

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 05-138274

Employee: Debra Arnold
Employer: Missouri Department of Corrections
Insurer: CARO
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 section 287.480 RSMo.¹ We have reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the December 27, 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.

With respect to the administrative law judge's award of future medical care and treatment, she states near the bottom of page 10 of the award that "[employer] is ordered to provide all medical treatment that is necessary to cure and relieve [e]mployee from the effects of [her] work injury for the remainder of her life as recommended by Dr. Volarich or a treating physician recommended by Dr. Volarich." We find that the administrative law judge erred in directing that employee, Debra Arnold's future medical care be recommended by Dr. Volarich or a treating physician recommended by Dr. Volarich. Dr. Volarich was retained by employee to provide an independent medical evaluation. Dr. Volarich is not employee's treating physician and has no intention of being directly involved with employee's future medical care. We modify the administrative law judge's award and find that the award of future medical care shall be limited, simply, to that which is reasonable and necessary to cure and relieve employee from the work-related injury.

In addition to the aforementioned, we would also like to clarify an ambiguous use of the word "he" on page 13 of the award. At the beginning of the second paragraph on page 13, the administrative law judge states that "**He** diagnosed left internal derangement...." (emphasis added). However, the administrative law judge did not specify as to whom she was referring to as "he." We find that the administrative law judge's use of "he" in this sentence and the remainder of that second paragraph was in reference to Dr. Volarich. We modify the award and find that in the second paragraph of page 13 of the award, "Dr. Volarich" shall replace the word "he" in all instances.

Finally, we note that in the last paragraph on page 14, the administrative law judge discusses the percentage of preexisting permanent partial disability employee suffered from at the time of the primary injury. We find that this paragraph is legally incorrect and is unnecessary in light of the fact that employee is deemed permanently and totally disabled as a result of the primary injury considered in isolation. We modify the award by deleting the last paragraph on page 14.

We modify the award of the administrative law judge as provided herein. In all other respects, we affirm the award.

¹ Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

Employee: Debra Arnold

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The award and decision of Administrative Law Judge Maureen Tilley issued December 27, 2010, is attached and incorporated to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 14th day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

VACANT
Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Debra Arnold

Injury No. 05-138274

Dependents: N/A

Employer: Missouri Department of Corrections

Additional Party: Second Injury Fund

Insurer: CARO

Hearing Date: December 20, 2010

Checked by: MT/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? October 20, 2005.
5. State location where accident occurred or occupational disease contracted: St. Francois 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 injured her left knee while kicking a dummy in self defense

training. The employee then was non-weight bearing on her left knee. She injured her right knee and low back due to the abnormal weight bearing.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Bi-lateral knees and low back.
14. Nature and extent of any permanent disability: See Findings.
15. Compensation paid to date for temporary total disability: \$12,004.54.
16. Value necessary medical aid paid to date by employer-insurer: \$18,651.75.
17. Value necessary medical aid not furnished by employer-insurer: See Findings.
18. Employee's average weekly wage: \$466.85
19. Weekly compensation rate: \$311.23 for TTD, PTD, and PPD.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Findings.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

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: Douglas Van Camp.

FINDINGS OF FACT AND RULINGS OF LAW

On September 27, 2010, the employee, Debra Arnold, appeared in person and with her attorney, Douglas Van Camp, for a hearing for a final award. The employer was represented at the hearing by its attorney, Gregg Johnson. The Second Injury Fund was represented by its attorney, Eileen Krispin. 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. Covered employer: Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability fully insured by CARO.
2. On or about October 20, 2005, Debra Arnold was an employee of Missouri Department of Corrections and was working under the Workers' Compensation Act of Missouri.
3. Accident: On or about October 20, 2005, the employee sustained an accident arising out of and in the course of her employment.
4. Notice: 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 is \$466.85. The employee's rate for permanent partial disability and permanent total disability is \$311.23.
7. Medical causation: Employee's injury was medically causally related to the accident.
8. The medical aid furnished by the employer-insurer was the amount of \$18,651.75.
9. The amount of temporary disability paid by the employer-insurer was \$12,004.54. This was for 38 4/7 weeks. The time periods covered were 9-28-06 through 10-11-06 and 12-08-06 through 8-20-07.

