

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

Injury No.: 03-123619

Employee: Robert Workman
Employer: Columbia Public School District
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 27, 2008. The award and decision of Administrative Law Judge Robert Dierkes, issued October 27, 2008, is attached and incorporated by this reference.

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.

Given at Jefferson City, State of Missouri, this 25th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Robert Workman

Injury No. 03-123619

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Columbia Public School District

Additional Party: Second Injury Fund (deferred)

Insurer: Self-Insured

Hearing Dates: September 17, 2007 and October 17, 2008

Checked by: RJD/lw

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: December 5, 2003
5. State location where accident occurred or occupational disease was contracted: Columbia, Boone 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? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was pushing a barrel of trash when he fell.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left hip, left shoulder.

- Nature and extent of any permanent disability: Determined by settlement approved October 22, 2008.

15. Compensation paid to-date for temporary disability: \$15,108.58
16. Value necessary medical aid paid to date by employer/insurer? \$65,739.99
17. Value necessary medical aid not furnished by employer/insurer? None at this time.
18. Employee's average weekly wages: \$612.47
19. Weekly compensation rate: \$408.31/\$347.05
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: As per partial stipulation of settlement approved October 22, 2008.
22. Second Injury Fund liability: Deferred to future hearing.
23. Future Requirements Awarded: Employer is ordered to provide employee with all such medical, surgical and other treatment as may reasonable be required to cure and relieve employee from the effects of his left hip fracture.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

ISSUE TO BE DECIDED

An evidentiary hearing was held in this case on September 17, 2007, on Claimant's request for a temporary or partial award. The record was held open for thirty days for additional deposition testimony. The transcripts of the deposition testimony of Dr. Michael Nogalski and Dr. Byron Tarbox were filed on October 12, 2007, and the record was closed. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on October 17, 2007. After reviewing the record, the undersigned administrative law judge contacted the parties and indicated generally that the case appeared to be in a posture for a final award or settlement (rather than a temporary or partial award, as requested). Counsel for Claimant and counsel for Employer then indicated to the undersigned administrative law judge that they would like to have additional time to attempt to settle the issues between them. On October 8, 2008, a conference call was held with counsel for all parties (including the Second Injury Fund), during which conference call counsel for Claimant and Employer indicated that they had reached a settlement agreement between them on all issues, except for the issue of Employer's liability, if any, for future medical benefits, and that such settlement agreement was in the process of being reduced to writing. Counsel requested that the undersigned administrative law judge (having already taken all the evidence on the medical issues in the case) enter an award on the **sole issue** remaining between Claimant and Employer, i.e., **the liability, if any, of Employer for future medical benefits pursuant to Section 287.140.**

STIPULATIONS

The parties stipulated as follows:

1. The Division of Workers' Compensation has jurisdiction over this case;
2. Venue for the evidentiary hearing is proper in Boone County;
3. The claim is not barred by Section 287.430 or Section 287.420;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. The rates of compensation are \$408.31/\$347.05, based on an average weekly wage of \$612.47;
6. Claimant sustained an accident arising out of and in the course of his employment with Columbia Public School District on December 5, 2003;

7. Columbia Public School District was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times;

- Employer has paid \$65,739.99 in medical benefits; and

9. Employer paid TTD benefits through August 20, 2004, in the amount \$15,108.58.

ADDITIONAL STIPULATIONS APPROVED ON OCTOBER 22, 2008

As indicated in the conference call of October 8, 2008, Employer and Employee were in the process of reducing their settlement agreement to writing. On October 17, 2008, the undersigned administrative law judge received the written settlement agreement. On October 22, 2008, that settlement agreement was approved by the undersigned administrative law judge. That settlement agreement stipulated that Claimant Robert Workman sustained a permanent partial disability of approximately 50% of the left hip, 5% of the left knee and 5% of the left shoulder as a result of the work-related injury of December 5, 2003. That settlement agreement provided for a payment to Claimant by Employer of \$42,721.86 for permanent partial disability benefits. That settlement agreement stipulated that all payments for medical expense, temporary total disability and/or mileage expense had either already been paid or were included in the settlement agreement.

EVIDENCE

The evidence consisted of the testimony of Claimant, Robert Alan Workman; the deposition testimony of Robert Alan Workman; the testimony of Matthew Woods, Claimant's counsel; the deposition testimony of Dr. David Hockman; the deposition testimony of Dr. Byron ("Bus") Tarbox; the deposition testimony of Dr. Michael Nogalski; the deposition testimony of James M. England, Jr., the narrative medical report of Dr. David T. Volarich; and additional medical records.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, Robert Alan "Alan" Workman, was born August 7, 1947, and worked for over 25 years for Employer, Columbia Public School District, initially as part of the grounds crew, and then as a custodian for the last twenty years. Prior to working for Employer, Claimant worked full-time at a grocery store as a clerk. Claimant also held a part-time grocery store job for about seventeen years, concurrent with his full-time job with Employer. I find that Claimant is a high school graduate with no additional schooling or training.

