

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

Injury No.: 05-144189

Employee: Michael Webb
Employer: Pepsi MidAmerica Company
Insurer: Self-Insured

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, heard the parties' arguments and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the August 20, 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.

Preliminaries

The issues stipulated in dispute at the hearing were: (1) medical causation; (2) future medical treatment; and (3) the nature and extent of permanent partial disability.

The administrative law judge made the following findings: (1) employee's right knee arthritis is medically and causally related to his December 1, 2005, work related injury; (2) employee met his burden of demonstrating a probability that he will need a future knee replacement and employer is liable for such future medical treatment; and (3) employee sustained a 35% permanent partial disability of his right knee at the 160 week level as a result of the December 1, 2005, work injury.

Employer submitted a timely Application for Review with the Commission alleging the administrative law judge erred as a matter of law in not finding its experts credible and setting forth twenty-two pages of various arguments in support of this proposition.

For the reasons set forth in this award and decision, the Commission modifies the award of the administrative law judge.

Findings of Fact

Conflicting expert testimony

We are presented with conflicting expert testimony in this matter. Despite employer's efforts to portray the administrative law judge's credibility determination as a legal error (we find no "crucial defect" that renders Dr. Volarich's opinion somehow incompetent as a matter of law), the obvious issue before us is the credibility that ought to be afforded to the conflicting opinions of the various medical experts.

The administrative law judge found Dr. Volarich more credible than Drs. Haupt and Milne on the question whether the condition of employee's right knee is causally related to the work injury or the result of unrelated degenerative processes. The administrative law judge credited Dr. Volarich's opinion that there was plenty of time for post-traumatic

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arthritis to set in during the eighteen months employee went without treatment following his work injury, and found a medical causal relationship between the work injury and employee's arthritis. We disagree with this finding.

Dr. Haupt, a board-certified orthopedic surgeon, was employee's treating doctor and thus had the benefit of appraising employee's medical condition and right knee complaints from October 2007 through March 2008. Dr. Haupt performed the December 2007 right knee surgery. Dr. Haupt's post-operative diagnoses were Grade IV changes at the entire medial tibial plateau, Grade III and IV changes at the femoral trochlea, and chronic tearing of the medial meniscus. Dr. Haupt explained that chondromalacia is the breakdown of the articular cartilage covering the ends of bones and that in employee's case, there is no articular cartilage left to be broken down. Dr. Haupt opined that employee's Grade IV chondromalacia is the result of a chronic rather than an acute process. Dr. Haupt explained that the acute injury suffered by employee on December 1, 2005, was a hyperflexion injury that resulted in a meniscus tear, and that employee's arthritis was a condition preexisting and unrelated to the work injury. Dr. Haupt found employee at maximum medical improvement on December 1, 2005, in regard to the work injury, and opined that employee is not in need of future medical treatment related to the effects of the work injury. Dr. Milne concurred in Dr. Haupt's opinion that employee's degenerative conditions of the right knee were preexisting rather than the results of the work injury, and that there is no need for future medical treatment flowing from the work injury. Dr. Volarich offered conflicting opinions, but we find his testimony less persuasive than that of Drs. Haupt and Milne.

Because we are convinced Drs. Haupt and Milne provided the more convincing expert medical testimony in this matter, we conclude that the work injury of December 1, 2005, was not the prevailing factor causing employee's chondromalacia and degenerative conditions of the right knee, and we credit Dr. Haupt's opinion that employee is at maximum medical improvement and that any need employee has for future medical care is attributable to employee's preexisting conditions and does not flow from the work injury.

Nature and extent of permanent disability referable to the December 1, 2005, work injury

The administrative law judge took into account employee's preexisting degenerative conditions of the right knee when he found that employee suffered a 35% permanent partial disability of the right knee at the 160-week level as a result of the work injury. Given our resolution of the conflicting medical expert testimony, we disagree with the administrative law judge's assessment of the nature and extent of employee's permanent partial disability.

Dr. Haupt opined that employee has an overall 10% permanent partial disability of the right knee, of which 3% is attributable to the work injury. Dr. Milne found a 15% overall permanent partial disability of the right knee, with 5% attributable to the work injury. Dr. Volarich found a 50% permanent partial disability of the right knee, but took into account the degenerative conditions we have found unrelated to the work injury and did not provide an alternative rating limited to employee's disability resulting from the medial meniscus tear. We note employee's testimony regarding the considerable difficulties and limitations he presently suffers in regard to his right knee, but we find employee's testimony lacking probative value

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on the issue because he offered an overall picture of his present disability that includes the effects of the preexisting degenerative conditions we have found unrelated to the work injury.

After carefully weighing the evidence presented, we find that employee sustained a 15% permanent partial disability of the right knee at the 160-week level.

Conclusions of Law

Future medical treatment

The question is whether employee met his burden of demonstrating he is entitled to future medical treatment as a result of the work injury of December 1, 2005. Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

We have credited the opinions of Drs. Milne and Haupt that employee has no need for future medical care as a result of the December 1, 2005, injury, and that any need for future medical care is related to his preexisting degenerative conditions.

The claimant is not required to present evidence of the specific medical care that will be needed but he is required to establish through competent medical evidence that the care requested flows from the accident. An employer is required to compensate for future medical care only if the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury.

ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo. App. 2007) (citations omitted).

We conclude that employee has failed to meet his burden of establishing a reasonable probability that additional medical treatment is needed and that the need arose from the work injury. Accordingly, we conclude that employer is not liable for future medical treatment.

Nature and extent of permanent partial disability resulting from the work injury

The question is the nature and extent of permanent disability resulting from the work injury of December 1, 2005.

The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a

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medical question. The nature and permanence of the injury is a medical question, however, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.

Elliott v. Kan. City School Dist., 71 S.W.3d 652, 657 (Mo. App. 2002) (citations omitted).

We have found that employee sustained a 15% permanent partial disability of the right knee as a result of the work injury of December 1, 2005. Employee is entitled to permanent partial disability benefits consistent with this finding, and employer is liable for same.

Award

We modify the award of the administrative law judge. We find that employee failed to meet his burden of proving he is entitled to future medical treatment. Accordingly, we conclude employer is not liable for future medical treatment. Additionally, we find that employee did not sustain a 35% permanent partial disability but rather sustained a 15% permanent partial disability of the right knee at the 160-week level as a result of the work injury. Employer is liable for permanent partial disability benefits in the amount of \$8,761.92 (24 weeks x \$365.08).

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 Carl Strange, issued August 20, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 2nd day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Michael Webb

DISSENTING OPINION

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 believe the decision of the administrative law judge should be affirmed.

I disagree with the majority's credibility determinations on the issue of medical causation. On December 1, 2005, employee slipped on a pile of sugar while working for employer. Employee's right leg and knee were twisted and pinned underneath him as he fell to the floor. Employer had timely notice of employee's injury, but nonetheless neglected to have him sent for treatment. As a result, employee walked around and worked on an injured knee for approximately sixteen to eighteen months before receiving the treatment he needed, which eventually included surgery. Employee had no complaints or problems with either of his knees prior to December 1, 2005. Currently, employee's right knee swells, catches, is painful, lacks mobility, and hurts every day. All of the doctors to testify opined that employee will need a total knee replacement.

The majority credits Drs. Haupt and Milne in finding that employee's chondromalacia is the result of a chronic degenerative condition that preexisted the work injury. But both doctors admitted that employee was asymptomatic prior to December 1, 2005, and that there is no way to conclusively date the chondromalacia as a preexisting condition. Neither of employer's doctors compared the left knee to the injured right knee. In essence, employer's doctors ask us to believe that employee's right knee was already bad before the December 1, 2005, injury, and that is why it is bad today. But this view ignores the uncontested evidence that employee had no problems with either knee before December 1, 2005, and that he currently has no problems with his left knee.

Dr. Volarich, on the other hand, opined that the chondromalacia and degenerative breakdown of employee's right knee was due to post-traumatic arthritis caused by the December 1, 2005, injury. Dr. Volarich explained that walking around on an injured knee for sixteen to eighteen months can cause degenerative changes, and that there was more than enough time between the injury and employee's surgery for post-traumatic arthritis to set in. Dr. Haupt agreed that a tearing of the meniscus would cause the leg to become weaker and increase the symptoms of the degenerative condition, and that an injury like employee's could cause the degenerative condition to become symptomatic. Dr. Milne also agreed that the injury caused the right knee to become symptomatic, and the fact that employee continued walking on the injured right knee would cause the meniscus to further tear and cause degeneration and irritation of the knee joint.

Dr. Volarich's view offers the only explanation as to why an employee with no prior right knee problems suffered from advanced-stage degenerative changes on the date of surgery, and explains why employee's left knee remains asymptomatic. Employer's experts conceded that the mechanism of post-traumatic arthritis was a possible cause of employee's condition, but chose to ignore the fact employee walked around on an injured knee for sixteen to eighteen months, preferring their (admittedly unverifiable) theory that employee's right knee was always bad. In sum, I find Dr. Volarich's view

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more likely, logical, and credible than that of Drs. Haupt and Milne, and would affirm the administrative law judge's award on the issue of medical causation.

As for future medical care, I am convinced the majority's decision to reverse the administrative law judge and deny benefits is contrary to established law. It is worth noting the evidentiary standard employee is required to meet in order to demonstrate that employer was responsible for providing her future medical care in connection with the work injury, as it appears this was ignored by the majority. In order for employer to be liable, the "[e]vidence must demonstrate that future medical care required flows from the accident ... An employer is not responsible for compensation for future medical care unless the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury, even if the treatment will also provide a benefit to a non-compensable condition." *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 85 (Mo. App. 2006).

I believe that employee met the foregoing burden in this case. Employee credibly testified that he had no symptoms prior to the injury, that the right knee became symptomatic following the injury, and that the right knee remains symptomatic as of the date of hearing. Every doctor to testify opined that employee will need a knee replacement. Dr. Haupt testified that the December 1, 2005, injury triggered the symptoms and process leading to employee's need for a knee replacement. That such future medical care may also serve to treat symptoms related to a pre-existing condition is irrelevant: "[w]hile an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury." *Stevens v. Citizens Mem'l Healthcare Found.*, 244 S.W.3d 234, 238 (Mo. App. 2008) (citations omitted). Again, employee was not required to prove that the work injury was the substantial or prevailing factor causing the need for future medical care, but only needed to show that a need for future medical care flows from the accident. It appears to me the majority held employee to a higher and inappropriate standard of proof, as the evidence is essentially uncontested that employee has a need for future medical care for his right knee that flows from the accident of December 1, 2005.

I find that employee met his burden of establishing that the accident of December 1, 2005, was the prevailing factor causing the medical condition of employee's right knee (including chondromalacia) and his resultant disability in this case. I find that employee demonstrated a reasonable probability that future medical care is needed, and that his need for treatment flows from the work injury. Accordingly, I would affirm the award of the administrative law judge that employee suffered a 50% permanent partial disability referable to the right knee and award future medical care to this employee.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Michael Webb

Injury No. 05-144189

Dependents: N/A

Employer: Pepsi MidAmerica Company

Additional Party: N/A

Insurer: Self-Insured
(TPA: Constitution States Service Company)

Hearing Date: May 10, 2010

Checked by: CS/rf

SUMMARY OF FINDINGS

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? December 1, 2005.
5. State location where accident occurred or occupational disease contracted: Scott 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 happened or occupational disease contracted: The employee was removing empty pallets and organizing products at a store when he slipped on some spilt sugar in the aisle injuring his right knee.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right Knee.
14. Nature and extent of any permanent disability: 35% referable to the right knee (See Findings)
15. Compensation paid to date for temporary total disability: \$535.60
16. Value necessary medical aid paid to date by employer-insurer: \$21,709.39
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$562.38
19. Weekly compensation rate:
 - \$374.92 for temporary total disability
 - \$365.08 for permanent partial disability
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
 - 56 weeks of permanent partial disability: \$20,444.48
22. Second Injury Fund liability: N/A
23. Future requirements awarded: Employer-insurer directed to pay future medical aid pursuant to Section 287.140 RSMo (See Findings).

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Joseph Rice.

FINDINGS OF FACT AND RULINGS OF LAW

On May 10, 2010, the employee, Michael Webb, appeared in person and by his attorney, Joseph Rice, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, David Ware. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about December 1, 2005, Pepsi MidAmerica Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer with a third party administrator of Constitution States Service Company.
2. On or about December 1, 2005, the employee was an employee of Pepsi MidAmerica Company and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about December 1, 2005, the employee sustained an accident during the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$562.38, his rate for temporary total disability and permanent total disability is \$374.92, and his rate for permanent partial disability is \$365.08.
7. The employee's injury related to his torn meniscus is medically causally related to the work injury on or about December 1, 2005.
8. The employer has furnished \$21,709.39 in medical aid to employee.
9. The employer has paid temporary total disability benefits for 1 3/7 weeks at a rate of \$374.92 per week for a total of \$535.60.

ISSUES:

1. Medical Causation.
2. Future Medical Aid.
3. Nature and Extent.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records of Ferguson Medical Group
- B. Medical records of Cape Imaging
- C. Medical records of Orthopaedic Associates, LLC
- D. Mid America Rehab records
- E. Not offered
- F. Dr. David Volarich's report

- F-1. Dr. David Volarich's Curriculum Vitae
- F-2. Deposition of Dr. David Volarich
- G. Drawings prepared by Dr. Haupt

Employer-Insurer's Exhibits

- 1. Deposition of Dr. Herbert Haupt with records attached
- 2. Deposition exhibit of Dr. Michael Milne

FINDINGS OF FACT:

Based on the testimony of Michael Webb ("employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, the employee was 59 years old and began working for Pepsi MidAmerica Company ("employer") on a part time basis in 2002. The employee was later promoted to territorial manager covering six (6) stores. While working for Pepsi MidAmerica Company, the employee's duties included pulling pallets of cases, stocking high and low shelves, putting up store displays, ordering product and removing empty pallets which required constant kneeling and crawling. The employee has a high school diploma and a bachelors of science in education from Southeast Missouri University. His prior work history includes working as a manager at Kmart, a storekeeper, a Frito Lay route salesman, a manager at Brookshire Brothers, and a manager at Albertsons. According to the testimony and evidence, the employee had no stiffness, limitations or functional problems with his knees prior to December 1, 2005.

On December 1, 2005, the employee was removing empty pallets and organizing products at a store in Sikeston, Scott County, Missouri. As he was walking down the aisle, the employee slipped on some spilt sugar and fell down pinning his right leg behind his back. The employee immediately reported the incident to the store and his company. Although the right knee was swelling, the employee received no medical treatment. As his knee became more painful and symptomatic, the employee began requesting medical treatment. The employee initially received treatment on his knee at Ferguson Medical Group where he received an x-ray that indicated loss of joint space in the medial compartment which could be associated with a chronic tear of his medial meniscus (Employee Exhibit A). The employee was then referred to Dr. Jimmy Bowen who ordered an MRI. The MRI performed on October 9, 2007, indicated that the employee had a markedly abnormal medial meniscus with degeneration, extensive tear and essential disintegration of most of the meniscus. Further, it showed that there was a likely tear of the lateral meniscus and severe osteoarthritis, particularly of the medial compartment (Employee Exhibit B).

The employee was then referred to Dr. Herbert Haupt for treatment on November 15, 2007. At the initial visit, Dr. Haupt noted that "it is likely that this patient will have disability regarding his knee both as a direct result of the work related injury for the acute injury process and certainly related to what are likely chronic and pre-existing conditions about the knee as well" (Employee Exhibit C, Page 3). On December 5, 2007, Dr. Haupt performed a right knee arthroscopic partial medial meniscectomy with a debridement of areas of chondromalacia to repair both the posterior horn and the medial aspect of the medial meniscus. At that time, Dr. Haupt noted significant Grade III and IV changes in the femoral trochlea (Employee Exhibit C, Pages 3-4 & 10-11). Following the surgery, the employee underwent physical therapy until

January 31, 2008 (Employee Exhibit D). The employee continued to have swelling and soreness. Dr. Haupt opined that the employee was at maximum medical improvement on March 31, 2008 and noted that the employee would continue to have discomfort with activities at work but it is more a result of his chronic degenerative condition. On June 8, 2008, Dr. Haupt opined that the employee had sustained a permanent rateable disability of ten percent (10%) at the level of the right knee, but that only three percent (3%) would be considered a direct result of the work related injuries of December 1, 2005 (Employee Exhibit 8-9).

On January 21, 2009, the employee was evaluated by Dr David Volarich. Following his examination of the employee and a review of the employee's medial history, Dr. Volarich opined that the December 1, 2005 work accident was the substantial contributing factor, as well as the prevailing factor causing the torn medial meniscus and aggravation of chondromalacia that required arthroscopic repair and resulted in a 50% permanent partial disability of the right knee. Further, Dr. Volarich opined that the employee would require future medical care in the form of medications, injections, physical therapy, and additional repairs possibly another debridement procedure but more likely a knee replacement. (Employee Exhibit F). On June 30, 2009, the employee was evaluated by Dr. Michael Milne who opined that the employee's current complaints are primarily of an arthritic type of knee pain and that the work related injury was not the primary or prevailing factor or a substantial factor in his knee complaints regarding arthritis. After concluding that the employee was at maximum medical improvement, Dr. Milne opined that the employee had an impairment of approximately 15% of his right knee with only 5% permanent partial disability as a result of the work related injury (Employer-Insurer Exhibit 2, Deposition Exhibit 2).

On October 19, 2009, Dr. Volarich testified at his deposition that there was enough time for post-traumatic arthritis to set in since eighteen months went by before treatment on his right knee (Employee Exhibit F-2, Deposition Page 15). Dr. Volarich further clarified that the employee's pre-existing chondromalacia was an impairment but not a disability since a disability requires symptoms (Employee Exhibit F-2, Deposition Page 42). Finally, Dr. Volarich opined that the employee's degenerative condition was actually post-traumatic arthritis caused by the work accident (Employee Exhibit F-2, Deposition Page 47).

Dr. Haupt testified at his deposition on December 10, 2009, and noted that the employee had significant progressive degenerative conditions approaching end stage with no articular cartilage left even to break down (Employer-Insurer Exhibit 1, Deposition Pages 15-16). After opining that the Naprosyn and brace were needed due to the degenerative condition, Dr Haupt testified that there was no Grade IV arthritis in any other part of the femur (Employer-Insurer Exhibit 1, Deposition Pages 19-20 & 25). Further, Dr. Haupt testified that a tear in the meniscus can propagate, get larger, with persistent wear and tear, walking, or other activities, but that he did not know if it occurred in this situation or how much the tear had changed following the December 1, 2005 work injury (Employer-Insurer Exhibit 1, Deposition Page 32). In addition to testifying that degenerative and traumatic arthritis will alter the articular surface, Dr. Haupt opined that there is a probability that the employee will need a knee replacement (Employer-Insurer Exhibit 1, Deposition Pages 44-45 & 46).

On January 18, 2010, Dr. Milne testified at his deposition that he would expect the employee to have a knee replacement in his lifetime but not as a result of this injury (Employer-Insurer Exhibit 2, Deposition Pages 14-17). In addition to noting that he had no records of symptoms in the employee's knee prior to December 1, 2005, Dr. Milne admitted that when a

meniscus is injured there can also be injury to the articular cartilage of the knee (Employer-Insurer Exhibit 2, Deposition Pages 23 & 29). Finally, Dr. Milne noted that he could not tell exactly how long it took the arthritic change to occur, but he would expect it to take years and years and not just a couple of years (Employer-Insurer Exhibit 2, Deposition Page 35).

At the time of the hearing, the employee testified that his right knee reacts to the weather, causes him to limp, causes him to have problems walking and stepping, goes numb after riding in a vehicle, occasionally locks, bows out in a different direction, causes him pain, and swells. In addition to testifying that his left knee had no problems, the employee stated that his right knee had no problems prior to December 1, 2005. According the employee, Dr. Volarich actually took the time to examine the employee and Dr. Milne never touched his knee or did any measuring. Finally, the employee testified that he is now working at a less demanding job of delivering bread.

APPLICABLE LAW:

- The employee has the burden to prove all material elements of his claim. Melvies v Morris, 422 S.W.2d 335 (Mo.App.1968). The employee has the burden of proving not only that he sustained an accident that arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. Griggs v A B Chance Company, 503 S.W.2d 697 (Mo.App.1973).
- Section 287.020.3(1) RSMo. states “the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment. 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.”
- Under Section 287.800.1 RSMo., “administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.”
- Under Section 287.800.2 RSMo., “administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.”
- Under Section 287.140.1 RSMo., “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury”. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. Emert v Ford Motor Company, 863 S.W. 2d 629 (Mo.App. 1993); Shores v General Motors Corporation, 842 S.W. 2d 929 (Mo.App.1992) and Hendricks v Motor Freight, 520 S.W. 2d 702, 710 (Mo.App.1978).
- Under Section 287.140.2 RSMo., “if it be shown to the division or the commission that the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or the commission may order a change in the physician, surgeon, hospital or other requirement.”

RULINGS OF LAW:***Issue 1. Medical Causation***

The employer-insurer has disputed that the employee's arthritis was not medically and causally related to the employee's work injury of December 1, 2005. In support of their position, the employer-insurer has offered the opinions of Dr. Haupt and Dr. Milne. Both doctors admit that they have no evidence that the employee had any pre-existing symptomatic problems with his right knee and that they cannot specifically estimate when the damage to the employee's articular cartilage (arthritis) occurred. However, both Dr. Haupt and Dr. Milne opined that the employee's arthritis was degenerative in nature. Conversely, the employee offered the opinion of Dr. Volarich. Dr. Volarich opined that the employee's degenerative condition was actually post-traumatic arthritis caused by the work accident (Employee Exhibit F-2, Deposition Page 47). Dr. Volarich based his opinion on the facts that there was plenty of time for post-traumatic arthritis to set in since eighteen months went by before treatment on his right knee, that the employee had no symptoms in his right knee prior to December 1, 2005, that the employee's left knee had no problems, and his review of the employee's medical history.

Based on the evidence and observing the employee at the hearing, I find the employee credible regarding his testimony concerning his right knee. Further, I find the opinions of Dr. Volarich regarding the employee's right knee to be credible based on the evidence and the facts that the employee had no symptoms in his right knee prior to December 1, 2005, that the employee's left knee is not symptomatic, and that the employee utilized his injured right knee for over eighteen months without proper treatment. Thus, I specifically find that the employee's post-traumatic arthritis is medically and causally related to his December 1, 2005 work related injury.

Issue 2. Additional Medical Aid

All of the doctors in this matter agree that there is a probability that the employee will need a future knee replacement. Dr. Milne even testified that he expects that the employee will have a future knee replacement in his lifetime (Employer-Insurer Exhibit 2, Deposition Pages 14-17). On the other hand, Dr. Volarich opined that the employee would require future medical care in the form of medications, injections, physical therapy, and additional repairs possibly another debridement procedure but more likely a knee replacement. (Employee Exhibit F). Based on the evidence and my above findings, the medical evidence supports a finding that the additional treatment and surgery being suggested by Dr. Volarich is both reasonable and necessary to cure and relieve the employee from the effects of his injury.

Based on these findings, the employer-insurer is directed to furnish additional medical aid in accordance with Section 287.140 RSMo and Dr. Volarich's recommendations.

Issue 3. Nature and Extent of Disability

The employee has also requested an award of permanent partial disability benefits due to his December 1, 2005 work related right knee injury. Based on the evidence and my above findings, I find that the employee has a 35% permanent partial disability of his right knee at the 160 week level as a result of the December 1, 2005 work related injury for a total of 56 weeks of disability. The employer-insurer is therefore directed to pay to the employee the sum of \$365.08 per week for 56 weeks for a total of \$20,444.48.

ATTORNEY’S FEE:

Joseph Rice, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Ms. Naomi Pearson