

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

Injury No.: 03-107773

Employee: David Vance  
Employer: Blake Flooring Company  
Insurer: Mid-Century  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the Administrative Law Judge Matthew D. Vacca dated September 18, 2008. The award and decision of the administrative law judge are attached hereto. The administrative law judge's *Findings of Fact* are incorporated to the extent they are not inconsistent with our Award.

Preliminaries

Under the heading *Rulings of Law* the administrative law judge concludes, "claimant has failed to establish that he sustained an accident and/or an occupational disease which arose out of and in the course of his employment with Blake Flooring Company." This conclusion is contrary to the stipulations of the parties. The stipulations were recited by the administrative law judge and are partially recounted here:

The parties have entered into a stipulation regarding certain facts that are not at issue. The parties agree that on September 1st, in the year 2003, David Vance was working for Blake Flooring Company when he sustained an occupational disease which arose out of in the course of his employment. That occupational disease caused injury which necessitated medical care in the amount of \$21,654.77 and also which resulted in the claimant being temporarily and totally disabled and receiving \$12,061.42 in temporary total disability. ...Temporary total disability benefits from September 3rd, 2003, until May 1st, 2004.

...

The issues presented for resolution by way of this hearing are the nature and extent of any permanent partial or permanent total disability and the apportionment of any said disability between the employer and the Second Injury Fund if there is any apportionment.

Transcript pp. 1-2.

The administrative law judge was bound to limit his determination to the stipulated issues.

The rules of the Department of Labor and Industrial Relations, in particular, 8 CSR 50-2.010(14), provide: "hearings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the state of Missouri shall apply. Prior to hearing, the parties shall stipulate uncontested facts and present

evidence only on contested issues." Therefore, the ALJ should confine the evidence during the hearing to the stated contested issues. Stipulations are controlling and conclusive, and the courts are bound to enforce them. A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish. In *Lawson*, our colleagues in the Southern District concluded that the Commission acted in excess of its powers in making its award on grounds not in issue.

*Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. E.D. App. 2001) (citations omitted).

The administrative law judge acted in excess of his powers when he made his award on a ground not in issue, to wit, the incidence of an occupational disease. We are compelled to reverse the administrative law judge and decide the stipulated issues.

#### Findings of Fact

The administrative law judge found that employee was diagnosed with a torn meniscus. Although an MRI revealed what appeared to be meniscus tear, Dr. Mannis found no tear during arthroscopy. Dr. Mannis performed chondroplasty on the femoral condyles and patellas of both knees. Employee reported the surgery provided no relief.

The administrative law judge mischaracterized the opinion of Dr. Johnston. The doctor stated in his June 15, 2004, report that some of employee's symptoms "may be due to an underlying undiagnosed neuromuscular problem." But Dr. Johnston clearly recommended employee be evaluated by a specialist in neuromuscular problems for diagnosis.

#### Nature and Extent of Permanent Disability from the Primary Injury

Employee experiences popping, cracking, pain, aching, swelling, burning, in his knees. He also experiences cramping and loss of feeling in his knees and legs. Employee described how he is limited in his physical activities as a result of his bilateral knee condition. He testified that everyday activities take longer to perform. Employee's sleep is disrupted. He has difficulty walking, kneeling, traversing stairs, bathing, and showering. His ability to lift is hampered. Dr. Hanaway recommended permanent restrictions of no repetitive bending, kneeling, or squatting.

Originally, employee only claimed injury to his knees. Employee amended his claim to assert he also sustained injury to his low back and body as a whole. Employee presented medical evidence and testimony regarding a cervical condition as well. We are not persuaded that employee's back and neck disabilities were caused by or aggravated by employee's work as a floor installer. Although Dr. Hanaway opined that employee's work as a floor installer aggravated preexisting, asymptomatic conditions in employee's back and neck, the medical records do not support the opinion. The records of employee's treating physicians reflect no low back or neck complaints. Employee's low back and neck complaints first appear in Dr. Hanaway's records. Employee's low back and cervical conditions were not caused or aggravated by his work as a floor installer.

Dr. Hanaway opined that employee is permanently and totally disabled based upon employee's knee, back and neck complaints. Because we found that employee's low back and neck conditions do not flow from the work injury, Dr. Hanaway's opinion does not support a finding that employee is permanently and totally disabled due to the primary injury.

Dr. Hanaway rated employee's bilateral knee condition at 30% permanent partial disability of each knee. Dr. Hoffmann concluded employee sustained a 25% permanent partial disability of each knee. Dr. Johnston found a 5% permanent partial disability of each knee. "It is...within the exclusive province of the commission to determine matters of disability. The commission is not bound by percentages of disability found by medical experts."

Based upon employee's testimony about his limitations and the restrictions recommended by physicians, we conclude employee sustained a 15% permanent partial disability of each knee as a result of his occupational disease.