ISSUES

1. Claim for previously incurred medical. The amount claimed was \$851.00 for unpaid prescription bills. There is a dispute as to reasonableness and necessity.
2. Employee is claiming reimbursement of the costs associated with the IME of Dr. Mace, in the amount of \$1,302.75.
3. Claim for future mileage.
4. Claim for future medical aid.
5. Claim for additional TTD in the amount of \$2,223.07.
6. Permanent total disability.
7. Permanent partial disability.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A Parkcrest Orthopedics
- B Dr. Ritchie
- C Mercy Burn and Plastic Surgery
- D Great Mines Health Center
- E Parkcrest Orthopedics
- F Parkcrest Orthopedics
- G Parkcrest Orthopedics
- H Parkland Health Center
- I Donna Yates
- J Farmington Sports & Rehabilitation Center
- K Mineral Area Regional Medical Center
- L Various prescription receipts
- M Deposition of Dr. Volarich
- N Deposition of Dr. Mace
- O Deposition of Jim England
- P TTD Claim of Employee
- Q Demand Letters and Costs of Employee
- R Unpaid Medical Bills

Employer-Insurer's Exhibits

1. Deposition of Sherry Browning

The Second Injury Fund did not offer any exhibits into evidence.

FINDINGS OF FACT

The employee, Debra Arnold, is 52 years old and currently unemployed. She is receiving Social Security Disability. The employee graduated from high school, attended cosmetology school, and later completed 71 hours of college credits focusing on criminal justice. She did not obtain a degree.

The employee had been last employed with the Department of Corrections as a Correctional Officer I. She was responsible for monitoring meals and recreation, conducting searches, and escorting prisoners. She was employed in this capacity for approximately two and a half years. Her prior employment was as a server at a restaurant and substitute teacher. Prior to that, she stayed at home with her children.

On October 20, 2005, the employee was participating in self-defense training. As part of the class, she had to kick a stationary six-foot dummy at the chest to waist level. She kicked the dummy once, felt an immediate pop and sharp pain in her left knee, and was advised by trainers to rest briefly. She attempted a second kick, which made her symptoms worse. The employee testified that she informed a supervisor of the incident, and informed several staff of the injury, asking for treatment. She testified that her symptoms continued to worsen and that she informed the personnel office staff who told her she had to “wait her turn to see a workers’ compensation doctor.”

The employee was evaluated by Dr. Mace in June 2006, who diagnosed an acute injury to the left knee, likely an internal derangement, and that the prevailing factor leading to the diagnosis was the injury of October, 2005. She also recommended an MRI, evaluation by an orthopedic specialist, and took her off work completely until MRI results were obtained. She also recommended crutches, and that she be completely non-weight bearing on the left lower extremity. Ms. Arnold was off work beginning on June 22, 2006 due to Dr. Mace’s recommendations but was not paid temporary total disability until September 28, 2006.

The Employer then referred her to Dr. Ritchie who ordered an MRI revealing a tear of the ACL. She eventually had surgery, performed by Dr. Ritchie, on September 28, 2006, consisting of an excision of the hypertrophic plica of the anterior medial and anterior lateral plica. Following surgery, the employee was on light duty, attended physical therapy, but reports the knee surgery did not relieve her pain. She also testified and informed Dr. Ritchie that she had ongoing complaints with her right knee, due to the long-standing altered gait. She had additional injections that did not relieve her symptoms following surgery. Dr. Ritchie kept her off work and the employee testified that he did not complete her essential functions from allowing her to return to work. During this time, through the end of 2006, the employee was experiencing ongoing and worsening symptoms in her right knee, and low back.

After requesting a second opinion, the employee was referred to Dr. Johnson who diagnosed patellofemoral pain secondary to quad weakness and abnormal gait. She testified that she had been walking with a cane, held in her right hand, and that the pain was intensifying in her back. Dr. Johnson prescribed aqua therapy and physical therapy. During the course of this therapy Dr. Johnson had her on light duty. This extended period of light duty resulted in the employee losing her job at the Department of Corrections. She applied for and received long-term disability.

By June 2007, the employee was still using a cane and still had restrictions limiting her to sedentary duty. In August she underwent a functional capacity exam which placed her in the light to sedentary demand level. Her job as a CO I was classified as medium level. She continued throughout 2007 to experience low back pain, particularly on the right side due to her altered gait. She also continued to have pain in her right knee due to overcompensation for the left knee.

On June 13, 2008, Mr. Mathieu, Dr. Johnson's P.A., stated that the employee had reached MMI. He stated that the employee had a 10% rating and her permanent work restrictions were "sedentary only."

Dr. Volarich evaluated the employee on February 5, 2009. He diagnosed left internal derangement- S/P arthroscopic excision of the hypertrophic plica and redundant synovium, severe postoperative left knee pain syndrome primarily involving the lateral compartment with associated patellofemoral mistracking secondary to quadriceps. He also diagnosed right knee pain syndrome secondary to abnormal weight bearing and lumbar pain syndrome secondary to abnormal weight bearing. He found the accident of October 20, 2005 to be the substantial contributing factor as well as the prevailing or primary factor in leading to these diagnoses. He further assigned a rating of 40% of the left knee, 15% of the right knee, and 15% of the body as a whole referable to the lumbar spine and recommended an evaluation by a vocational expert to assess her ability to return to the open labor market. He outlined extensive restrictions in his report, including an avoidance of all stooping, squatting, crawling, kneeling, pivoting, climbing, and impact maneuvers. He also recommended she avoid uneven terrain, slopes, steps, ladders, and that she limit prolonged weight bearing activities, including standing or walking to 15-20 minutes. He also limited her bending, lifting, pushing, pulling.

Dr. Volarich also outlined a pre-existing condition and diagnosed 3rd and 4th degree burns on her left leg which required skin grafting. He explained that she was burned in an accident in 2003 when she was attempting to put wood in an outdoor furnace. She was treated with skin grafting on her left leg and was advised to use compression stockings. After the accident, she used 100% skin-block when out in the sun and had numbness in her left lower leg. Cold weather irritated the leg, as did extreme heat. She had minimal burning on her hands and wrists, which resolved. Dr. Volarich gave a rating of 7.5% of the left leg referable to these burns.

In his deposition, Dr. Volarich testified regarding the use of a cane and the effect on her complaints as follows, "when a patient has problems like she does and weight bearing and gait is not fluid, meaning normal swing to the arms and normal swagger so to speak, patients continue to have difficulties when they have to use these devices. Whether it's a cane or a walker or a brace or whatever it might be, they continue to have some sort of problems."

Dr. Volarich recommended vocational assessment. He found that if vocational assessment was unable to identify a job for which she was suited, then she was permanently and totally disabled as a direct result of the work related injury of October 20, 2005 injury standing alone.

Dr. Volarich stated that the employee will require ongoing care for her pain syndrome using modalities including but not limited to narcotics and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of her complaints. He also stated that the employee would benefit from treatments at a pain clinic because of her left knee pain syndrome. Dr. Volarich recommended that she see either a psychiatrist or pain management specialist to determine the

cause of her severe lateral compartment knee pain syndrome. He also stated that nerve blocks, trigger point injections, aggressive physical therapy, and similar treatments are all indicated.

The employee was evaluated by vocational expert, James England, at the request of the employee. Mr. England opined that it would be difficult for the employee to compete in the open labor market or to sustain it in the long run.

Mr. England stated that the employee appears to be limited to the point that she is more likely than not going to remain totally disabled from a vocational standpoint. He stated that without a great deal of assistance, he does not believe that the employee could successfully find alternative work on her own. Mr. England also stated that it does not appear that the employee could sustain work even if able to find because of lack of sleep and difficulty being awake, alert and attentive during the day.

