combine with future work-related injuries so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Finally, we note that the administrative law judge left open the question whether she took into account post-accident worsening of employee's preexisting conditions when she stated that employee's chronic obstructive pulmonary disease (COPD) factored into her finding of permanent total disability. The evidence on record is unclear as to when employee was first diagnosed with COPD, and demonstrates that his use of an oxygen machine referable to this condition arose after the primary injury.

Employee: Jeffrey Taylor

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We wish to make clear that we believe employee is permanently and totally disabled owing to the effects of the primary injury combined with his preexisting conditions of ill *as they existed on the date of injury*, without regard to any subsequent worsening. As noted above, Mr. England did not factor COPD into his analysis of employee's permanent total disability. Relying on his testimony, nor do we.

Conclusion

The Commission affirms and adopts the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with this supplemental opinion.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued May 4, 2012, is attached and incorporated by this reference.

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 14th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jeffrey Taylor

Injury No.: 07-084243

Dependents: N/A

Employer: Corporate Interiors, Inc.

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

Additional Party: Second Injury Fund

Insurer: State Automobile Mutual Insurance Co.

Hearing Date: February 29, 2012

Checked by: MDL

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 23, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
Employee was operating a floor sander.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right knee
14. Nature and extent of any permanent disability: 27.5% PPD of the right knee for which Employer is liable, and permanent total disability due to combination of primary and preexisting injuries for which SIF is liable
15. Compensation paid to-date for temporary disability: \$18,135.00
16. Value necessary medical aid paid to date by employer/insurer? \$10,009.00

Employee: Jeffrey Taylor

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- 17. Value necessary medical aid not furnished by employer/insurer? \$22,734.02
- 18. Employee's average weekly wages: \$1,002.24
- 19. Weekly compensation rate: \$668.16/\$389.04
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$22,734.02
4 weeks of temporary total disability	\$2,672.64
44 weeks of permanent partial disability from Employer	<u>\$17,117.76</u>
Total from Employer	\$42,524.42

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential (\$279.12) payable by SIF for 44 weeks beginning November 3, 2008, and, thereafter, \$668.16 for Claimant's lifetime	INDETERMINATE
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TOTAL: INDETERMINATE

23. Future requirements awarded: None

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ms. Ann Dalton

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jeffrey Taylor

Injury No.: 07-084243

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Corporate Interiors

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

Additional Party: Second Injury Fund

Insurer: State Automobile Mutual Insurance Co.

Checked by: MDL

PRELIMINARIES

A hearing was held on February 29, 2012 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Jeffrey Taylor ("Claimant") was represented by Ms. Ann Dalton. Corporate Interiors, Inc. ("Employer") and its insurer, State Automobile Mutual Insurance Co. ("Insurer"), were represented by Randall W. Schroer. The Second Injury Fund, ("SIF") was represented by Assistant Attorney General Kristen Frazier. Ms. Dalton requested a fee of 20% of Claimant's award.

The parties stipulated that on or about August 23, 2007, Claimant sustained an accidental injury arising out of and in the scope of employment; Claimant was an employee of Employer; venue is proper in the city of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; Employer paid medical benefits of \$10,009.00 and temporary total disability benefits in the amount of \$18,135.00; and the rates of compensation are \$668.16 for Permanent Total Disability ("PTD") and Temporary Total Disability ("TTD") benefits, and \$389.04 for Permanent Partial Disability ("PPD") benefits. The parties further stipulated if Claimant is found to be permanently and totally disabled, PTD benefits should commence on November 3, 2008 if the total knee replacement is found to be causally related to Claimant's work, and if it is found the total knee replacement is not causally related to Claimant's work, the PTD benefits should commence on February 28, 2008.

The issues for resolution are: medical causation with respect to Claimant's need for a total knee replacement; liability of Employer for past medical benefits in the amount of \$22,734.02; whether Claimant is entitled to four weeks of past Temporary Total Disability ("TTD") benefits; nature and extent of permanent disability sustained by Claimant; and the liability of the SIF.

SUMMARY OF EVIDENCE

Claimant is a fifty four year old man who graduated from high school in 1975. He has no other formal education. He worked his entire career in the flooring industry. Claimant began work for Employer as an installer/floor man in 2000 and worked until August 23, 2007. His work

involved installing all types of flooring, primarily in commercial settings. The physical requirements of his job required Claimant to stand, walk, squat and kneel constantly, lift and carry.

PRIMARY INJURY

On August 23, 2007, Claimant was working with a large sander at Children's Hospital when it started bouncing out of control. As he attempted to stabilize the sander, his right knee snapped and buckled under him causing him to fall. Employer authorized treatment through Dr. Keohane who diagnosed internal derangement of the right knee, aspirated and injected it, and referred him for an MRI. Following the MRI, Dr. Keohane recommended arthroscopic surgery which was performed on October 9, 2007. The surgery involved an arthroscopy of the right knee with a tear of the medial meniscus and degenerative changes in the medial femoral condyle. Surgery failed to provide significant relief and Dr. Keohane recommended a total knee replacement which was ultimately performed on June 20, 2008. Treatment leading up to the knee replacement was provided by Employer and its workers' compensation carrier. The knee replacement was denied under workers' compensation and paid by Claimant's Health and Welfare benefits through the Carpenters' Union. The Carpenters' union is seeking reimbursement of this expense if the replacement is found to be compensable under the workers' compensation statute.

PRIOR INJURIES

Claimant has a history of difficulties with his right knee dating back to 2006. At that time, he was diagnosed with degenerative joint disease of the medial compartment of the right knee. Dr. Henderson performed surgery involving arthroscopic partial medial meniscectomy, and chondroplasty of the medial femoral condyle. Post operatively, Claimant continued to have significant problems with his right knee and remained off work and in physical therapy. A cortisone injection was administered on February 14, 2006, without significant relief. Claimant continued physical therapy and a total joint replacement were discussed. Rather than the knee replacement, Claimant underwent Synvisc injections on three occasions in October 2006 and was under no further medical care leading up to his work-related injury on August 23, 2007.

Claimant characterized the pain following the primary injury as worse than the pain prior to the work-related injury. Prior to the work incident on August 23, 2007, Claimant still had some pain, clicking and locking in the right knee, but was able to continue working as a floor layer up until the time of his injury on August 23, 2007. Following the August 23, 2007 work-related injury, Claimant complains of increased pain, popping and swelling in his right knee. He is unable to stand or walk for more than 20 to 30 minutes, and he avoids ladders and takes stairs slowly. After sitting in one spot too long, Claimant's right leg becomes stiff. He has to get up and move around. He is only able to drive approximately one hour, and then needs to stretch. He takes pain medication regularly.

Claimant developed right elbow pain in 1986. His elbow was injected with cortisone, and aspirated without relief. He was diagnosed with right olecranon bursitis and underwent excision of the right bursa. Following this surgery, Claimant returned to work full duty as a floor layer, but continued to have right elbow pain with difficulty extending his right arm fully. He had difficulty leaning on his right elbow due to pain and weakness.

Prior to August 23, 2007, Claimant had pain and stiffness in his left elbow after falling. He was diagnosed with a small avulsion fracture of the coronoid and was placed in a sling. Leading up to August 23, 2007, Claimant continued to have left elbow pain and difficulty fully extending his left arm. He tried to avoid heavy lifting, and was hindered at work.

Prior to August 23, 2007, Claimant had difficulty with his low back. He treated with a chiropractor, and was careful how he lifted despite continuing to work full duty.

Prior to August 23, 2007, Claimant was diagnosed with chronic obstructive pulmonary disease and sleep apnea. At the time of the hearing, Claimant utilized an oxygen tank. He was not using oxygen prior to the injury on August 23, 2007. Since the work injury of August 23, 2007, Claimant is limited to standing and walking due to knee pain. He avoids kneeling and squatting all together. After standing for around 15 minutes, he has to lean or sit down. Claimant lays down one to two hours every day.

Dr. Keohane testified that the work injury of August 23, 2007 caused Claimant's medial meniscus tear, and was the prevailing factor in the need for the total knee replacement. Dr. Keohane rated Claimant's disability for the meniscus tear at 20%, and testified the total knee replacement would be additional disability over and above that 20%.

Dr. David Volarich reviewed Claimant's treatment records from the primary injury as well as the pre-existing injuries and subsequent medical conditions, examined Claimant, prepared a report, and testified on behalf of Claimant. Claimant told Dr. Volarich that although he had continued pain, clicking and locking in the right knee prior to August 23, 2007, the injury of August 23, 2007 increased the level of pain severely. Dr. Volarich opined, within a reasonable degree of medical certainty, that the August 23, 2007 work-related accident resulted in 37.5% PPD of the right knee; that Claimant had 37.5% PPD of the right knee prior to the August 23, 2007 accident and that the total knee joint replacement was not completely due to the August 23, 2007 accident, but was due to the August 23, 2007 accident and the pre-existing condition in the right knee from 2006. Dr. Volarich testified it could not be stated to a reasonable degree of reasonable certainty that Claimant would have required a total knee replacement due to the August 23, 2007 accident in isolation without the preexisting history.

Dr. Volarich opined, within a reasonable degree of medical certainty, Claimant suffered from 20% permanent partial disability of the right elbow and 15% permanent partial disability of the left elbow prior to August 23, 2007. Dr. Volarich further testified a small amount of disability existed prior to August 23, 2007 in the low back and there was disability from the chronic obstructive pulmonary disease prior to August 23, 2007. Dr. Volarich testified if vocational assessment was unable to identify a job for which the Claimant is suited; Claimant is permanently and totally disabled as a result of the work-injury of August 23, 2007 in combination with his pre-existing medical conditions.

James England interviewed Claimant on October 12, 2009, prepared a report, and testified on behalf of Claimant. Mr. England opined it was obvious Claimant could not return to the type of work he performed his entire work life, and when considering the restrictions indicated by Dr. David Volarich, Claimant is precluded from any sedentary work activity because

of the combination of his knee and upper extremity problems. Mr. England further testified given Claimant's limitations and size, it would be difficult for him to compete for employment in the open labor market. Mr. England testified because of Claimant's presentation and difficulty he has sitting very long before he needs to get up and move around, it would be very difficult for him to successfully compete in the open labor market. He testified there is no reason for an employer to pick Claimant over other alternative candidates.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant's work injury of August 23, 2007 meets the legal standard required for medical benefits under Missouri law. This standard is clearly and plainly articulated in section 287.140.1 RSMo and guarantees an injured worker the right to medical treatment "reasonably necessary to cure and relieve the effects" of a compensable injury, and does not require a finding that a work place accident was the prevailing factor in causing the need for that particular medical treatment. Once it is determined there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. *Tillotson v. St. Joseph Medical Center*, 347 SW 3d 511 (Mo. App.2011). Although Dr. Keohane testified Claimant's work accident was the prevailing factor in the need for his total knee replacement, according to *Tillotson*, the statute does not require that. In addition, Dr. Volarich testified Claimant's need for the total knee replacement was partially due to his work accident of August 23, 2007. Therefore, Employer is liable for the cost of the total knee replacement in the agreed amount of \$22,734.02. Since I find Employer is liable for the knee replacement, it follows that Employer is also liable for the additional four weeks of TTD benefits for the recovery period following the knee replacement surgery.

I find Claimant sustained 27.5% permanent partial disability of the right knee as a result of the injury of August 23, 2007. Employer is, therefore, liable for 27.5% permanent partial disability of the right knee (44 weeks) at a rate of \$389.04 or \$17,117.76.

Claimant is permanently and totally disabled. All of the evidence establishes he is unemployable. Dr. Volarich testified if vocational assessment was unable to identify work for Claimant within his restrictions, he is permanently and totally disabled. Mr. England, the vocational expert, testified Claimant could not compete in the open labor market based upon the restrictions from Dr. Volarich. Mr. England's testimony is uncontroverted. It is clear given Claimant's age, physical limitations, employment experience; Claimant is unable to secure employment in the open labor market.

Claimant is permanently and totally disabled as a result of his last accident of August 23, 2007, and the pre-existing injuries to his right knee, left and right elbows and low back, as well as the chronic obstructive pulmonary disease. Before August 23, 2007, Claimant had a well-documented disability in his right knee which required medical treatment, lost time, and the discussion of a total knee replacement. Medical records and Claimant's testimony also establish

that he had pre-existing disability in both upper extremities prior to August 23, 2007 that caused a hindrance or obstacle to his employment.

I find Claimant has been rendered permanently and totally disabled due to the combination of his work-related and pre-existing disabilities and conditions, and that the liability rests, therefore, with the SIF. Because I find the total knee replacement should have been provided by Employer, I find Claimant reached maximum medical improvement on November 3, 2008 pursuant to the stipulation of the parties. Thus, the Second Injury Fund is liable for the differential of \$279.12 for 44 weeks beginning November 3, 2008, and \$668.16 thereafter, for Claimant's life.

This award is subject to an attorney's lien in the amount of 20% in favor of Claimant's attorney, Ms. Ann Dalton.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation