

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

Injury No.: 09-012651

Employee: Michael Wood
Employer: The Doe Run Company
Insurer: Zurich American Insurance Company

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard the parties' arguments, reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated September 7, 2010. 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 administrative law judge heard this matter to consider the nature and extent of permanent disability, if any, resulting from employee's compensable workplace injury of February 26, 2009. The administrative law judge found employee sustained a 30% permanent partial disability of the left knee at the 160-week level.

Employer filed a timely Application for Review with the Commission alleging that the administrative law judge erred in finding employee sustained permanent partial disability in excess of all the doctors' ratings.

For the reasons set forth below, the Commission modifies the finding of the administrative law judge as to the amount of permanent partial disability sustained by employee. All other aspects of the award of the administrative law judge are affirmed.

Discussion

The question is the nature and extent of permanent disability, if any, resulting from the left knee injury of February 26, 2009.

The Commission may consider all of 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 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).

Employee: Michael Wood

- 2 -

Having considered all of the evidence, we agree with employer that the award of 30% permanent partial disability of the left knee is excessive and not supported by the record. Dr. Volarich, who was hired by employee to provide an independent medical evaluation, found only 20% permanent partial disability of the left knee. Dr. Volarich conducted an extensive examination, performing tests including toe walk, heel walk, tandem walk, standing and hopping on either leg, and squatting, and even examined employee's leg with a protractor. Dr. Volarich found employee to have full range of motion in the left knee, no limp, and no foot drop. Dr. Volarich did not place any restrictions referable to the left knee on claimant's ability to work. We are convinced that employee sustained a 20% rather than a 30% permanent partial disability of the left knee, and we so find.

In sum, we believe the administrative law judge's award of permanent partial disability is excessive and modify that portion of the award. All other aspects of the award are affirmed.

Award

We modify the award of the administrative law judge. Employer is liable for permanent partial disability benefits consistent with our finding that employee sustained a 20% permanent partial disability of the left knee at the 160-week level.

The award and decision of Administrative Law Judge Carl Strange, dated September 7, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of attorney's fees 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 12th day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Michael Wood

Injury No. 09-012651

Dependents: N/A

Employer: The Doe Run Company

Additional Party: N/A

Insurer: Zurich American Insurance Company

Hearing Date: August 2, 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? February 26, 2009.
5. State location where accident occurred or occupational disease contracted: Jefferson 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: Employee was walking through the shop when a piece of metal flew over and struck him in the back of his left leg near his knee.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left lower extremity at the level of the knee.
14. Nature and extent of any permanent disability: 30% of Left Knee (see Findings).
15. Compensation paid to date for temporary total disability: \$0.00
16. Value necessary medical aid paid to date by employer-insurer: \$14,255.89
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate: \$404.66 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$19,423.68 (See Findings)
22. Second Injury Fund liability: N/A
23. Future requirements awarded: N/A

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: Kenneth Seufert.

FINDINGS OF FACT AND RULINGS OF LAW

On August 2, 2010, the employee, Michael Wood, appeared in person and by his attorney, Kenneth Seufert, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Jay Lory. 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 February 26, 2009, The Doe Run Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Zurich American Insurance Company.
2. On or about February 26, 2009, the employee was an employee of The Doe Run Company and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about February 26, 2009, the employee sustained an accident or occupational disease 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 rate for permanent partial disability is \$404.66.
7. The employee's injury is medically causally related to the work injury on or about February 26, 2009.
8. The employer has furnished \$14,255.89 in medical aid to employee.
9. The employer has paid no temporary total disability benefits.

ISSUES:

1. Nature and Extent

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Notice of Intent to Submit Into Evidence Complete Medical Report;
- B. Report of Dr. David Volarich;
- C. Medical Records
 1. Jefferson Regional Medical Center
 2. Dr. David Brown
 3. Dr. John Krause

4. ProRehab; and
 5. Parkland Health Center
- D. Medical Records of Jefferson Regional Medical Center
- E. Chart of Leg

Employer-Insurer's Exhibits

1. Curriculum Vitae of Dr. John O. Krause

FINDINGS OF FACT & RULINGS OF LAW:

Issue 1. Nature and Extent of Disability

In August of 2007, Michael Wood ("employee") began working for The Doe Run Company ("employer") as a maintenance apprentice. Following his training period, employee became a maintenance journeyman. On February 26, 2009, employee was walking into the maintenance shop when he was struck in the back right side of the upper left calf with a piece of metal which lodged in the back of employee's left leg. The piece of metal came from a sledge hammer that shattered as other employees were hammering on a gearbox nearby. Employee eventually had surgery to remove the piece of metal with Dr. John Krause on March 5, 2009 (Employee Exhibit C4). On April 13, 2009, Dr. Krause released employee to full duty without restrictions and placed him at maximum medical improvement. Dr. Krause rated employee's permanent partial disability at 2% at the level of the knee on April 22, 2009. Employee was evaluated by Dr. David Volarich on December 15, 2009 who opined that employee suffered a 20% permanent partial disability of the left lower extremity at the level of the knee. According to Dr. Volarich's report this rating accounted for ongoing paresthesias along a superficial sensory branch of the saphenous nerve, mild swelling in the left calf, as well as some weakness in the left quadriceps causing some occasional knee discomfort in the left lower extremity (Employee Exhibit B).

At the time of the hearing, employee continued to have many limitations with his knee. Although he still is working full time with employer, employee has problems that include knee swelling every day, pain in the muscle above his knee down to the ankle, numbness down his shin to the top of his foot, loss of range of motion since he cannot fully extend his knee, some knee stiffness, difficulty standing on a ladder and using spray hose, his leg falling asleep if he sits too long, sensitivity in the inside portion of his ankle, decreased strength, decreased stamina, popping, difficulty playing sports and with his children, and difficulty pushing off the knee. As a result of the work-related knee injury, employee now takes three extra strength Tylenol or ibuprofen between one to four times daily. Employee is also having soreness and cramping in his lower back. Prior to the February 26, 2009 work injury, employee had no injuries to his left leg and also has not had any subsequent injury to it.

Based on the evidence and employee's testimony, I find that employee is credible regarding his injury and his limitations. The February 26, 2009 work injury is far more disabling

than both Dr. Krause and Dr. Volarich have considered in their ratings. Consequently, I find that the ratings by the doctors in this case are too conservative and do not accurately reflect, as of the date of the hearing of August 2, 2010, the condition of the knee and its permanent disability caused by the February 26, 2009 work injury.

There is a long line of cases that state that the Administrative Law Judge and Commission are not bound to accept the opinions of the doctors as conclusive and may make a finding that the permanent disability is lower than the lowest rating or higher than the highest rating. The extent of disability is a finding of fact within the special province of the Administrative Law Judge and Commission and there is not a duty to be conclusively bound or restricted to the percentage estimate or opinion of any one or more of the doctors. See Murphy v. W.J. Lynch Co., 57 S.W.2d 685 (Mo. App. 1933), Zickefoose v. Walker and Williams, 79 S.W.2d 511 (Mo. App. 1935), Henderson v. Laclede Christy Clay Products Co., 206 S.W.2d 673 (Mo. App. 1947), Barron v. Mississippi Lime Co., 285 S.W.2d 46 (Mo. App. 1955), McAdams v. Seven-Up Bottling Co., 429 S.W.2d 284 (Mo. App. 1968), Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983), Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237 (Mo. App. 1986), Jones v. Jefferson City School District, 801 S.W.2d 486 (Mo. App. 1990), Sifferman v. Sears Roebuck, 906 S.W.2d 823 (Mo. App. 1995), Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo. App. 1996), and Buskuehl v. The Doe Run Co., 68 S.W.3d 535, 540 (Mo. App. 2001).

Based on the credible testimony of the employee, my observations at the hearing, and a thorough review of the medical records, I find that the employee as a result of his work-related accident of February 26, 2009 has sustained a 30% permanent partial disability of the left knee at the 160-week level. The employer-insurer is therefore directed to pay to the employee 48 weeks of permanent partial disability at the rate of \$404.66 per week for a total award of permanent partial disability equal to \$19,423.68.

At the time of the hearing, employee has also requested an award of permanent partial disability for his low back complaints. Although his complaints may be related to the knee, I specifically find that the employee has failed to meet his burden of proof regarding his request for compensation on his low back condition. Therefore, employee's claim regarding his low back is denied.

ATTORNEY'S FEE:

Kenneth Seufert, 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