Mr. England reviewed the employee's educational and employment background. He noted that the employee often sits with her knee elevated, that she has numbness and pain in her left and right knees and low back, can only stand or walk for 20-30 minutes at the most, and can only sit for around 15-20 minutes. He noted that the employee seldom drives her car. He also noted that the side effects of her pain and sleep medication make her fearful of driving a car. He also noted the job requirements at the Department of Corrections include squatting, bending, climbing. Mr. England stated that the employee had no background using a computer. He also noted that the employee made an effort to obtain other employment or training through the Missouri Division of Vocational Rehabilitation.

After reviewing Mr. England's report, Dr. Volarich reiterated that Ms. Arnold was permanently and totally disabled to the last injury alone.

Sherry Browning evaluated the employee in July, 2010 at the request of the Employer. Ms. Browning concluded that the sedentary restrictions as outlined by Dr. Mace and by the functional capacity exam, preclude the employee from returning to "many of the jobs for which she could have performed otherwise." However, she opined that the employee could return to work at the sedentary level, including customer service representative, receptionist/information clerk, general office clerk, and non-emergency dispatcher. Ms. Browning believed that these positions would allow the employee to change physical positions. Ms. Browning stated that any computer work would be data entry rather than word processing for these positions. Ms. Browning also recommended ongoing education and training.

During the hearing, the employee relayed her complaints and current symptoms as follows: Pertaining to the right knee, she described a constant tightness/squeezing sensation below her right knee cap, a constant need to shift her weight to relieve the pain, a burning sensation in the back of the right knee, and that her pain ranges from a 2 to a 5 on a 10 point scale. Regarding the low back, she experiences constant stiffness and a frequent use of topical pain creams and medicines to relieve the symptoms, she reported that her low back feels like a sunburn with a hot throbbing pain that travels down her left buttocks and often lasts for hours. She reports the pain in her back is never lower than a 5 on a 10 point scale.

Regarding her left knee, she explained popping, swelling, buckling, and that on a good day her pain is at a 4-5 on a 10 point scale. On good days the pain is less intense and that elevating will help the pain. On a bad day she reported pain of at least an 8, with sharp pain up the side of the knee and down into the foot. She explained a sensation like a bubble in her knee ready to pop, a hot burning feeling, and that symptoms vary depending on weather. She reported that it will frequently give out and buckle, feels weak, affects her balance, and requires her to brace herself on objects as she maneuvers and walks around. She reported that she avoids stairs entirely and that activities like shopping and dish washing are difficult due to the need to walk or stand for long periods.

The employee explained that she never sleeps through the night, that she goes to bed around 9:30 p.m., falls asleep around 11:00 p.m., and is up by 12:00 or 1:00 a.m. to walk around and alleviate the pain. She stated that she averages about 2 hours of sleep at a time and that she will often get up in the middle of the night to get a heating pad or ice pack for her back and knee. She testified that she is “constantly in a fog” due to the lack of sleep, that she cannot concentrate, and has trouble reading.

The employee also testified that she takes pain medicine. She testified that she takes Tramadol, hydrocodone, and ibuprofen. She stated that some months the Employer-Insurer would pay for these medications, and other months they would not pay for the medications. The employee requested \$851.00 in unpaid prescription medications.

The employee testified that the brace that was prescribed for her left knee helped, however she was not able to wear it because it irritated her skin due to her prior skin graft.

She testified that she feels she cannot work for many reasons, including the fact that she cannot drive farther than four miles without feeling pain in her back and knees. She cannot concentrate due to sleep deprivation and her medications affect her ability to stay focused. She needs to lay down approximately four to five times per day and she needs to ice her knee and elevate her leg. She further testified that she cannot function or stay on any work task for longer than two hours due to pain. She testified that she applied for and obtained long-term disability, looked for alternative work through vocational rehabilitation, and eventually applied for and received social security disability on her own.

RULINGS OF LAW:

Issue 1. Previously Incurred Medical

The employee offered Exhibit R, a printout of pharmacy bills from Wal-Mart, and Exhibit L, a copy of pharmacy receipts. Although the employee credibly testified that she takes pain medications, the evidence presented is not sufficient to order a reimbursement of the unpaid pharmacy bills. The employee has not reached her burden of proof on this issue because there is simply a lack of corresponding medical documentation regarding who prescribed this medicine and for what purpose the medicine was prescribed.