As stipulated, I find that Claimant sustained an accident arising out of and in the course of his employment with Employer on December 5, 2003. I find that the accident occurred when Claimant was pushing a barrel of trash over an uneven piece of concrete covered by carpet when a wheel got stuck, causing Claimant to fall and break his left hip. Claimant was taken by ambulance to Boone Hospital Center where he was diagnosed with an intertrochanteric fracture of the left hip. Claimant was transferred to Columbia Regional Hospital where Dr. James Eckenrode performed an open reduction and internal fixation of the intertrochanteric fracture of the left hip. On December 15, 2003, Dr. David Hockman performed a repeat open reduction and internal fixation of the intertrochanteric fracture of the left hip.

Although Claimant is a poor historian, it is pretty clear that Claimant had sustained some injuries of significance prior to December 5, 2003. I find that when Claimant was seventeen years old, he fell or was thrown over a balcony at the old Hall Theater in Columbia, landing "on all fours", and sustaining injuries to both knees. I find that Claimant has had some problems with his knees since that time. I find that on October 3, 2003, Claimant presented to Dr. David Hockman of Columbia Orthopaedic Group with complaints of left knee pain, which Dr. Hockman characterized as an arthritic problem. Claimant also testified that his family doctor, Dr. Vogt, had drained fluid off of both knees on at least one occasion prior to December 5, 2003. Claimant also testified that he was thrown from the back of a pickup truck traveling down Interstate 70, while working for Employer. Claimant testified that this occurred in 1983. A medical record from Columbia Orthopaedic Group dated June 8, 1981, states that this incident occurred on October 21, 1980; although partially illegible, this note reflects that Claimant injured his right shoulder, fractured his right wrist, fractured his right foot, and injured his right ankle. Claimant also has some partially amputated fingers on his left hand, resulting from an interaction between Claimant's left hand and a moving lawn mower blade; according to a record from Columbia Orthopaedic Group dated January 18, 1985, this injury occurred on May 10, 1982. Dr. David Volarich also identified as pre-existing: "left shoulder impingement syndrome with probable partial tear of the rotator cuff".

The Claim for Compensation filed in this case on December 18, 2003, alleges injury to “hip, back, leg and knee (whole body)”. There is no question that Claimant fractured his left hip in the December 5, 2003 work-related accident. At the evidentiary hearing, Claimant alleges that he is entitled to additional medical treatment for his left knee and his left shoulder, as well as for the left hip. Employer disputes that Claimant injured his left knee or left shoulder in the 12/5/03 accident.

I will address the left shoulder first. Dr. Byron Tarbox testified by deposition and Dr. Volarich testified via a complete medical report. Dr. Tarbox first saw Claimant on January 23, 2004, for his left shoulder symptoms. After conducting a physical exam, Dr. Tarbox requested an MRI of the shoulder, which was taken the same day. Dr. Tarbox’s reading of the MRI revealed large chronic tears of the supraspinatus and the infraspinatus tendons, with retraction back to the glenoid. Dr. Tarbox believed that these were chronic tears, which preexisted the 12/5/03 accident. Dr. Tarbox recommended a long course of physical therapy, which Claimant completed. Dr. Tarbox released Claimant at maximum medical improvement on July 12, 2004, noting that Claimant no longer had any left shoulder complaints. Dr. Tarbox opined that Claimant had a 5% permanent partial disability of the left shoulder as a result of the December 5, 2003 accident. Dr. Volarich opined that the 12/5/03 accident caused “aggravation of left shoulder internal derangement”, and recommended an MRI arthrogram of the left shoulder.

Both Dr. Tarbox and Dr. Volarich agree that the December 5, 2003 accident aggravated Claimant’s preexisting shoulder condition. An aggravation of a preexisting disease or condition as the result of a work-related incident can be a compensable accident under the Missouri Workers’ Compensation Law, *see, e.g., Kelley v. Banta & Stude Construction*, 1 S.W.3d 43, 48 (Mo.App. E.D.1999). Therefore, I find that Claimant has sustained a compensable left shoulder injury as a result of the 12/5/03 accident. However, I must disagree with Dr. Volarich’s conclusion that Claimant requires an MRI arthrogram of the left shoulder. An MRI of the shoulder has already been done. There is no real question as to the pathology of the shoulder. However, Dr. Tarbox, the treating orthopedic surgeon, felt very strongly on July 12, 2004 that Claimant’s left shoulder was doing well upon completion of physical therapy, and Dr. Tarbox opined on September 25, 2007 that no additional surgery or treatment was needed. **I find that Claimant is not in need of future treatment or diagnostics for his left shoulder.**

Dr. David Hockman testified regarding the left knee by deposition; Dr. Michael Nogalski also testified regarding the left knee by deposition, and Dr. David Volarich testified regarding the left knee via a complete medical report dated February 2, 2005. There is no question that Claimant’s left knee was problematic prior to December 5, 2003; this is evidenced quite clearly by the fact that Claimant saw Dr. Hockman for left knee pain a mere two months before the work-related injury, complaining of knee pain, which Dr. Hockman characterized as an arthritic problem. Again, although Claimant is a poor historian, Claimant testified in both his deposition testimony and in his hearing testimony that he fell on his left knee in the 12/5/03 accident. (In his deposition, Claimant first denied having struck his left knee in the 12/5/03 accident, then testified that he did strike his knee in that accident. It is clear from his deposition testimony that Claimant is easily confused between “right” and “left”, and is generally confused by questioning of counsel.) As Claimant fell with sufficient force on his left hip to sustain a hip fracture, it certainly *plausible* that Claimant struck his left knee in the 12/5/03 accident.

Dr. David Hockman was authorized by Employer to perform the second hip surgery on Claimant, and was Claimant’s authorized treating doctor for a period of time thereafter. Claimant began seeing Dr. Hockman for left knee pain March 1, 2004, on a scheduled office visit for a re-check of the hip. By April 30, 2004, Dr. Hockman suspected that Claimant had torn his medial meniscus and his lateral meniscus, and “recommended obtaining an MRI and that he would likely require an arthroscopic surgery to address the meniscus tears should the MRI confirm the diagnosis.”

Dr. Michael Nogalski testified to his belief that Claimant did not injure his left knee in the fall on December 5, 2003. Dr. Nogalski testified that Claimant had, prior to December 5, 2003, a significantly degenerative left knee, and that the 12-5-03 accident did nothing to worsen the left knee condition. Dr. Nogalski testified that he did not believe an MRI of the left knee would be beneficial at this time.

Dr. David Volarich stated in his medical report that he believes Claimant requires a debridement procedure of his left knee.

Considering the poor condition of Claimant’s left knee prior to the December 5, 2003 accident, and Claimant’s general denial of any significant left knee symptoms at the hearing, **I find that Claimant is not in need of future treatment or diagnostics for his left knee.** Again, Claimant’s failure to articulate any significant left knee symptoms may be attributable to Claimant’s apparent poor ability to understand and respond to questions, or it may be that Claimant’s left knee symptoms have subsided. Dr. Hockmann testified that the knee complaints for which he saw Claimant in March, April and May 2004 (which Dr. Hockmann suspects are due to meniscus tears) very likely were caused by a fall Claimant sustained just prior to March 1, 2004, and not by the work accident of December 5, 2003. (Exhibit B, Hockmann deposition, pp. 43-44). Thus, there is certainly a question as to whether Claimant sustained any injury whatsoever to his left knee in the December 5, 2003 accident, but it is clear that Claimant’s preexisting left knee problems vastly outweigh any left knee problems attributable to the accident in question.

The left hip injury was a significant injury, and is without question the most significant injury Claimant sustained in the 12/5/03 accident. Dr. David Hockman, Claimant’s treating doctor, described the hip fracture as “quite severe”. (Exhibit B, Hockmann deposition, p.50). Claimant has a permanent partial disability rating of 50% of the left hip, and Claimant and Employer have agreed to settle the permanent partial disability claim on the left hip for 50%. Dr. James Eckenrode performed an open reduction and internal fixation of the intertrochanteric fracture of the left hip on December 5, 2003, and on December 15, 2003, Dr. David Hockman performed a repeat open reduction and internal fixation of the intertrochanteric fracture of the left hip. While Dr. Hockman was not asked to opine on the need for future medical care for Claimant’s hip, that issue was addressed by Dr. David Volarich. In this regard, Dr. Volarich stated:

Based on today's examination, additional surgery to the left hip is not indicated. It is noted that the orthopedic fixating hardware in the hip can at times become infected, loosen, or fail and would need to be removed or replaced. The decision to perform any additional surgeries on the hip should be made in conjunction with his wishes, change in symptoms, and expert surgical opinion. (Exhibit A, Volarich report, p. 11).

Claimant did, in fact, have problems with the hardware loosening almost immediately after the original surgery on December 5, 2003, which required a complete repeat procedure by Dr. Hockmann ten days later. While the hip has been stable for almost four years (at the time of the evidentiary hearing), which suggests that the likelihood of removing, replacing or revising the hardware again has reduced dramatically, the possibility still exists nonetheless. Should that possibility materialize, the probability is great that the December 5, 2003 accident would be a substantial factor in the need for the revision surgery. **Therefore, I find that an award of future medical for Claimant's left hip is necessary.**

ORDER

-

Employer is hereby ordered to provide Claimant with all such medical, surgical and other treatment as may reasonably be required to cure and relieve Claimant from the effects of his left hip fracture, pursuant to Section 287.140, RSMo. Employee's claim for an order of future medical treatment on his left knee and left shoulder is denied.

Date: October 27, 2008

Made by: /s/Robert J. Dierkes
Robert Dierkes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Jeffrey Buker
Jeffrey Buker
Director
Division of Workers' Compensation