#### Second Injury Fund Liability

Employee seeks permanent total disability benefits from the Second Injury Fund. "Before the Fund can be held liable for payment of benefits for permanent disability, the law requires that a permanent partial disability preexist the injury or occupational disease for which the employee claims benefits, and more than that, the preexisting partial disability must be of such seriousness as to constitute a hinderance [sic] or obstacle to employment or reemployment."

Employee testified that he had no problems with his back or neck before he began experiencing the effects of his occupational disease. He asserted he had no conditions affecting his ability to do his work. He agreed he was "healthy, 100 percent, could do everything [he] had to do with the labor work." Based upon employee's testimony, we find he had no hindrances or obstacles to employment or reemployment before the primary injury. The Second Injury Fund is not liable to employee for permanent disability.

#### Award

For the foregoing reasons, we reverse the award of the administrative law judge.

We direct employer/insurer to pay to claimant \$11,876.16 for permanent partial disability benefits (\$247.42 X 48 weeks).

Harry J. Nichols, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 15th day of July 2009.

#### LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

#### CONCURRING IN PART AND DISSENTING IN PART

John J. Hickey, Member

Attest:

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Secretary

SEPARATE OPINION  
Concurring in Part and Dissenting in Part

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I agree with the decision of the majority to award compensation in this case. For the reasons set forth below, I believe employee's award of benefits should be increased.

First, I believe the award of permanent partial disability for the primary injury to employee's knees is too low. I would award 25% permanent partial disability for each knee based upon the testimony of Drs. Hanaway and Hoffmann.

Second, I believe employee is entitled to permanent total disability benefits from the Second Injury Fund. Employee had a motor vehicle accident in 1990 that left him with chronic neck pain. Diagnostic imaging revealed that he has herniated discs at C4-5 and C5-6. Dr. Hanaway believes employee's disc problems resulted in a preexisting 40% permanent partial disability of the body as a whole. Employee's preexisting neck condition was of such seriousness as to constitute a hindrance or obstacle to employment. Dr. Hanaway believes employee's installer work increased employee's neck symptoms.

Dr. Hanaway testified that employee's work as an installer aggravated employee's underlying degenerative low back condition such that it became symptomatic. Imaging revealed that employee has disc protrusions L4-5 and L5-S1. I believe employee had a preexisting underlying back condition that was aggravated by his employment.

Employee's physical restrictions are summarized in the main opinion. Employee's work history is almost exclusively in positions involving physical labor. Employee has a limited education. Employee has short-term memory problems. Based upon the employee's physical restrictions, labor background and limited education, Dr. Bernstein believes that employee is unable to compete in the open labor market. I agree. So does Dr. Hanaway, who believes employee is permanently totally disabled due to a combination of his knee, neck and back conditions.

Based upon the foregoing, I would award to employee permanent total disability benefits from the Second Injury Fund. I respectfully dissent from the decision of the majority of the Commission to deny permanent total disability benefits.

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John J. Hickey, Member

## AWARD

Employee: David Vance

Injury No.: 03-107773

Dependents: N/A

Before the  
Division of Workers'  
Compensation

Employer: Blake Flooring Company

Department of Labor and Industrial

Additional Party:

Second Injury Fund Relations of Missouri  
Jefferson City, Missouri

Insurer: Mid Century

Hearing Date: August 14, 2008

Checked by: MDV: cw

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
  - Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
  - Date of accident or onset of occupational disease: N/A
  - State location where accident occurred or occupational disease was contracted: St. Louis, County
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? No
  - 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: N/A
12. Did accident or occupational disease cause death? No      Date of death?
13. Part(s) of body injured by accident or occupational disease: None
  - Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$12,061.42
16. Value necessary medical aid paid to date by employer/insurer? \$21,654.77

Employee: David Vance

Injury No.: 03-107773

17. Value necessary medical aid not furnished by employer/insurer? 0

- Employee's average weekly wages: \$521.11

19. Weekly compensation rate: \$247.42/\$347.05

20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning , for \$0  
Claimant's lifetime

22. Second Injury Fund liability: No

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:  
weekly differential ( ) payable by SIF for weeks beginning  
and, thereafter, for Claimant's lifetime

Total: \$0

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 of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Vance

Injury No.: 03-107773

Dependents: N/A

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

Employer: Blake Flooring Company

Additional Party: Second Injury Fund

Insurer: Mid Century

Checked by: MDV: cw

### ISSUES PRESENTED

The issues presented for resolution at this hearing are: Accident and/or occupational disease, medical causation, and the nature and extent of any disability.

### FINDINGS OF FACT

1. Claimant was born on March 5, 1969, and graduated from the 8th grade. He is 40 years old. Since graduating school at the age of 17, he worked as a greenhouse laborer and at a Burger King restaurant cleaning up and taking apart boilers after the restaurant was closed and cleaning the floors.
2. Claimant also worked for Anchor Industries in manual labor lifting boxes from 75-80 pounds, stacking skids, and rolling plastic.
3. Claimant also worked managing a 183 racehorse farm called Embry's Secret Acres where he would feed the horses, maintain the farm, cut the fields, and generally manage the horse operation.
4. Claimant also worked off and on over the years as a deckhand on the inland waterways tying up and connecting the barges to each other and to docks. Claimant worked on the President Casino from 1992 to 1993, as a demolition dockhand.
5. From April of 1994 to 2003, Claimant worked in the flooring industry installing, sanding, and finishing three-quarter inch hardwood floors. This job would require Claimant to bend over and work on his knees. He has done this kind of work for nine years.
6. Claimant had no prior claims for any injuries before working for the Employer, Blake Flooring Company. He injured his elbow after having surgery on both of his knees. Both knee injuries are alleged to be related to the employment.

7. Claimant also alleges that his neck and back hurt as a result of his gait being altered by his knee conditions. He experiences pain, aching, swelling, burning, cramping, loss of sensation, popping, and cracking of the knees. Claimant said the knee surgery provided him with no relief from the pain and the doctor said he needs more surgery although he doesn't have any insurance.

8. Claimant says his knee condition has gotten worse. He says it takes him longer to perform everyday activities. He has difficulty sleeping, walking, showering, and bathing and contends that he cannot do any of his prior jobs and that he knows of no jobs that he can do.

9. His condition has been getting worse.

10. The Claimant's children have Social Security because their mother died. That is the income that Claimant has been living on.

11. Claimant finds difficulty walking stairs. Walking down stairs is more difficult than walking up the stairs.

12. The Claimant has no prior work injuries.

13. Pain was the first symptom he experienced.

14. He injured his low back during therapy. He fell and hurt his elbow during the therapy and may have hurt his back then also.

15. The Claimant has not had any vocational rehabilitation and his Social Security claim is pending.

16. Records indicate that Claimant alleges a specific accident on September 1, 2003, after sanding a wooden floor. He began to have pain in both knees towards the end of that day. Claimant was ultimately diagnosed with a torn meniscus and chondromalacia involving the femoral condyles in both knees and of the patellar cartilage.

17. After 8 months he still had pain in his knees when he saw Dr. Hanaway, even though he hadn't been working. Claimant also alleged bilateral heel pain in February of 2004.

18. Claimant has a history of alcohol abuse and at one point wanted to try Antabuse because he was drinking a 6 pack a day.

19. In 2005, Claimant was diagnosed with serious degenerative disc disease, disc protrusions, and contact with the spinal cord. Claimant was also diagnosed with stenosis.

20. Dr. Hanaway believes he has discs at C4-5 and C5-6 which explain underlying neck pain. Dr. Hanaway also diagnoses heel pain, back pain, and jaw jerk for TMJ syndrome. He believes Claimant is permanently and totally disabled. Mr. Bernstein thinks Claimant is permanently and totally disabled. Dr. Hoffman believes Claimant has 25% disability in each knee due to chondromalacia of the patella.

21. Dr. Mannis believes Claimant suffers from an inflammatory process, that he has tendonitis in both knees, and that it should improve once he is away from work. Dr. Johnston thought Claimant had an undiagnosed neuromuscular problem. He didn't think such a condition would be work related.

RULINGS OF LAW

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Claimant has failed to establish that he sustained an accident and/or an occupational disease which arose out of and in the course of his employment with Blake Flooring Company.

DISCUSSION

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Claimant is extremely young and suffers from multiple severe degenerative osteoarthritic conditions which afflict his upper extremities, lower extremities, heels, knees, and neck. None of these conditions are work related. I think the most logical explanation is that provided for by Dr. Johnston who I note does not often testify in medical/legal matters. He believes Claimant suffers from a systemic inflammatory condition. This explanation is corroborated by the 2005 diagnosis of serious degenerative disc disease in the spine. His condition continues to deteriorate. He is one of those unfortunate souls whose body degenerates at an extremely early age. The osteo-arthritis however, is not caused by floor laying. The degenerative condition afflicts his entire body. The knees are just part of that degenerative condition, not the result of any occupational disease.

While Claimant may be disabled, that disability has to do with his underlying anatomical condition, not as a result of working as a floor installer from age 26 to 35. Claimant's disability is wholly personal or idiopathic, not related to work. This is a Social Security issue, not a work related issue.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

MATTHEW D. VACCA

*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeff Buker

*Director*

*Division of Workers' Compensation*

*Lawson v. Emerson Electric Company*, 809 S.W.2d 121 (Mo. App. 1991).

*Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo. App. 2004)(citations omitted).

*Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 177 (Mo. App. 2004).