Based on the evidence presented, the employee has failed to meet her burden of proof on the issue of previously incurred medical expenses. The employee failed to prove that these medications were necessary to cure and relieve the effects of the employee's injury. The employees request for previously incurred medical expenses is therefore denied.

Issue 2. Reimbursement for the IME of Dr. Mace

The employee is claiming that she should be reimbursed for the IME of Dr. Mace. The employee argues that she should be reimbursed under Section 287.560.

Section 287.560. That section, in relevant part, states:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

The employee did not meet her burden of proof in proving that the case was defended without reasonable ground. Therefore, the employee's request to be reimbursed for the IME of Dr. Mace is denied.

Issue 3. Future Mileage

At this point in time, it is premature to make a finding on future mileage. The employee's file will remain open based on the finding of permanent total disability. If necessary, a decision on additional mileage can be made when the issue is ripe.

Issue 4. Future medical

Employee, Debra Arnold, is seeking an award ordering that Employer/Insurer provide her with future medical aid to cure and relieve the effects of her work injuries resulting from the accident of October 20, 2005. Employee is asking for an award of future medical treatment, to include, but not be limited to, the treatment recommendations of Dr. Volarich.

Section 287.140.1 RSMO states that Employer/Insurer provide "such medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." *Kaderly v. Race Bros. Farm Supply*, 993 S.W.2d 512, 517 (Mo. App. S.D. 1999). Medical aid may be required even though it merely relieves the employee's suffering and neither cures it nor restores the employee to soundness after an injury. *Landman v. Ice Cream Specialties*, 107 S.W.3d 240, 249 (Mo. banc 2003); *Stephens v. Crane Trucking, Inc.*, 446 S.W.2d 772, 782 (Mo. 1969), *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). The right to treatment does not

end when Employee reaches maximum medical improvement. *Williams v. City of Ava*, 982 S.W.2d 307, 312 (Mo. App. S.D. 1998). An award of medical benefits is appropriate "if the Claimant shows by 'reasonable probability' that he is in need of additional medical treatment by reason of his work-related accident." *Landers v. Chrysler Corp.*, 963 S.W. 2d 275, 283 (Mo. App. E.D. 1997)(citing *Sifferman v. Sears, Roebuck, and Co.*, 906 S.W. 2d 823, 828 (Mo. App. S.D. 1995)).

The employee testified that she has chronic pain in her knees and low back resulting from her injury on October 20, 2006.

Dr. Volarich stated that the employee will require ongoing care for her pain syndrome using modalities including but not limited to narcotics and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of her complaints. He also stated that the employee would benefit from treatments at a pain clinic because of her left knee pain syndrome. Dr. Volarich recommended that she see either a physiatrist or pain management specialist to determine the cause of her severe lateral compartment knee pain syndrome. He also stated that nerve blocks, trigger point injections, aggressive physical therapy, and similar treatments are all indicated.

I specifically find that Employee has met her burden of proof and has offered the credible testimony and medical opinion of Dr. Volarich that supports her claim for future medical care for the injury she sustained to her knees and low back on October 20, 2005. I find that the treatment Dr. Volarich has recommended for Employee's chronic pain is reasonable. I further find that the Employee's work accident of October 20, 2005 was the prevailing factor in causing her bilateral knee injuries and low back injury and need for future medical aid. I find that the recommendations of future medical care made by Dr. Volarich are reasonable and necessary to cure and relieve the effects of the injury.

Based on these findings, Employer/Insurer is ordered to provide all medical treatment that is necessary to cure and relieve Employee from the effects of his work injury for the remainder of her life as recommended by Dr. Volarich or a treating physician recommended by Dr. Volarich. Without otherwise limiting this award for future medical care, it is intended that such care shall include non-narcotic medications, muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of her complaints. It is also to include treatments at a pain clinic, nerve blocks, trigger point injections, aggressive physical therapy.

Issue 5. Additional temporary total disability

The employee is requesting additional TTD for the following time periods and dates:

1. 6-22-06 through 7-11-06 (20 days)
2. 7-16-06
3. 7-31-06
4. 8-2-06
5. 8-18-06

6. 8-25-06
7. 8-31-06
8. 9-26-06
9. 10-18-06
10. 10-27-06
11. 11-13-06 through 12-5-06 (23 days)

The employee has met her burden of proof that she was temporarily and totally disabled for the time periods of 6-22-06 through 7-11-06 and 11-13-06 through 12-5-06. During those time periods, the employee was unable to return to any employment. Those time periods amount to 43 days, or 6 1/7 weeks of TTD. The Employer/Insurer is therefore directed to pay the employee for 6 1/7 weeks of TTD which equals \$1,911.84.

The employee worked intermittently during this time period where she requested TTD for individual days. Based on all of the evidence presented, I find that the employee did not reach her burden of proof that she was temporarily and totally disabled for the following days requested; ; 7-16-06, 7-31-06, 8-2-06, 8-18-06, 8-25-06, 8-31-06, 9-26-06, 10-18-06, and 10-27-06. Therefore the employee's request for TTD for those specific dates is denied.

Issue 6. Permanent total disability

Employee alleges that she is permanently and totally disabled.

Section 287.020.7 RSMo. provides that "[t]he term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident."

The phrase "inability to return to any employment" has been interpreted as the inability of the Employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. S.D. 1992). The test for permanent total disability is whether, given the Employee's situation and condition, he is competent to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. E.D. 1992). Total disability means the "inability to return to any reasonable or normal employment." An injured Employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown v. Treasurer of State of Missouri*, 795 S.W.2d 479, 483 (Mo. App. E.D. 1990).

The key question is whether any Employer in the usual course of business would reasonably be expected to employ the Employee in that person's present condition, reasonably expecting the Employee to perform the work for which he was hired. *Reiner*, 837 S.W.2d at 367; *Thornton v. Haas Bakerv*, 858 S.W.2d 831, 834 (Mo. App. E.D. 1993); *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo. App. E.D.1995).

The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., in pertinent part as follows:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of . . . the "Second Injury Fund"

Given these statutory provisions and cases, the first question that must be addressed is whether the Employee is permanently and totally disabled. If the Employee is permanently and totally disabled, then it must next be determined whether the accident of October 20, 2005 alone, caused her permanent total disability. If so, Employer/Insurer is liable to Employee for her permanent total disability benefits and the Second Injury Fund has no liability to Employee. If not, the Second Injury Fund is only liable for permanent total disability benefits if her permanent total disability was caused by a combination of her pre-existing injuries and conditions and the Employee's injury of October 20, 2005. Under Section 287.220.1, the pre-existing injuries must also have constituted a hindrance or obstacle to the Employee's employment or reemployment.

Is the Employee permanently and totally disabled?

The employee's initial injury was to her left knee. After the injury, the employee was not weight bearing on her left knee. She eventually experienced problems in her right knee and low back as a result of her injury.

The employee testified that she has constant pain in her right knee, left knee, and low back. She stated that she is in a "constant fog" from lack of sleep, she can't drive more than four miles without feeling pain in her back and knees, medications effect her ability to focus, she needs to lay down four to five times per day, and she needs to ice her knee and elevate her leg during the day.

I find the Employee was a credible and persuasive witness on the issue of permanent total disability. The Employee offered detailed testimony concerning the impact her injuries have had on her daily ability to function. The Employee's testimony in this regard is very credible and supports a conclusion that the Employee will not be able to compete in the open labor market. With her physical limitations and level of pain, it is extremely unlikely any Employer would reasonably be expected to hire the Employee in her present physical condition.

He diagnosed left internal derangement- S/P arthroscopic excision of the hypertrophic plica and redundant synovium, severe postoperative left knee pain syndrome primarily involving the lateral compartment with associated patellofemoral mistracking secondary to quadriceps. He also diagnosed right knee pain syndrome secondary to abnormal weight bearing and lumbar pain syndrome secondary to abnormal weight bearing. He found the accident of October 20, 2005 to be the substantial contributing factor as well as the prevailing or primary factor in leading to these diagnoses. He further assigned a rating of 40% of the left knee, 15% of the right knee, and 15% of the body as a whole referable to the lumbar spine and recommended an evaluation by a vocational expert to assess her ability to return to the open labor market.

The employee was evaluated by vocational expert, James England, at the request of the employee. Mr. England opined that it would be difficult for the employee to compete in the open labor market or to sustain it in the long run.

Mr. England stated that the employee appears to be limited to the point that she is more likely than not going to remain totally disabled from a vocational standpoint. He stated that without a great deal of assistance, he does not believe that the employee could successfully find alternative work on her own. Mr. England also stated that it does not appear that the employee could sustain work even if able to find because of lack of sleep and difficulty being awake, alert and attentive during the day.

After reviewing Mr. England's report, Dr. Volarich reiterated that Ms. Arnold was permanently and totally disabled to the last injury alone.

Sherry Browning evaluated the employee in July, 2010 at the request of the Employer. Ms. Browning concluded that the sedentary restrictions as outlined by Dr. Mace and by the functional capacity exam, preclude the employee from returning to "many of the jobs for which she could have performed otherwise." However, she opined that the employee could return to work at the sedentary level, including customer service representative, receptionist/information clerk, general office clerk, and non-emergency dispatcher. Ms. Browning believed that these positions would allow the employee to change physical positions. Ms. Browning stated that any computer work would be data entry rather than word processing for these positions. Ms. Browning also recommended ongoing education and training.

Based on the evidence presented, I find the opinion of Mr. England more credible than the opinion of Ms. Browning on the issue of whether the employee can compete in the open labor market.

Based on a review of all the evidence, I find that the opinions of Dr. Volarich and Mr. England are credible regarding whether the Employee is permanently and totally disabled.

Based on the credible testimony of the Employee and the supporting medical and vocational expert evidence, I find that no Employer in the usual course of business would reasonably be expected to employ the Employee in her present condition and reasonably expect the Employee to perform the work for which she is hired. I find that the Employee is unable to compete in the open labor market and is therefore permanently and totally disabled.

Next, I must determine whether the October 20, 2006 work injury alone is enough to make him permanently and totally disabled.

Based on all of the evidence presented, I find that the employee's current pain and disability resulting from the October 20, 2005 work accident caused the employee's permanent and total disability.

On June 13, 2008, Employee was at maximum medical improvement. I find that the Employee was in his healing period through June 13, 2008. I find that as of June 14, 2008 no Employer in the usual course of business would reasonably be expected to employ Ms. Arnold in her physical condition and reasonably expect her to perform the work for which she is hired, and therefore was no longer able to compete in the open labor market and was permanently and totally disabled. I find the Employer/Insurer is liable to Employee for permanent total disability benefits.

Employer/Insurer is directed to pay the Employee the sum of \$311.23 per week commencing on June 14, 2008 and continuing thereafter for the remainder of the Employee's lifetime or until suspended if the Employee is restored to her regular work or its equivalent as provided in Section 287.200 RSMo. The Second Injury Fund has no liability in this case on the issue of permanent total disability.

Since the Employee has been awarded permanent total disability benefits against the Employer/Insurer, Section 287.200.2 RSMo. mandates that the Division "shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability". Based on this section and the provisions of Section 287.140 RSMo., the Division and Commission should maintain an open file in the Employee's case for purposes of resolving medical treatment issues and reviewing the status of the Employee's permanent disability pursuant to Sections 287.140 and 287.200 RSMo.

Issue 7. Permanent partial disability

The employee has a 7.5% body as a whole disability from her pre-existing burns. The employee's pre-existing disability does not reach the statutory threshold for liability. Based on all of the evidence presented, I find that the Second Injury Fund does not have any liability in this case.

ATTORNEY'S FEE

Douglas Van Kamp, 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.

Employee: Debra Arnold

Injury No. 05-138274

Date: _____ Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation