

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

Injury No. 09-072091

Employee: Pamela Bertels

Employer: Houghton Mifflin Harcourt Publishing Company

Insurer: American International Group, Inc.

This 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 parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the 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 parties asked the administrative law judge to resolve the following issues: (1) liability for past medical expenses; (2) future medical care; (3) temporary disability (including employer's request for a credit for unemployment and short-term disability benefits); and (4) permanent disability.

The administrative law judge rendered the following findings and conclusions: (1) employee is entitled to \$29,589.98 as the unchallenged value of medical services provided to cure and relieve from employee's injury at work; (2) employee is awarded such medical, surgical, chiropractic, and hospital treatment as may be reasonably required to cure and relieve from the injury; (3) employer is entitled to a credit for temporary total disability benefits from short term disability payments in the amount of \$1,384.21; and (4) employee suffered a 40% permanent partial disability to her right knee from the accident based on the totality of the evidence.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred by not awarding past medical expenses in the amount of \$89,603.50 instead of \$29,589.98.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in finding employee sustained a 40% permanent partial disability of the right knee as a result of the August 6, 2009, accident and injury; (2) in failing to engage in the first step of the analysis under *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011) before ruling employee could recover future medical treatment for her right knee complaints; (3) in holding employer was obligated to provide employee with future medical care, including a total knee replacement, for her right knee complaints; and (4) in granting employee past medical expenses she incurred following her release by Dr. Lyndon Gross.

For the reasons explained below, we supplement the findings and conclusions of the administrative law judge with respect to the issues of medical causation and past medical

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expenses, and modify the award of the administrative law judge as to the issue of past medical expenses.

### **Findings of Fact**

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modifications herein.

#### *Scope of stipulations and disputed issues; medical causation*

The parties now dispute whether any issue of medical causation was properly before the administrative law judge where employer stipulated that employee suffered an injury by accident arising out of and in the course of employment. Employer argues that the administrative law judge was required, in order to resolve the issue whether the treatment employee received was reasonably required to cure and relieve the effects of her injury, to first determine whether the accident was the prevailing factor resulting in the medical conditions for which employee sought the disputed treatment. Employee responds that once a compensable injury is stipulated, the only inquiry remaining under *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011) is whether employee proved that the disputed treatment was reasonably required to cure and relieve the effects of her injury.

Notably, the parties did not specifically stipulate the particular medical conditions or disabilities resulting from the accident of August 6, 2009.<sup>1</sup> In her brief and at oral argument, employee failed to explain how we are to resolve the issue of what medical treatment flows from her stipulated injury by accident without resolving the conflicting expert medical opinions as to the question what particular medical conditions resulted from that accident. As recognized by the court in *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466 (Mo. App. 2012), the *Tillotson* decision does not relieve an employee from the burden of proving that an accident was the prevailing factor in causing the resulting medical conditions and disability (i.e. the particular injuries) for which the employee claims compensation. *Id.* at 471. Even where an employee is shown to have suffered an injury by accident, there may remain legitimate disputes regarding the particular medical conditions and disabilities resulting from the accident. *Id.* at 472-73. The *Armstrong* court made clear that, in such cases, it is appropriate to apply the standard for medical causation of a compensable injury set forth in § 287.020.3 RSMo. *Id.*

In any event, we find most persuasive the opinion from Dr. James Strickland that the accident of August 6, 2009, caused employee to suffer the medical conditions he identified during his surgeries and described during his deposition as resulting from the accident: the initial traumatic injuries to the medial femoral condyle and patella; chondral degeneration affecting the patellofemoral joint (and specifically the lateral as well as the medial patellar facet), medial femoral condyle, and lateral tibial plateau; a chondral fissure affecting the patellofemoral compartment; and a breakdown of cartilage on the femoral groove. Dr. Strickland credibly explained that the accident of August 2009

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<sup>1</sup> Section 287.020.3(1) RSMo provides that "[a]n injury by accident is *compensable* only if the accident was the prevailing factor in causing both the resulting medical condition and disability" (emphasis added).

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caused trauma to the primary weight-bearing surface in employee's knee, which in turn rendered the surrounding cartilage in employee's knee far more susceptible to further breakdown whenever employee put weight on her knee. Dr. Strickland noted that he'd seen many patients with presentations similar to employee's, and that it did not surprise him that employee continued to have problems in her knee following the surgery performed by Dr. Gross. Dr. David Volarich substantially corroborated Dr. Strickland's theory when he opined that, although employee had some preexisting chondromalacia in her knee, the cartilage flaps seen during the course of Dr. Strickland's surgeries were traumatic and products of the accident.

On the other hand, employer's expert Dr. Gross suggested that employee's ongoing complaints did not result from the accident but instead were the product of a purely spontaneous breakdown in the cartilage in employee's right knee in the months after he released her from his care. Dr. Gross conceded that chondromalacia can progress rapidly and can be impacted by trauma to the knee joint. He also agreed that the recurrent pathology affecting the medial femoral condyle identified during Dr. Strickland's September 2011 surgery was in the very same area of the knee as one of the cartilage tears Dr. Gross originally diagnosed as resulting from the accident.

We note that employee had no right knee problems before the accident of August 2009, and there is no evidence she has experienced any pain or limitations affecting her left knee. After careful consideration, we are not persuaded by the theory from Dr. Gross.

Accordingly, we find that the accident of August 2009 was the prevailing factor causing employee to sustain the initial traumatic injuries to the medial femoral condyle and patella (including the pre-patellar bursitis and tear of the medial patellar facet identified by Dr. Gross); chondral degeneration affecting the medial femoral condyle, lateral tibial plateau, and patellofemoral joint (including specifically the lateral as well as the medial patellar facet); a chondral fissure affecting the patellofemoral compartment; and a breakdown of cartilage on the femoral groove.

#### Past medical expenses

Having credited the opinions from Drs. Strickland and Volarich regarding the particular medical conditions resulting from employee's stipulated injury by accident, we additionally credit their opinions (and so find) that the treatment employee received (including the disputed arthroscopic surgeries and total knee replacement) flowed directly from the accident, and were reasonably required to cure and relieve the effects of her compensable injuries. We further credit the testimony from Dr. Strickland (and so find) that the charges reflected in the bills employee received for her treatment for her knee injury were reasonable and are the charges normally assessed for that type of treatment.

With regard to her past medical expenses, the administrative law judge accurately recounted employee's testimony that she is unsure whether she has any further liability for her medical expenses. Employer makes much of this testimony from employee. But there is no showing on this record that employee has any particular training or expertise with regard to the topics of medical billing, insurance law, or an employee's liability for past medical expenses incurred in the context of a disputed workers' compensation case.

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Accordingly, we are neither surprised by employee's testimony that she is unsure as to the extent of her liability for the bills, nor do we believe that a contrary assertion would be particularly persuasive. On the other hand, we do find credible employee's testimony describing the disputed treatment she received in connection with her work injury after employer declined to authorize further care, as well as her identification of Exhibit G listing the bills she received for that treatment. We find that employee received the bills set forth in Exhibits 11, 15, 16, 17, 18, and 19 in connection with the disputed treatment for her work injury.

Turning to the bills, we find attached affidavits from the custodians of records for each of the providers. Therein, these custodians identify the bills and also purport to identify the total costs for the services, the amounts employee paid, the amounts paid by health insurance, the amounts "written off" or adjusted, and the "balance[s] outstanding for which [employee] is personally liable." *Transcript*, pages 1101, 1112, 1117, 1120, 1125, and 1133. The affidavits do not identify the individual or individuals who negotiated or authorized the "write-offs" or adjustments, nor do they identify the various providers' reasoning in agreeing to discounts of their original charges. Nor do they contain any foundational statements that would qualify the custodians of these medical bills as authorized on behalf of the providers to fix or set employee's actual liability with regard to the bills.

In fact, there is no evidence on this record that the individuals who signed these affidavits possessed any qualification whatsoever to opine as to the question of employee's ongoing liability for the bills. (We are not convinced that the mere fact that one is a custodian of records automatically confers any special authority or qualification to opine as to the actual meaning of the records themselves.) Our concern regarding the qualification of these individuals to opine regarding the extent of employee's liability is compounded by the existence of obvious errors in their calculations. For example, the affidavit from Elaine Duff with Advance Physical Therapy suggests that the total cost for services was \$7,360.00, of which employee paid \$60.00, insurance paid \$2,554.67, and \$4,556.33 was written off or adjusted. Ms. Duff opines that the outstanding balance for which employee is personally liable is thus \$0, but a simple calculation reveals that she has not accounted for \$189.00.<sup>2</sup> Similarly, the affidavit from Terry Haub of Professional Rehabilitation Services suggests employee and her insurance paid the provider \$0.40 more than was originally charged. Meanwhile, the affidavit from Marilyn Henry with City Place Surgery Center incredibly suggests the provider reduced or adjusted the bills in an amount \$6,791.50 greater than was originally charged. Ultimately, after careful consideration, we do not find the assertions from these custodians of medical bills to be particularly probative or persuasive as to the question of employee's personal liability for her past medical expenses.

Instead, from our own careful review of the affidavits, bills, and associated medical records, as well as the summaries of charges provided by both parties in Exhibits G and 10, in combination with employee's credible testimony that she received these bills in connection

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<sup>2</sup> \$7,360.00 - \$60.00 - \$2,554.67 - \$4,556.33 = \$189.00, not \$0.

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with disputed treatment for her work injury, we find that employee incurred past medical expenses, as follows:

<b><u>Provider:</u></b>	<b><u>Total charges:</u></b>
Dr. Strickland/St. Louis Orthopedic Institute, Inc.	\$28,538.21 <sup>3</sup>
Mercy Hospital St. Louis	\$28,249.29
City Place Surgery Center	\$21,800.00
Advance Physical Therapy	\$ 5,045.33 <sup>4</sup>
Dr. Gary Meltz	\$ 1,349.00
Professional Rehab Services	\$ 432.00

We find that the total amount of the charges reflected in the bills is \$85,413.83. Of that amount, employee and/or her insurance paid \$29,234.98, the providers adjusted \$56,083.85 for unknown reasons,<sup>5</sup> and \$95.00 remains due and owing to Dr. Meltz.

## **Conclusions of Law**

### **Medical causation**

Section 287.020.3(1) RSMo, provides, in relevant part, as follows:

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.

We have credited the opinions from Drs. Strickland and Volarich as to the injuries that employee sustained as a result of the accident of August 2009. We conclude that the accident was the prevailing factor causing employee to suffer the resulting medical conditions of the initial traumatic injuries to the medial femoral condyle and patella (including the pre-patellar bursitis and tear of the medial patellar facet identified by Dr. Gross); chondral degeneration affecting the medial femoral condyle, lateral tibial plateau, and patellofemoral joint (including specifically the lateral as well as the medial patellar facet); a chondral fissure affecting the patellofemoral compartment; and a breakdown of cartilage on the femoral groove, as well as permanent partial disability of 40% of the right knee.<sup>6</sup>

<sup>3</sup> This amount differs from the total charges of \$30,413.21 reflected in Exhibit G as well as the attached affidavit because that amount includes \$1,875.00 charged to employee's counsel's law firm for medical testimony.

<sup>4</sup> This amount differs from the total charges reflected in Exhibit G as well as the attached affidavit because, as employer correctly suggests in its Exhibit 10 and in its brief, the bill reveals that employer accepted and paid for certain services between June 25, 2010, and August 10, 2010. Our review of the bill indicates employer paid \$2,314.67 of the \$7360.00 total charges, resulting in disputed charges of \$5,045.33.

<sup>5</sup> Employer did not provide any evidence to explain the basis for these reductions, and they are not particularly clear from the face of the bills themselves; for this reason we decline to make any findings as to the reasoning of the various providers in accepting reductions of the originally charged amounts. Likewise, we decline to make any finding that employee will have no reimbursement obligation or other liability to pay such sums.

<sup>6</sup> We acknowledge employer's appeal of the administrative law judge's finding that employee suffered a 40% permanent partial disability of the right knee. Employee provided detailed testimony describing the limitations and disabilities she now suffers with respect to her right knee, and the administrative law judge was able to observe employee and assess her demeanor during the hearing. After a careful consideration of the arguments in employer's brief, we discern no compelling reason to disturb the administrative law judge's findings regarding the nature and extent of disability employee suffered as a result of the accident and subsequent surgeries.

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Past medical expenses

We have found that the treatment employee received (including the disputed arthroscopic surgeries and total knee replacement) flowed directly from the accident, and were reasonably required to cure and relieve the effects of her compensable injuries. As a result, employer is liable for employee's past medical expenses pursuant to § 287.140.1 RSMo:

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.

Employer's statutory duty to provide employee with reasonable and necessary medical treatment following a compensable work injury is "absolute and unqualified." *Abt v. Miss. Lime Co.*, 420 S.W.3d 689, 704 (Mo. App. 2014). Where, as here, an employer refuses or fails to fulfill that duty, an award of past medical expenses against the employer is appropriate.

The courts have consistently held that an award of past medical expenses is supported when the record includes (1) the bills themselves; (2) the medical records reflecting the treatment giving rise to the bills; and (3) testimony from the employee establishing the relationship between the bills and the disputed treatment. See *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. 1989); *Shores v. General Motors Corp.*, 842 S.W.2d 929, 932 (Mo. Ct. App. 1992); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 739 (Mo. App. 1994); *Metcalf v. Castle Studios*, 946 S.W.2d 282, 288 (Mo. App. 1997); *Esquivel v. Day's Inn*, 959 S.W.2d 486, 488 (Mo. App. 1998); *Goerlich v. TPF, Inc.*, 85 S.W.3d 724, 732 (Mo. App. 2002); *Treasurer of the State v. Hudgins*, 308 S.W.3d 789, 791 (Mo. App. 2010); and *Abt v. Miss. Lime Co.*, 420 S.W.3d 689, 703 (Mo. App. 2014). When these three elements are met, the burden shifts to the employer to prove some reason the award of past medical expenses is inappropriate (such as employee's liability for them has been extinguished, the charges are not reasonable, etc.) See *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 822-23 (Mo. 2003); *Ellis v. Mo. State Treasurer*, 302 S.W.3d 217, 225 (Mo. App. 2009); *Proffer v. Fed. Mogul Corp.*, 341 S.W.3d 184, 190 (Mo. App. 2011); and *Maness v. City of De Soto*, 421 S.W.3d 532, 544 (Mo. App. 2014).

Employer argues that employee failed to meet her burden under *Martin* (and thus failed to shift the burden to employer) because she forthrightly conceded she is unsure whether she has any further liability for her medical expenses. We are convinced that employer misstates employee's burden of proof under *Martin* (and the numerous decisions following *Martin* cited above) in arguing that employee was required to affirmatively testify as to the extent of her liability for the charges reflected in the bills. The *Martin* employee testified that she "received" the bills at issue in connection with treatment for her work injury, and the court held that this was sufficient to shift the burden to the employer. See *Martin*, 842 S.W.2d at 111-12.

More recently, in rejecting a similar argument in the case of *Maness v. City of De Soto*, 421 S.W.3d 532 (Mo. App. 2014), the court made clear that the employee was not required to

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testify that he was able to read and understand his medical bills in order to shift the burden to employer under *Martin*:

Relying on *Martin*, Employer asserts that Claimant's testimony was without credibility or probative value because he stated that he did not know if he could read and understand Exhibit K and that he did not know "the specifics, the detail of what's included in Exhibit K." However, we find nothing in *Martin* requiring a claimant to testify that he can read and understand the specifics of the medical bills. Fn.6 We also note that the bills in Exhibit K contain such unintelligible entries as "ANS ESPH STH" and "SPNG PEANUT." Instead, the *Martin* court found sufficient the claimant's testimony identifying the bills "as being related to and the product of her injury."

*Id.* at 544.

Employer argues that the *Maness* case is distinguishable, because there, the record included documents the employee signed agreeing to be responsible for the total charges for services rendered by one of the providers. *Id.* at 546. We are not persuaded. The *Maness* court discussed those documents in the context of analyzing whether the employer had carried its burden of proving entitlement to credits for various unexplained write-offs and reductions, and did not suggest that the employee was required to provide such evidence to shift the burden under *Martin*. *Id.* Employer essentially asks us to read *Maness* as establishing an additional element of proof that an employee must satisfy before the burden is shifted to the employer, but the court specifically stated that "[t]he bills, Claimant's testimony identifying the bills, and the accompanying medical records constitute a sufficient factual basis under *Martin* for the Commission's award of past medical expenses." *Id.* at 544. Far from establishing a new requirement that employees personally opine as to the extent of liability for past medical expenses, the *Maness* court confirms and reinforces the longstanding and unbroken line of cases applying the *Martin* burden-shifting analysis.

Here, employee testified that she received the bills at issue in connection with her treatment for the work injury, and we have credited that testimony and found that the total of the billed amounts was \$85,413.83. We conclude that the burden was properly shifted to employer to demonstrate that employee "was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished, and that the reason that her liability was extinguished does not otherwise fall within the provisions of section 287.270 [RSMo]." *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 823 (Mo. 2003).

Employer argues that it should be entitled to benefit from the various adjustments reflected in the bills. "For Employer to seek a reduction for write-downs, write-offs, or adjustments, it had to show that Claimant had no reimbursement obligation or other liability to pay such sums." *Proffer v. Fed. Mogul Corp.*, 341 S.W.3d 184, 190 (Mo. App. 2011). Employer points to the affidavits it provided from the custodians of records for medical billing at the various providers, and asserts that the affidavits prove that employee has no further liability for the bills. We have found those affidavits lacking any probative value or persuasive force to the extent their authors purport to fix or opine as to employee's liability for the bills.

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It is clear that the bills contain certain adjustments and deductions, but employer has provided no credible evidence to (1) demonstrate that employee's liability for the full amount of the charges has been reduced or extinguished by these write-offs and deductions, and (2) show that the reason employee's liability was extinguished does not fall within the provisions of § 287.270 RSMo. In the absence of any credible evidence from the employer as to these questions, we must conclude that employer has failed to meet its burden of proof under *Farmer-Cummings*. We conclude that employer is liable for employee's past medical expenses in the amount of \$85,413.83, and modify the administrative law judge's award accordingly.

**Award**

We supplement the findings and conclusions of the administrative law judge as to the issues of medical causation and past medical expenses, and we modify his award as to the issue of past medical expenses.

Employer is ordered to pay to employee the sum of \$85,413.83 for her past medical expenses.

In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 25, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further 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 14<sup>th</sup> day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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DISSENTING OPINION FILED  
James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Pamela Bertels

**DISSENTING OPINION**

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 Commission should affirm the award of the administrative law judge.

As aptly stated by the Supreme Court of Missouri, to "award [employee] compensation for medical expenses for which she has no liability would result in a windfall rather than compensation." *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 822 (Mo. 2003). It is clear enough to me from the face of the bills at issue that employee does not (and will not) have any further liability for the amounts written off or adjusted by the providers. Especially where (as the majority acknowledges) employee is unable to provide any credible testimony of her own to establish the extent of her liability for the bills, I would find that employee's liability on the bills does not include the amounts written off or adjusted, and that employer met its burden of proving that employee's liability for those amounts has been extinguished.

I believe the administrative law judge appropriately evaluated the evidence and reached the correct result. I would affirm the award of the administrative law judge without modification. Because the majority has determined otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

## AWARD

Employee: Pamela Bertels Injury No.: 09-072091  
Dependents: N/A Before the  
Employer: Houghton Mifflin Harcourt Publishing Company **Division of Workers'**  
**Compensation**  
Additional Party: N/A Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Insurer: American International Group, Inc.  
Hearing Date: May 1, 2014 Checked by: EJK/kr

### 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: August 6, 2009
5. State location where accident occurred or occupational disease was contracted: Lincoln 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 occurred or occupational disease contracted:  
The employee, a warehouse worker, injured her right knee when she tripped on a pallet and struck her knee on the concrete floor.
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: Right knee
14. Nature and extent of any permanent disability: 40% percent permanent partial disability to the right knee
15. Compensation paid to-date for temporary disability: \$3,908.18
15. Value necessary medical aid paid to date by employer/insurer: \$30,176.18

- 17. Value necessary medical aid not furnished by employer/insurer?
- 18. Employee's average weekly wages: \$672.62
- 19. Weekly compensation rate: \$448.41/\$422.97
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$29,589.98
Credit for temporary total disability from short term disability payments	(\$1,384.21)
64 weeks of permanent partial disability from Employer	\$27,070.08

- 22. Second Injury Fund liability: No

TOTAL: \$55,275.85

- 23. Future requirements awarded: See Additional Findings of Fact and Rulings of Law

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ryan R. Cox, Esq.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Pamela Bertels	Injury No.: 09-072091
Dependents:	N/A	Before the
Employer:	Houghton Mifflin Harcourt Publishing Company	<b>Division of Workers'</b>
Additional Party:	N/A	<b>Compensation</b>
Insurer:	American International Group, Inc.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri Checked by: EJK/kr

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a warehouse worker, injured her right knee when she tripped on a pallet and struck her knee on the concrete floor. The issues for determination are (1) Liability for Past Medical Expenses, (2) Future medical care, (3) Temporary Disability, and (4) Permanent disability. The evidence compels an award for the claimant for medical expenses, future medical care, and permanent partial disability benefits.

At the hearing, the claimant testified in person and offered the following exhibits which were received without objection:

- Exhibit A: Curriculum Vitae of Dr. James Strickland;
- Exhibit B: 6-3-10 arthrogram diagram;
- Exhibit C: 6-23-10 surgery diagram;
- Exhibit D: 6-23-11 surgery diagram;
- Exhibit E: 9-29-11 surgery diagram;
- Exhibit F: Medical records;
- Exhibit G: Medical bills summary;
- Exhibit H: Curriculum vitae of Dr. David Volarich;
- Exhibit I: Medical examination report of Dr. Volarich, dated 5-5-11;
- Exhibit J: Medical examination report of Dr. Volarich, dated 5-6-11;
- Exhibit K: Addendum to Dr. Volarich report, dated 2-25-13;
- Exhibit L: Request and denial of medical treatment;
- Exhibit M: Deposition of Dr. Strickland, dated 8-28-13;
- Exhibit N: Deposition of Dr. Volarich, dated 9-13-13;
- Exhibit O: List of what employee can't do and has difficulty doing [withdrawn].

The defense offered the following Exhibits, all of which were received in evidence:

- Exhibit 1: Report of injury;
- Exhibit 2: Deposition of Dr. Gross;
- Exhibit 3: Certified records of BarnesCare;
- Exhibit 4: Certified records of Dr. Kramer at Metropolitan Orthopedics;

Exhibit 5: Certified records of Dr. Meltz at Boonslick Medical Group;  
Exhibit 6: Certified records of Advance Physical Therapy and Sports Medicine;  
Exhibit 7: Certified records of MRI Partners of Chesterfield;  
Exhibit 8: Treatment records of Dr. Gross;  
Exhibit 9: Certified records of Timberlake Surgery Center;  
Exhibit 10: Spreadsheet of unauthorized medical treatment;  
Exhibit 11: Certified bill from Dr. Meltz;  
Exhibit 12: Certified bill from Professional Imaging;  
Exhibit 13: Certified bill from MRI Partners of Chesterfield;  
Exhibit 14: Certified bill from Metropolitan Orthopedics;  
Exhibit 15: Certified bill from Advance Physical Therapy-Troy;  
Exhibit 16: Certified bill from City Place Surgery Center;  
Exhibit 17: Certified bill from St. Louis Orthopedic Institute;  
Exhibit 18: Certified bill from Mercy Hospital St. Louis;  
Exhibit 19: Certified bill from Professional Rehabilitation Services;  
Exhibit 20: Certified bill of Timberlake Surgery Center;  
Exhibit 24: Certified business records of employer.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

### **SUMMARY OF FACTS**

On August 6, 2009, this then 49 year old claimant, a warehouse worker, injured her right knee when she tripped on a pallet and struck her knee on the concrete floor. She had started work at 6:00 am that morning putting together a kit of books. She dumped boxes of books onto a table and threw the empty boxes into the trash hamper. At 9:00 a.m., the claimant's trash hamper was full. While taking the hamper to dump, the claimant tripped and fell over a pallet onto her right kneecap on the concrete floor.

After the fall, the claimant became nauseated and sick to her stomach and sat in the office for about 30 minutes, cooling off and letting her stomach settle. She returned to work, finished her shift, but did not receive on-site medical attention. Although the claimant had pain and swelling in her right knee, she did not request medical treatment that day and continued to work, full duty, for the next four weeks. The claimant testified that she waited to ask for treatment because she thought she just had bruising to the knee.

On September 1, 2009, a BarnesCare physician examined the claimant for right knee pain and tightness, obtained x-rays of her right knee, and prescribed knee exercises. The claimant rated her pain as a 7 on a 10 point scale. The claimant reported pain only when she knelt on the right knee and denied locking, buckling, or giving way of the knee. Examination of the right knee revealed slight swelling of the prepatellar knee with no evidence of effusion and no joint line tenderness. Range of motion and motor strength were normal. Dr. Clark diagnosed prepatellar bursitis. She ordered right knee x-rays and returned employee to work, full duty, under the restriction to avoid kneeling. On September 1, 2009, right knee x-rays were negative for fracture or dislocation. See Exhibit 3.

On September 15, 2009, the claimant returned to Dr. Clark with continued pain and swelling in the right knee and no improvement. Additionally, the claimant reported increased pain with squatting. Exam of the right knee showed swelling of the prepatellar area with tenderness to palpation, but no joint line tenderness. Range of motion was full and motor strength was normal. Dr. Clark diagnosed prepatellar bursitis of the right knee. She recommended referral to a qualified orthopedic physician for consultation. The claimant remained at full duty work status. See Exhibit 3.

On September 15, 2009, Dr. Kramer, an orthopedic physician, examined the claimant for her right knee injury. The claimant had significant swelling over the anterior aspect of the right knee, which decreased after 4 or 5 days. During this interval, claimant continued to work her full occupational duties. She denied any previous history of right knee injury. During the physical examination the claimant walked with a normal gait. She had full extension and flexion of the knee. There was minimal tenderness over the right prepatellar bursal region. Dr. Kramer diagnosed right prepatellar bursitis, resolving. The discomfort and swelling over the anterior aspect of the claimant's right knee continued to improve. Since Dr. Kramer did not appreciate any significant fluid accumulation in the prepatellar bursa, he did not recommend aspirating and injecting a cortisone preparation at that time. The claimant could perform her regular work duties, but should limit kneeling on the right knee. Dr. Kramer opined that the claimant's right knee condition was a direct result of the August 19, 2009, injury. See Exhibit 4.

On November, 6, 2009, Dr. Meltz, the claimant's primary care physician, treated her for cough drainage and chest tightness. At that time, the claimant did not report either the work accident or right knee complaints. See Exhibit 5.

On November 10, 2009, the claimant returned to Dr. Kramer with right knee discomfort. She had no trouble walking, but experienced difficulty over the medial aspect of the right knee with squatting and attempting to rise from a squatting position. Additionally, the claimant experienced sharp pain over the medial aspect of the right knee. On physical examination the claimant walked with a normal gait. On attempting to squat and stand, the claimant complained of discomfort over the medial aspect of the right knee. The right knee had full extension and flexion. There was no evidence of effusion or joint line tenderness. Nor was there any swelling or fluid collection in the prepatellar bursal region. Dr. Kramer diagnosed right knee contusion, and right prepatellar bursitis, resolved. Given the persistent discomfort in employee's right knee, Dr. Kramer recommended a right knee MRI to rule out intra-articular damage from the accident. See Exhibit 4.

On November 19, 2009, a right knee MRI demonstrated intact right knee menisci and cruciate ligaments, and mild quadriceps insertional tendinopathy without evidence of a tear. See Exhibit 4.

On November 30, 2009, Dr. Kramer examined the claimant who reported slight discomfort in the right knee over the anterior patella tendon region with squatting, bending, and attempting to rise from a squatting position. The claimant denied any discomfort in the quadriceps tendon region. On physical exam, the claimant walked with a normal gait and had full extension and flexion of the right knee. He found no effusion, joint line tenderness, swelling

of the knee, tenderness over the quadriceps tendon insertion, nor the patella tendon. Dr. Kramer diagnosed right knee contusion, resolved; mild quadriceps insertional tendinopathy. Dr. Kramer opined that the claimant had reached maximum medical improvement, could perform her regular work duties, without limitation, and did not require further orthopedic follow-up. See Exhibit 4.

On December 14, 2009, Dr. Meltz examined the claimant for unrelated conditions. See Exhibit 5.

On January 21, 2010, Dr. Gross examined the claimant for pain in the anterior aspect of the right knee, especially when squatting or kneeling. She had right knee pain when she stood from a squatting position but did not complain of swelling, catching, or giving way in the right knee. On reviewing the November 2009, MRI, Dr. Gross opined that the claimant had a contusion to her right knee from the August 2009 accident and developed peripatellar bursitis. See Dr. Gross deposition, page 11; Deposition Exhibit 2. On this physical examination, Dr. Gross found no swelling of either knee. She had normal range of motion of the right knee and negative provocative signs for any type of ligament or meniscal pathology. The claimant was tender to palpation over the anterior aspect of the knee. Range of right knee motion was symmetric, from side to side. There was no abnormality in motion to suggest an injury to the ligaments, meniscus, or cartilage. Dr. Gross performed a Lachman test for stability of the ACL, which was normal. He performed anterior and posterior drawer tests, for stability of the anterior and posterior cruciate ligaments, which were also normal. Varus and valgus laxity testing of the right knee for the medial collateral and lateral collateral ligaments was normal. The McMurray test for meniscal pathology was also normal, as was the pivot shift test. The only positive finding on exam was tenderness with palpation over the anterior aspect of the right knee in the area of the peripatella bursa. See Dr. Gross deposition, page 14; Deposition Exhibit 2.

Based on his exam, review of diagnostic studies, history of the injury, and mechanism of the injury, Dr. Gross diagnosed a right knee contusion and peripatella bursitis and recommended restrictions with regard to squatting and kneeling. He opined that the claimant should take a non-steroidal anti-inflammatory and use a pad to cushion the right knee if she had to kneel on that side. Dr. Gross opined that the claimant would continue to improve without any management from an orthopedic standpoint. X-ray studies did not show any bony abnormalities. While the MRI showed mild swelling in the peripatella bursa, it did not show any articular damage to the patellofemoral articulation. The remainder of the findings on the right knee MRI, including the ligaments and menisci, were normal. See Dr. Gross deposition, pages 14-15; Deposition Exhibit 2.

On June 1, 2010, Dr. Gross examined the claimant for pain in the anterior aspect of the right knee. On physical exam, the claimant had mild swelling over the anterior aspect of the right knee. Right knee range of motion was normal. The claimant had negative provocative signs for ligament pathology. The claimant had pain with compression of the patella and tenderness with palpation over the anterior aspect of the knee, similar to her prior exam. See Dr. Gross deposition, pages 14-16; Deposition Exhibit 2. Dr. Gross diagnosed right knee pain, history of right knee contusion, and peripatella bursitis. He opined that the claimant's continued pain was either related to scarring of the peripatella bursa, or damage to the articular surface of the knee. Dr. Gross recommended an MRI arthrogram and allowed employee to return to work under the

restrictions to avoid significant squatting or kneeling on the right side. See Dr. Gross deposition, pages 15-16; Deposition Exhibit 2.

The MRI arthrogram revealed a full thickness lesion of the medial aspect of the patella, and fluid in the peripatella bursa, similar to the previous MRI scan, which showed peripatella bursitis. The cruciate and collateral ligaments were intact, as were the memsci. On June 3, 2010, Dr. Gross diagnosed right knee patellar chondral defect and peripatella bursitis. The arthrogram showed damage to the cartilage on the inside of the patella. Dr. Gross recommended an arthroscopy to assess the lesion, as well as a bursectomy. The claimant could return to work, but was to avoid significant squatting and kneeling on the right knee. See Dr. Gross deposition, pages 17-18; Deposition Exhibit 2.

On June 18, 2010, Dr. Meltz examined the claimant, diagnosed a torn cartilage of the right knee and osteoarthritis of the right hip and granted the claimant a surgical clearance to undergo arthroscopy by Dr. Gross. See Exhibit 5.

On June 23, 2010, Dr. Gross performed a right knee arthroscopy with a chondroplasty of the medial femoral condyle, patella, and open peripatellar bursectomy. During the arthroscopy, Dr. Gross looked inside the right knee. There was an area on the inside of the kneecap which had cartilage damage. The inside of the femoral condyle had partial thickness cartilage damage. Dr. Gross did an open procedure, during which he made a small incision in the front of the knee and took out the swollen peripatella bursa. His post-operative diagnosis was right knee Grade II/III medial femoral condyle chondromalacia; and Grade II/III patella chondromalacia; and peripatella bursitis. See Dr. Gross deposition, pages 18-19; Deposition Exhibit 2.

On July 1, 2010, Dr. Gross found some lack of knee motion, but opined that this was not uncommon after this type of surgery. She had normal motor function and sensation. Dr. Gross diagnosed status post right knee arthroscopy, chondroplasty of the medial femoral condyle and peripatellar bursectomy. Dr. Gross prescribed physical therapy and authorized the claimant to return to work, under the restrictions of avoiding prolonged squatting and kneeling. See Dr. Gross deposition, pages 19-20; Deposition Exhibit 2. On July 22, 2010, Dr. Gross recommended that the claimant continue physical therapy. Claimant could return to work under the restrictions of avoiding prolonged squatting and kneeling. See Dr. Gross deposition, pages 20-21; Deposition Exhibit 2. As of August 16, 2010, Dr. Gross opined that the claimant had normal range of right knee motion and less pain with patella mobilization. She had normal motor function and sensation, but experienced tenderness to palpation over the anterior aspect of the knee. Dr. Gross returned the claimant to regular-duty work. See Dr. Gross deposition, page 21, Deposition Exhibit 2.

When the claimant returned to Dr. Gross on September 1, 2010, she reported pain in the anterior and medial aspects of the right knee. On exam, the claimant did not have any significant swelling. She had normal knee range of motion, motor function, and sensation. Claimant had partial thickness cartilage damage to the patella and medial femoral condyle. Dr. Gross' opined that the claimant did not require a cartilage restoration procedure. Rather, the claimant would benefit from non-operative measures, including a corticosteroid injection and an orthotic in her shoe to improve alignment and unload this area of the knee. Dr. Gross provided an injection.

The claimant pain lessened after the injection. Dr. Gross returned the claimant to regular-duty work. See Dr. Gross deposition, pages 22-23; Deposition Exhibit 2.

In his September 21, 2010, report, Dr. Gross reported that the claimant had occasional right knee pain related to partial thickness cartilage damage in her medial femoral condyle. With that type of damage, it was not uncommon to have mild, residual knee problems. Besides a corticosteroid injection to decrease any remaining inflammation, Dr. Gross did not recommend further medical management. Dr. Gross returned the claimant to regular-duty work. He opined that the claimant had received appropriate treatment, and had reached MMI for her work injury and sustained a 5% permanent partial disability of the right knee. See Dr. Gross deposition, pages 23-25; Deposition Exhibit 2.

On October 15, 2010, Dr. Meltz examined the claimant for persistent right knee pain and difficulty walking. The claimant reported that she experienced right knee pain when standing and occasionally had swelling at the end of the workday. On exam, mild soft tissue swelling was noted over the right knee, along with crepitus. Range of motion of the right knee was normal. Dr. Meltz diagnosed persistent post-operative pain, related to work injury. He recommended an orthopedic follow-up. See Exhibit 5.

On December 20, 2010, Dr. Strickland took a medical history, reviewed the claimant's medical records, and examined the claimant. After reviewing the arthrogram and Dr. Gross' surgical notes, Dr. Strickland found the August 2009 accident caused injury to the medial femoral condyle and possibly the patella. A physical exam of the right knee showed tenderness over the medial joint line with a moderate amount of swelling in the knee. There was no ligament instability to varus or valgus stressing. Lachman's test was negative. McMurray's test was positive medially. The claimant did not have any significant crepitus or grinding in the kneecap, thighbone joint, or patellofemoral joint. The claimant's right quadriceps muscle was diminished 25% to 30%, in comparison to the left leg. Dr. Strickland deposition, pages 19-20; Exhibit F. Bilateral knee x-rays revealed well-preserved joint spaces in both knees with no abnormalities. See Exhibit F.

Based on his examination, review of medical history, medical records, and tests, Dr. Strickland opined that the claimant most likely had a repeat flap of cartilage on the knee. Dr. Strickland opined that the claimant required a repeat arthroscopic evaluation of the right knee, and most likely, a repeat chondroplasty. He opined that the repeat flap of cartilage was caused by continued deterioration of the cartilage on the bone. It could have been caused by further walking. Walking could cause further damage when there were chondral defects of a significant size. Dr. Strickland opined that this damage flowed from the August 2009 work injury and that the claimant was at risk to have persistent trouble in that area of the knee. Dr. Strickland opined that the type of work employee performed, which required lifting and frequent squatting, was not going to be tolerated in the future. He contended that the claimant should be in an occupation which would not require squatting and heavy lifting. Dr. Strickland directly and causally related the need for further surgery to the work injury. Dr. Strickland deposition, pages 20-21; Exhibit F.

When the claimant returned to Dr. Gross on February 24, 2011, she reported continued pain in the anterior and medial aspects of the right knee. She reported that there was some catching in the area. Dr. Strickland had evaluated the claimant and opined that she had clinical

findings and ancillary studies which were suspicious for recurrent chondral flap to the medial femoral condyle. He recommended a repeat arthroscopy and chondroplasty. Dr. Gross found no right knee swelling and a normal range of motion. She had pain with McMurray test, mostly over the anterior medial portion of the right knee. She complained of pain with patella mobilization and compression. The claimant had normal motor function and sensation in the right knee. Right knee x-rays showed maintained tibiofemoral and patellofemoral joint space, without fractures, dislocations, or osseous abnormalities. See Dr. Gross deposition, pages 24-26; Deposition Exhibit 2.

Dr. Gross' impression was right knee pain. The claimant had some partial thickness cartilage loss from the patella and medial femoral condyle at the time of surgery. This may have continued to progress over time, causing the claimant to continue experiencing pain. Dr. Gross opined that the claimant's continuing pain related to damage present at the time of surgery or progression of that damage. He recommended an MRI arthrogram to determine if the claimant had a recurrent flap tear. Dr. Gross disagreed with Dr. Strickland's recommendation to proceed with surgery without additional testing. The claimant's symptoms were related to the continued degeneration of the cartilage in the right knee in the area where she had cartilage damage. Dr. Gross returned employee to regular-duty work. See Dr. Gross deposition, pages 24-26; Deposition Exhibit 2.

On March 21, 2011, a right knee MRI showed chondromalacia involving the inside medial facet of the patella and outside lateral facet of the patella, in addition to postoperative changes in those areas, and degenerative changes in the medial and lateral menisci, without tears. The MRI showed damage in the area where the claimant had previous surgical intervention. That damage could be postoperative change. The studies also showed damage in a different area of the knee. During surgery, Dr. Gross viewed the anterior, medial and lateral aspects of employee's right knee. The lateral changes shown on the March 21, 2011, MRI was not present at the time of surgery. Dr. Gross recommended further non-operative management such as viscosupplementation - injecting the knee - nonsteroidal anti-inflammatory medications, and an exercise program. See Dr. Gross deposition, pages 26-28. Dr. Gross opined that a repeat arthroscopy or chondroplasty would not help the claimant. He contended that the cartilage in the knee protected the underlying subchondral bone and nerve fibers and an arthroscopy and taking out more of the cartilage over and over would cause the claimant to require further surgical intervention, and then a more definitive procedure, such as a total knee replacement. He opined that an additional arthroscopy would not be beneficial and was unrelated to the August 2009 accident. See Dr. Gross deposition, pages 28-29. He opined that the claimant's continued problems were related to the ongoing degeneration of her cartilage from the new findings on the MRI scan. See Dr. Gross deposition, pages 28-29. Dr. Gross had released the claimant.

The claimant testified that her right knee continued to be painful and cause her problems even after the June 23, 2010 surgery. She testified that neither this pain nor swelling ever entirely disappeared until after her knee replacement in January 2012. Following the June 2010 surgery, her knee remained painful and she continued to be limited in what she could do. She could not walk long distances and could not stand without having pain. Dr. Gross released her to full duty several weeks following the surgery, but the claimant testified that despite this release, she continued to have limitations with the knee, including squatting and kneeling. Dr. Gross released her from all care in November 2010.

On June 20, 2011, the claimant went to Dr. Strickland with severe pain and aching over the anteriomedial aspect of the right knee. The knee was catching and swelling and the claimant could not stand on the right knee for a long period of time without severe pain. On physical exam, the claimant had swelling and tenderness over the anterior medial aspect of the right knee. Ligamentous exam was normal. There was mild patellofemoral crepitus. Neurological and circulatory exams were intact. The claimant reported she could not put weight on her right leg. If she was on the right knee for very long, she experienced pain and swelling. Dr. Strickland diagnosed internal derangement, right knee, and rule out chondral flap on the medial joint line. He recommended an arthroscopic evaluation and chondroplasty. See Dr. Strickland deposition, pages 21-23; Exhibit F.

On June 23, 2011, Dr. Strickland performed a right knee diagnostic arthroscopy, partial medial meniscectomy, and chondroplasty of multiple areas of chondromalacia. During surgery, Dr. Strickland found multiple flaps in the medial femoral condyle. The claimant had similar problems on the lateral tibial plateau. She had chondromalacia in the patella and a small tear in the posterior horn of the medial meniscus. Dr. Strickland found a chondral fissure and chondromalacia centrally in the lateral patellar facet. There were diffuse areas of Grade II/III chondromalacia with several flaps on the central, mid, and slightly anterior portion of the medial femoral condyle. The medial tibial plateau was spared of chondromalacia. The posterior horn of the medial meniscus had a wrinkle-type effect to it. Dr. Strickland trimmed the edge, removing part of the horn. Loose flaps in the medial femoral condyle were trimmed. Cruciate ligaments were normal. The lateral joint line showed a normal lateral femoral condyle and lateral meniscus. In the central medial portion and over to the mid-portion of the lateral tibial plateau, there was an area of Grade III chondromalacia with multiple flaps, having a loose rug appearance. This area was shaved. See Dr. Strickland deposition, pages 23-26; Exhibit F.

Dr. Strickland opined that the findings revealed in the surgery were caused by the continued breakdown of the cartilage on the inner thigh bone and that the claimant developed a compensatory gait, putting more pressure on the outside of the knee, and causing the cartilage to begin to break down. Dr. Strickland found the August 2009 trauma set this process into motion. Dr. Strickland opined that the treatment he provided was reasonably required to cure or relieve the pain and problems claimant experienced in June and July 2011. See Dr. Strickland deposition, pages 26-27.

On January 22, 2011, the Dr. Strickland examined the claimant's right knee and observed significant progress. Her quad bulk was improved. There was no effusion. The claimant was to continue her exercise program. By August 1, 2011, Dr. Strickland opined that the claimant could work under the restrictions of no squatting, and sitting 10 minutes every hour, or on an as-needed basis. See Dr. Strickland deposition, pages 27-28; Exhibit F.

On September 2, 2011, the claimant reported persistent swelling and pain on the inside and outside of the knee, as well as tenderness over the medial joint line and popping and catching, which began one week earlier. The claimant was experiencing the same symptoms she had before arthroscopic surgery in June 2011. A right knee MRI revealed articular cartilage loss

of the patella and within the medial compartment, joint effusion, and Grade II lateral meniscal signal intensity. See Dr. Strickland deposition, pages 28-30; Exhibit F.

The complaints the claimant experienced in September 2011 after Dr. Strickland's surgery was the result of the cartilage wearing away. At that stage, normal activities, such as walking, caused further damage to the cartilage. See Dr. Strickland deposition, page 62.

On September 29, 2011, Dr. Strickland performed a right knee diagnostic arthroscopy, right knee chondroplasty with multiple areas of chondromalacia, and right knee partial medial meniscectomy. The patella had diffuse multiple small flaps of Grade III severity. The central femoral groove had a new blister-type flap in the central portion of the groove. The medial joint line showed extensive Grade II/III chondromalacia with several small flaps. A couple of these were new on the medial edge of the defect. The medial meniscus had irregularity and a small re-tear near the junction of the posterior and middle third. An additional 20% of the meniscus was removed. The medial tibial plateau was normal, as were the cruciates. The lateral joint line showed the previous defect in the lateral tibial plateau with a new flap on the medial portion posteriorly. The lateral femoral condyle had a small area of previous shaving, but it was stable. The lateral meniscus was intact. Dr. Strickland's post-operative diagnoses were chondromalacia of the medial femoral condyle with flaps, Grade III, right knee; chondromalacia of the lateral tibial plateau with recurrent flap, Grade III, right knee; chondromalacia of the femoral groove with new flap, Grade II, right knee; chondromalacia of the patella with multiple small flaps, Grade III, right knee; and small re-tear of the posterior horn of the medial meniscus, right knee. Dr. Strickland opined that the 2009 work injury precipitated the findings noted during surgery on 9-29-11 and that these findings represented additional deterioration of the knee from the original injury, and flowed from that injury. See Dr. Strickland deposition, pages 30-31; Exhibit F. The claimant provided no history to Dr. Strickland of any activity she participated in which could have caused a re-tear of the cartilage. The claimant went about her daily activities. As a result, her cartilage broke down further. See Exhibit M, page 59.

Dr. Strickland examined the claimant on October 10, 2011, and found no significant improvement. He instructed the claimant to perform quadriceps strengthening exercises, and remain off work. On October 31, 2011, her right knee continued to swell with severe medial joint line pain. The claimant expressed concern about her job, since it required a lot of standing and walking. Dr. Strickland allowed the claimant to return to work, under the restrictions of no squatting or climbing. He opined that the only other procedure he would recommend was a total knee replacement, and that the claimant had severe osteoarthritis or chondromalacia of the right knee which is not uncommon in a woman in her fifties. See Dr. Strickland deposition, pages 31-32, 53-54; Exhibit F.

On December 27, 2011, Dr. Meltz examined the claimant's extremities and noted osteoarthritic changes in both knees, right greater than left as well as pain on extension and flexion of the right knee. A neurological exam was normal. Dr. Meltz diagnosed osteoarthritis of the right knee and cleared claimant for surgery. See Exhibit S.

On January 24, 2012, Dr. Strickland performed a right knee total arthroplasty and noted extensive degenerative changes about the articular surfaces of the patella. His pre- and post-

operative diagnosis was osteoarthritis of the right knee. See Exhibit F. On February 20, 2012, the claimant's right knee motion was 0 to 115° of flexion, with improving quad bulk. Dr. Strickland ordered the claimant to continue outpatient therapy. Right knee x-rays showed total knee replacement in excellent position. Following knee replacement surgery, Dr. Strickland took the claimant off work for 4 months. See Dr. Strickland deposition, pages 35-37; Exhibit F. By April 2, 2012, Dr. Strickland opined that the claimant's knee motion was excellent, and she returned to light-duty work, in a sit-down position. By May 30, 2012, the claimant completed physical therapy and had no pain, weakness, or swelling in her right knee. He advised her to continue her maintenance exercise program and work on weight reduction. See Dr. Strickland deposition, pages 36-37; Exhibit F. On January 25, 2013, Dr. Strickland examined the claimant for her one-year follow-up after total knee replacement. Right knee range of motion was normal at 0 to 125° of flexion. Quadriceps bulk had returned to normal. Right knee x-rays showed the total knee replacement was in excellent position with no sign of hardware loosening. See Dr. Strickland deposition, pages 36-37; Exhibit F.

The claimant testified that she had no prior injuries, problems, or limitations in either knee before August 2009. Before the accident, claimant was active. She played with her grandchildren and did a lot of walking, playing with grandchildren, and performing workouts three to four times per week.

The claimant now works full duty at Innovare, without restriction and does not take any prescription medications for her right knee. Nor is she under any active medical treatment for right knee complaints. The claimant does not wear any type of splint or brace for the knee. Nor does she use a cane or walker to ambulate. The claimant has a normal gait and is able to walk. She is able to go up and downstairs, but has to be careful in doing so. The claimant has more difficulty going upstairs than she does going downstairs. At present, the claimant is able to do normal daily activities performing housework, laundry, and grocery shopping. The claimant is able to drive. Her current job at Innovare is 15 minutes from her home, and she can make that drive without stopping. At Innovare, the claimant is able to perform all her job duties, despite knee complaints.

As to her current condition, the claimant experiences stiffness, swelling, and difficulty bending the right knee and cannot kneel on the right knee, squat, run, perform high impact exercises, or stand or walk for more than 30 minutes. The claimant testified that she currently cannot stand more than twenty to thirty minutes, walk more than thirty minutes, kneel, run, perform high impact activities, or squat. She testified that she has difficulty shopping, playing with her grandchildren, performing household chores such as vacuuming and cleaning, driving, getting dressed, cooking, going up and down stairs, walking, getting down to floor level and getting back up again, using stepladders, getting in and out of bathtubs, and walking on uneven surfaces. While she no longer has pain in the knee, she does continue to have swelling, stiffness, tightness, and soreness. She also testified that it is difficult to bend her right knee and that flexion in the right knee is limited to forty-five degrees. Her left knee presents her no problems and remains free of any pain, limitations, or any other symptoms. She further testified that her weight prior to her work injury was 160 pounds, but that her current weight is 185 pounds. She attributes her weight gain to the right knee injury and the physical limitations caused thereby. The claimant has limited range of right knee motion. After sitting for any prolonged period, the

claimant has right knee stiffness, and needs to get up and walk. At its worst, the claimant rates her right knee stiffness at 7-8 of 10, soreness at 6-7 of 10, and tightness at 8 of 10.

Lyndon G. Gross. M.D., Ph.D.

On June 20, 2013, Dr. Gross examined the claimant and found chondromalacia in the medial facet of the patella and medial femoral condyle, as well as peripatella bursitis. The claimant had a partial thickness, not full thickness lesion. On June 20, 2013, the claimant reported that before Dr. Strickland's surgery, her pain was 10/10 in the right knee. She had swelling and stiffness in the knee, but no mechanical symptoms. She reported that after Dr. Strickland's first surgery, she continued to have right knee pain at 10/10, with swelling and stiffness. Following the knee replacement, the claimant continued to have right knee pain, which she rated as 5/10. While the claimant could walk, she had difficulty standing for long periods of time, squatting and kneeling. On June 20, 2013, the claimant did not complain of pain or swelling in the right knee or any mechanical knee symptoms, but she reported that her right knee was completely normal after Dr. Strickland's last surgery. See Dr. Gross deposition, Deposition Exhibit 2.

During Dr. Gross' physical examination, the claimant had no effusion in either knee. Range of motion of the left knee was from 0 to 130°; range of motion of the right knee was from 0 to 125°. The claimant had no anterior, posterior, medial, or lateral instability of the right knee. She had no tenderness to palpation over the medial or lateral joint lines. The claimant had normal motor function and sensation in the femoral, tibial, and peroneal nerve distributions of the bilateral lower extremities. Right knee x-ray studies taken on that date showed changes consistent with a total knee replacement. The components were in appropriate position. There was no early loosening or wear of the components See Dr. Gross deposition, Deposition Exhibit 2.

After re-examining the claimant on June 20, 2013, and reviewing her medical records, Dr. Gross found she had continued degeneration in her right knee in areas which were unrelated to the areas that were the object of Dr. Gross' previous surgical procedures. Dr. Gross opined that the continued degeneration the right knee, in addition to the meniscal tear found in Dr. Strickland's surgery, were not related to the August 2009 work injury and were degenerative changes which had occurred as time progressed. See Dr. Gross deposition, page 34. He based his conclusions on the fact that Dr. Strickland's MRI results and surgical procedures dealt with areas of the right knee that Dr. Gross' prior MRI findings and surgical procedures found normal. Based on the contrast between the MRI findings and the surgical procedures, he opined that the claimant's right knee suffered progressive degenerative deterioration after Dr. Gross released the claimant from care. He also opined that in the mechanism of injury, the claimant fell on the front of her knee with no twisting injury to the knee producing trauma to the anterior aspect of the knee, or the patella. The initial MRI showed swelling in the anterior aspect of the right knee and soft tissues, consistent with falling on the front of the knee. It was an MRI scan, not an MRI arthrogram, so the cartilage surfaces appeared normal on that study. An MRI arthrogram was a better test for cartilage damage. The MRI arthrogram showed employee had a small area, or cartilage flap, on the patella. During Dr. Gross' surgery, he arthroscopically examined employee's right knee. All the ligaments were normal (the ACL and PCL). The menisci were normal. The medial and lateral meniscus showed no tearing or significant pathology. The

kneecap had an area of cartilage damage, of partial thickness. There was cartilage damage to the anterior aspect of the medial femoral condyle. This was partial thickness damage, which did not extend all the way to the bone. See Dr. Gross deposition, pages 34-35.

During surgery, Dr. Gross found a 1.5 cm x 1.5 cm flap of cartilage on the weight bearing surface of the medial femoral condyle. This was a partial thickness tear. The MRI arthrogram showed a traumatic tear of the medial facet of the patella. During surgery, Dr. Gross removed the damaged cartilage in that area, and the bursa. Dr. Gross diagnosed two traumatic injuries to claimant's right knee from the August 2009 accident and repaired by Dr. Gross in June 2010: (1) A partial thickness tear of the medial facet of the patella and (2) a partial thickness lesion on the medial femoral condyle. See Dr. Gross deposition, pages 46-49. Dr. Gross opined that the damage revealed in the February 28, 2011, MRI arthrogram, a 2 mm cartilage tear in the lateral patellar facet, was in a different part of the knee. Dr. Gross opined that portion of the knee was normal in Dr. Gross 2010 surgery. Dr. Gross concluded that the damage to the cartilage in the lateral patellar facet developed between the June 2010 surgery and the February 2011 MRI arthrogram. See Dr. Gross deposition, pages 52-55.

During his surgery, Dr. Gross noted a normal medial meniscus, but Dr. Strickland found an area of Grade III chondromalacia with multiple flaps in the central medial portion to the mid-portion of the lateral tibial plateau, a finding that did not exist during Dr. Gross' 2010 surgery. See Dr. Gross deposition, pages 57-60. During Dr. Strickland's second surgery, he found diffuse multiple flaps of grade III chondromalacia in the patella. The central femoral groove had a new blister type flap. Both of these findings were in the front of the knee. In the medial compartment, Dr. Strickland found Grade II/III chondromalacia with several small flaps in the same area where Dr. Gross found damage during his surgery. At the time of Dr. Strickland's second surgery, employee had damage in areas of the knee which were different from the areas Dr. Gross identified during his surgery. See Dr. Gross deposition, pages 62-64.

Dr. Gross' opined that none of the surgeries Dr. Strickland performed was directly and causally related to the August 2009 work injury and that those procedures related to the progression of the degeneration in employee's right knee which had occurred over the ensuing two years, since the time of Dr. Gross' surgery. See Dr. Gross deposition, page 73; Deposition Exhibit 2.

Dr. Gross opined that the claimant did not need additional medical treatment of the right knee related to the August 2009 work injury, that the claimant remained at maximum medical improvement with regard to that injury. She was at maximum medical improvement for that injury when Dr. Gross released her on September 21, 2010.

Dr. Gross opined that the claimant did not require any restrictions related to the August 2009 work injury. When Dr. Gross released the claimant from his care on September 21, 2010, he provided her with no work restrictions. During the ensuing two years, the claimant experienced further degeneration of her right knee as she continued to age. She underwent three additional surgeries by Dr. Strickland for underlying degeneration of the knee, which Dr. Gross opined was not causally related to the work injury. Dr. Gross opined that any restrictions based on her total knee replacement were unconnected to the work accident. Dr. Gross opined that the claimant sustained a 5% permanent partial disability of the right knee as a result of the August

2009 accident. This disability rating pertained to damage in the medial patella facet and medial femoral condyle, which was related to the accident. The rating did not include the additional treatment with and surgeries by Dr. Strickland. See Dr. Gross deposition, page 73; Deposition Exhibit 2.

Dr. Gross opined that the claimant experienced further degeneration in her right knee, which had progressed over the last two years, and caused her to need the surgical procedures that Dr. Strickland performed. This was an underlying, degenerative problem which progressively worsened over time, and was not directly causally related to the work injury. See Dr. Gross deposition; Deposition Exhibit 2.

Dr. Gross testified that the claimant had no subsequent injuries to her right knee and that her left knee gives her no problems and that she has no pain in her left knee or limitations in that knee. See Dr. Gross deposition, page 64. Dr. Gross testified that some people who have degeneration or chondromalacia in a knee joint can have no symptoms in the knee until trauma is sustained to the joint which can then render this condition symptomatic. See Dr. Gross deposition, pages 64, 65. Dr. Gross testified that the claimant no longer has any cartilage in her knee. See Dr. Gross deposition, page 65. He testified that four months off full duty work is reasonable, but that there could have been restrictions provided that would have allowed her to work in some capacity during that time. See Dr. Gross deposition, page 66. In terms of the other two surgeries that Dr. Strickland performed prior to the replacement, Dr. Gross testified that five to six weeks off work was a "little excessive" and that two weeks would have been appropriate to return to work with some restrictions such as squatting, kneeling, or prolonged standing. See Dr. Gross deposition, page 66. Dr. Gross testified that he was not familiar with all of her work activities and did not know all of her job duties. See Dr. Gross deposition, page 66. Dr. Gross testified that the average life span of a knee replacement is twenty to twenty-five years and that the present cost of such a surgery including the fees of the surgeon, hospital, and anesthesiologist is \$50,000. See Dr. Gross deposition, page 67.

On June 20, 2013, the claimant reported to Dr. Gross that she still had pain in the right knee pain, had difficulty walking for long periods, squatting, and kneeling, and that her knee did not feel completely normal. See Dr. Gross deposition, pages 67, 68.

Dr. Gross testified that his 5% permanent partial rating of the knee is only for that portion of her knee injury that he opined is work related, namely the injuries to her medial patella facet and medial femoral condyle. See Dr. Gross deposition, page 73. Such rating does not include any of the treatment she had for the knee subsequent to his involvement, including all three of Dr. Strickland's surgeries. See Dr. Gross deposition, page 73. Dr. Gross testified that he did not know how many hours per day the claimant spends standing or sitting, how often she has to lift items, the weight of any objects she may have to lift at work or if she ever has to ask for help lifting from other employees, or the contents of her work position description, or whether she was having any current difficulty performing her work duties. See Dr. Gross deposition, page 73-74.

Dr. Gross further testified that chondromalacia can progress rapidly and that such development can be impacted by trauma to the joint. See Dr. Gross deposition, page 76. He also testified that all of the medical charges for the treatment the claimant received to her knee were reasonable and customary. See Dr. Gross deposition, page 77.

James C. Strickland, M.D.

Dr. Strickland opined that the August 2009 accident injured the claimant's medial femoral condyle and patella and that the August 2009 accident was the prevailing factor necessitating all the medical treatment reflected in Exhibit F. He opined that the treatment was reasonable, and the charges for that treatment, as set forth in Exhibit G, were also reasonable. The amounts charged were consistent with those normally charged for the type of treatment employee received. He opined that all the treatment the claimant received for her right knee, including the surgical procedures, flowed from the August 2009 accident. The treatment employee received was reasonably required to cure and relieve her of the effects of the work injury. See Dr. Strickland deposition, pages 41-44.

Dr. Strickland opined that the claimant needed to have her right knee monitored every couple of years and that further revision surgery or replacement of the total knee could occur is possible. The life span of the prostheses used for total knee replacement was between 10 and 30 years. In present dollars, the cost of a total knee replacement was between \$25,000 and \$30,000. Dr. Strickland opined that there was a reasonable probability that the claimant would require a new total knee replacement in the future. He opined that the August 2009 accident was the prevailing factor necessitating the further treatment Dr. Strickland outlined. See Dr. Strickland deposition, pages 44-45. Dr. Strickland opined that as a result of the August 2009 accident, the claimant sustained disability in her knee that was a hindrance to employment or re-employment. He testified that most people with knee replacements have occasional aching and swelling. See Dr. Strickland deposition, page 46. He testified that a knee replacement is "not a normal knee" but that most people do most reasonable activities well, but are not able to engage in sports or very strenuous activity. See Dr. Strickland deposition, page 46. In terms of her restrictions, some pivoting and climbing would be allowed. See Dr. Strickland deposition, page 46. He testified that she should avoid squatting and crawling. See Dr. Strickland deposition, page 46. Dr. Strickland does not believe Mrs. Bertels has any underlying medical conditions that will shorten her expected life span. See Dr. Strickland deposition, page 47. Dr. Strickland did not agree with all of Dr. Volarich's restrictions. The claimant needed to avoid pivoting, squatting and crawling. She could perform some climbing. Individuals who did well with knee replacement were able to perform ladder and stair climbing. See Dr. Strickland deposition, pages 45-47.

Dr. Strickland reviewed seemingly contradictory aspects of the claimant's medical history. The claimant underwent a right knee MRI in November 2009 that did not show a lesion, but ten months after the accident, a lesion was present. See Dr. Strickland deposition, pages 51-52. Another surgeon, Dr. Gross, did not find a tear in the horn of the meniscus. The meniscal tear could have been caused by the irregular articular surface. See Dr. Strickland deposition, page 60. Dr. Strickland opined that the disintegration and further breakdown of the cartilage in the claimant's right knee flowed from the injury to her medial femoral condyle and patella. He testified that a cartilage lesion may not be noticeable on an x-ray or MRI unless there is a tear with fluid buildup beneath it. See Dr. Strickland deposition, page 50. He opined that as fluid builds up under this loose cartilage, the cartilage can shift and move abnormally causing pain and swelling and once that layer of cartilage is separated it starts to break down. See Dr. Strickland deposition, page 51. He testified that initially the traumatized cartilage "may stay together for

awhile,” but then, over time, break down and become loose enough that a cartilage flap would form. See Dr. Strickland deposition, page 52. Dr. Strickland testified that when an initial lesion forms in the weight-bearing section of the knee, the surrounding area gets stressed a lot more when walking and makes the knee much more susceptible to further breakdown. See Dr. Strickland deposition, page 56. He opined that the prevailing factor causing those injuries (including injury to the medial femoral condyle and patella) was the trauma from the August 2009 accident at work. See Dr. Strickland deposition, pages 42, 43, 62, 63.

David T. Volarich, D.O.

Dr. Volarich first evaluated the claimant on May 5, 2011, and took a medical history, reviewed medical records, and examined the claimant. The claimant reported that surgery and injections did not help her right knee pain. The right knee continued to pop, and felt as though it was going to buckle. When her right knee symptoms increased, the claimant had to stop and rest. After being on her right knee for about an hour, the claimant experienced swelling and had to ice the knee. Climbing stairs caused increased pain. The claimant could not stoop, squat, crawl, or kneel. Nor could she get down to the floor level. See Dr. Volarich deposition, pages 10-11; Exhibit I. While the claimant was able to care for herself daily, she went about dressing differently. Instead of pulling her right leg up to put on her pants, claimant reached down with her pants to put in her foot because she was unable to raise her right leg. The claimant's husband had to help with household chores, because she could not perform any task at floor level. As to leisure activities, the claimant used to work out at the gym, walk around the subdivision and take her grandson to the park. She could no longer perform these activities, because they required her to be on her right knee for extended periods of time. When the claimant drove for a prolonged period, her right knee ached. The claimant's sleep was poor. If she rolled onto her right knee at night, she awoke due pain. Prior to the accident, claimant had no difficulties with her right knee. See Dr. Volarich deposition, pages 10-12; Exhibit L.

At the time of this evaluation, Dr. Volarich did not have the opportunity to review any diagnostic studies or films, including x-rays or MRI's. Dr. Volarich's physical examination revealed that the claimant had a slight limp favoring the right lower extremity because of ongoing right knee pain. The claimant could only squat about one-half of normal, stopping due to knee pain. The worst discomfort with gait maneuvers occurred when squatting and trying to toe walk. See Dr. Volarich deposition, pages 15, 34; Exhibit I. Range of motion was measured. Flexion was only to 120° on the right. Extension was 0 on both sides. On the right knee, 3/4 crepitus was noted at the patellofemoral joint. Additionally, 1/4 patellar mistracking was noted, and 2/4 swelling was found in the prepatellar bursa. Patellar grind test was markedly positive. Right quadriceps was weak at 3/5; the left was 5/5. Hamstring was weak on the right at 4/5; left was at 5/5 See Dr. Volarich deposition, pages 14-15; Exhibit I. Based on his examination, Dr. Volarich's diagnosed trauma to the right knee causing internal derangement (chondral injuries to the patella and medial femoral condyle), status post arthroscopic chondroplasty of the medial femoral condyle and patella with prepatellar bursectomy; and persistent right knee pain all related to the work related accident. See Dr. Volarich deposition, pages 15; Exhibit I.

Dr. Volarich believed Dr. Gross' March 21, 2011, opinion that further treatment of the right knee for continued degeneration of the cartilage of the patella was not directly causally

related to the August 2009 accident, was limited to the patellofemoral joint. Dr. Volarich opined that Dr. Gross was not talking about the chondral surface of the medial femoral condyle, which was damaged. See Dr. Volarich deposition, page 38.

Dr. Volarich subsequently evaluated employee on February 25, 2013. See Dr. Volarich deposition, page 19; Exhibit K. The claimant reported that she had continued to work for this employer until September 2011, when she took off work for knee surgery. This employer laid claimant off in November 2011. In June 2012, the claimant began working at Innovare as a medical biller and coder. She worked 8 hours a day, 5 days a week, averaging 40 hours per week. As to how employee's injury impacted her present work, claimant noted prolonged sitting caused her right knee to become stiff. She had to periodically stand up and stretch the knee during the work day. Following the total knee replacement, the claimant's right knee pain improved somewhat. The claimant had ongoing stiffness, aching, and swelling in the right knee when she walked for more than an hour. When the right knee swelled, claimant elevated the leg and stretched the knee. She still had difficulty getting down to floor level and back up again. However, the claimant had less difficulty climbing stairs. She was still unable to kneel directly on the right knee. See Dr. Volarich deposition, pages 21-23; Exhibit K.

Dr. Volarich also examined the claimant's lower extremities. The claimant's gait was more fluent since undergoing a total knee replacement. While the claimant could toe walk and heel walk, it increased right knee discomfort. The claimant could stand on each foot without a problem, but was somewhat weak on the right side. Right knee range of motion had improved. Trace patellofemoral crepitus was appreciated in the right knee. There was trace swelling in the knee with 1/4 hyperemia. Right quadriceps was 4/5; left was 5/5. Right hamstring was 4.5/5; the left was 5/5. See Dr. Volarich deposition, pages 24-26; Exhibit K.

As of February 25, 2013, Dr. Volarich diagnosed blunt trauma to the right knee causing internal derangement (chondral injuries to the patella, medial femoral condyle, lateral tibial plateau, and medial meniscus tear) - status post 3 separate arthroscopic chondroplasties, debridements, and partial medial meniscectomies; persistent right knee pain secondary to accelerated post traumatic arthropathy - status post total right knee replacement all from the August 2009 accident. See Dr. Volarich deposition, pages 25-26; Exhibit K.

Dr. Volarich opined that the August 2009 accident was the substantial contributing factor, as well as the prevailing or primary factor, causing the chondral injuries to the knee with partial medial meniscal tear which required a series of 3 arthroscopic repairs. Because of ongoing pain and accelerated post-traumatic arthroscopy, the claimant required total right knee joint replacement. The 8-6-09 injury was the prevailing factor requiring the need for total knee replacement, and the treatment flowed directly from the August 2009 accident. That work injury was the prevailing factor causing employee's symptoms, need for treatment, and resulting disability. Dr. Volarich opined that the diagnoses he rendered were a direct result of the August 2009 accident. Dr. Volarich found the treatments employee received to and for her right knee were medically reasonable and necessary. Dr. Volarich opined that all the treatment the claimant received flowed from the August 2009 accident, and was reasonably required to cure and relieve the effects of that injury. See Dr. Volarich deposition, pages 26-28; Exhibit K.

When Dr. Gross examined employee on September 21, 2010, she had full range of right knee motion and no provocative signs for meniscal or cartilage pathology. However, when Dr. Volarich examined employee's right knee on May 5, 2011, she did not have full range of motion and lacked 20° in flexion. Dr. Volarich opined that the difference between the claimant's right knee range of motion from the two observations was the progression of a post-traumatic arthropathy that developed in the right knee. The knee continued to break down, because the cartilaginous surface had been damaged, and part of it had been removed. This was an ongoing, progressive breakdown with weight bearing. See Dr. Volarich deposition, pages 35-36.

Dr. Volarich testified that the claimant had wear and tear – degenerative osteoarthritis or chondromalacia -which developed over time and was not related to the August 2009 accident. Dr. Volarich opined that the continued degeneration of the cartilage flowed from the initial trauma to the knee. See Dr. Volarich deposition, pages 42-43.

Dr. Volarich did not opine whether the claimant suffered from any pre-existing disability as a result of osteoarthritis or degenerative arthritis in the right knee but found that the condition was asymptomatic before the accident. Dr. Volarich testified that the claimant's weight contributed to the continued breakdown of the cartilage in her right knee. See Dr. Volarich deposition, pages 40, 42.

Dr. Volarich opined that as a result of the August 2009 injury, the claimant sustained a 65% permanent partial disability of the right knee, due to internal derangement which required four separate surgical repairs, including three arthroscopies and a total knee replacement resulting in ongoing discomfort, swelling, and crepitus. See Dr. Volarich deposition, pages 28, 29, Exhibit K.

Dr. Volarich opined that the claimant required ongoing care using modalities including, but not limited to, narcotics and non-narcotic medications, muscle relaxants, physical therapy and similar treatment for symptomatic relief. Based on treatment provided to date, employee had achieved maximum medical improvement, and additional surgery is not indicated. However, Dr. Volarich opined that the orthopedic prosthesis placed in the claimant's right knee could become infected, loose or fail, and might need to be removed or replaced. The prosthesis also had a life expectancy of between 12 and 15 years. However, the decision to perform additional right knee surgery was to be made in conjunction with the claimant's symptoms and expert surgical opinion. See Dr. Volarich deposition, pages 29, 30, Exhibit K.

Dr. Volarich recommended that the claimant avoid all stooping, squatting, crawling, kneeling, pivoting, climbing and impact maneuvers; to be cautious navigating uneven terrain, slopes, steps, and ladders, especially if she had to handle weight; limit prolonged weight bearing, including standing or walking, to 60 minutes or to tolerance; if employee had to be on her knees for any reason, she should pad the surface on which she was kneeling. Dr. Volarich also recommended that the claimant use a glucosamine supplement daily and pursue an appropriate strengthening and stretching and range of motion exercise program, in addition to non-impact aerobic conditioning to tolerance daily. See Dr. Volarich deposition, pages 30-31, Exhibit K.

### **LIABILITY FOR PAST MEDICAL EXPENSES**

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

As stated in Sickmiller v. Timberland Forest Products, Inc., 407 S.W.3d 109, 121 (Mo. App. S.D. 2013), “[S]ection 287.140.1 ‘does not require a finding that the workplace accident was the prevailing factor in causing the need for particular medical treatment.’” (quoting Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 517 (Mo. App. W.D. 2011)). “Where a claimant produces documentation detailing his past medical expenses and testifies to the relationship of such expenses to the compensable workplace injury, such evidence provides a sufficient factual basis for the Commission to award compensation.” Id. (quoting Treasurer of Missouri v. Hudgins, 308 S.W.3d 789, 791 (Mo. App. W.D. 2010)).

Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 820 (Mo.banc.2003), held an employer was only obligated to reimburse an employee for those medical expenses for which the employee will actually be held liable. The medical fees and charges compensable under Section 287.140 refer only to an employee’s *actual* medical expenses – those expenses employee pays out of pocket, expenses for which employee will actually be held responsible in the future, and fees for which a Medicare or Medicaid lien exist. Id. The fees or charges recoverable by an employee are the amounts the care provider actually requires employee to pay, initially or thereafter, for medical services provided. Farmer-Cummings, 110

S.W.3d at 821. Thus, an employee's recoverable fees and charges include only those amounts which have to be paid for her treatment, and for which employee will otherwise be held liable. Farmer-Cummings, 110 S.W.3d at 822.

In the Farmer-Cummings case, the claimant developed work-related asthma, which required treatment. Farmer-Cummings, 110 S.W.3d at 819. While Farmer-Cummings sought compensation for her medical expenses, her employer refused to pay the charges. Farmer-Cummings, 110 S.W.3d at 819-820. The Commission held the defense liable for \$118,581.99 in medical expenses. Farmer-Cummings' total medical charges were \$158,291.71. From this amount, the Commission subtracted \$39,637.72 in fees that the medical care providers either wrote off or adjusted from the total medical charges. The amount remaining after write-offs and adjustments, \$118,581.99, was comprised of charges either paid by Medicaid, Farmer-Cummings, her private health insurer, or charges which were still outstanding. Farmer-Cummings, 110 S.W.3d at 820.

The claimant appealed and argued that the Commission erred in refusing to award compensation for those amounts written off or adjusted from the total medical charges. Id. The issue before the court was whether the original bills remained "fees and charges" collectible by the claimant, if they were reduced or written off by the provider. Farmer-Cummings, 110 S.W.3d at 821. Missouri courts previously determined an employee was not entitled to compensation for provider write-offs. Mann v. Varney Construction, 23 S.W.3d 231,233 (Mo.App.E.D.2000), held an employee was not entitled to compensation for Medicaid write-off amounts, when the total amount submitted had never been sought from him. Similarly, Lenzini v. Columbia Foods, 829 S.W. 2d 482,487 (Mo.App.W.D.1992), reduced a compensation award by an amount which had been written off by care providers. Id.

The Supreme Court noted that inherent in both Mann and Lenzini was the requirement of actual liability on the employee's behalf. Write-offs or adjustments which extinguished the liability of an employee were not fees and charges, within the contemplation of Section 287.140. Farmer-Cummings, 110 S.W.3d at 821. Thus, the claimant's fees and charges included only those amounts which had to be paid for her treatment, for which she would otherwise be liable. Id. On reviewing the medical bills, the court could not determine with certainty whether she remained liable for write-offs or adjusted fees. Farmer-Cummings, 110 S.W.3d at 823 n.9. The Supreme Court reversed, and remanded the claim for determination of the claimant's continuing liability for the medical expenses. If the claimant remained personally liable for any of the reductions, she was entitled to recover them. However, if the defense established that the claimant was not subject to further liability, she was not entitled to a windfall recovery. Farmer-Cummings, 110 S.W.3d at 823.

Ellis v. Treasurer, 382 S.W.3d 217,223-224 (Mo.App.S.D.2009), held the claimant could recover her entire medical charges where she testified that she had actual liability for her total medical expenses, and some of the medical charges were paid by an ERISA-qualified health insurer, which the claimant was contractually required to reimburse.

In Maness v. City of Desoto, 421 S.W.3d 532 (Mo.App.E.D.2014), the Court clarified the claimant's burden of proof to recover an award of past medical expenses, and the circumstances under which an employer can take credit for deductions and offsets taken against an employee's

total medical charges. Section 287.140.1 required an employer to provide such care as may reasonably be required after the injury to cure and relieve from the effects of the injury. An employee seeking past medical expenses had to prove the need for treatment and medication flowed from the work injury. A sufficient factual basis existed for an ALJ to award past medical expenses where employee's medical bills were introduced into evidence, employee testified those bills were related to and the product of the work injury, and the bills related to the professional services rendered, as shown by the medical records in evidence. An employer could challenge the reasonableness or fairness of the bills, or show the medical expenses incurred were not related to the injury in question. Maness, 421 S.W.3d at 544. The evidence showed, and the defense did not dispute, the claimant's health insurer paid a portion of his medical bills. Since the employer did not assert those payments came from it or its workers' compensation insurer, it could not take a credit for amounts paid by the claimant's health insurer. Thus, the Commission did not err in awarding these amounts to the claimant. Maness, 421 S.W.3d at 545.

However, when a claimant carried his burden under Martin by producing documentation detailing past medical expenses, and testifying to the relationship of the expenses to the compensable injury, the employer can raise a defense. Specifically, the employer can establish the employee was not required to pay the billed amounts, the employee's liability for the disputed amounts was extinguished, and the reason employee's liability was extinguished did not otherwise fall within the provisions of Section 287.270. If the employee remained personally liable for any write-offs or fee reductions taken against the total medical expenses, he was entitled to recover them as "fees and charges" within the meaning of Section 287.140. But if the employee was not subject to further liability for those amounts, he was not entitled to a windfall recovery. Maness, 421 S.W.3d at 545-546. The employer could not take advantage of fee reductions or discounts against the total medical charges. In so holding, the Court relied on the fact the injured employee had signed documents, wherein he agreed to be responsible for the total charges for medical services rendered to him by certain care providers. Id.

In this case, the defense released the claimant from medical care on the advice of Dr. Gross and denied any further medical care requested by the claimant to cure and relieve from the effects of the injury. The claimant obtained substantial additional medical care from appropriately credentialed medical providers including a total knee replacement due to persistent knee pain. At the hearing, the claimant identified Exhibit F as the medical records for the additional medical treatment she received and identified Exhibit G as a billing summary, which contained the total charges billed for that treatment, and which were submitted to her husband's group health insurer. The total amount of medical expenses claimant seeks to recover is \$89,603.50. The claimant had health insurance through her husband, who had health insurance through his employer. The claimant did not know if her husband's health insurance was an ERISA plan and did not know what ERISA was. She testified that her husband's group health insurance paid for the medical care, that she not received notification from any medical care provider that her obligation for her medical bills has been extinguished, and that no medical care provider has advised that her she still owes any amount on any of the medical bills for treatment she secured on her own. The claimant has not received any letter or contact from her husband's group health insurer, indicating she owes any amount to the insurer to reimburse it for its payments on her medical charges. She testified that she does not know if she has any further liability for her medical expenses. The claimant could not remember if she signed any paperwork at any of the care providers from which she received unauthorized

treatment, saying she would be responsible to pay the total medical expenses in the event the medical charges were not paid by insurance. In summary, the claimant offered no testimony or other evidence to show she was actually liable for the entirety of the medical charges set forth in Exhibit G.

The competent and substantial medical evidence demonstrates that the services rendered flow from the accident at work and that the claimant is entitled to recover the reasonable value for the medical services provided. The claimant met her burden of proving that the medical services flowed from her 2009 work-related injury.

At the hearing, the defense offered Exhibits 11, 15, 16, 17, 18, and 19, containing the medical bills, and billing Affidavits for Dr. Meltz, Advance Physical Therapy, City Place Surgery Center, Dr. Strickland, Mercy Hospital, and Professional Rehab Services, respectively, detail the expenses incurred with these care providers and the extent to which the expenses were paid by her husband's group health insurance. The claimant offered no testimony or other evidence to dispute the information contained in those Exhibits, in particular, the affidavits attached to the bills for each provider. The affidavits and billing statements attached to them demonstrate that the claimant has no liability for any of the disputed medical charges, except for Dr. Meltz, who stated that \$95.00 had not been processed by any insurer as of the date of the statement. The affidavits can be summarized:

Provider	Exhibits	Billed	Written Off	Paid by Employee or her spouse's group insurance plan
Dr. Gary Meltz	5, 11 \$95.00 owed	\$1,349.00	\$525.72	728.28
Mercy Hospital	G, 18	\$28,249.29	12,314.77	\$15,934.52
Advanced Physical Therapy	G, 6, 15	\$7,360.00	\$4,556.33	\$2,614.67
Advanced Physical Therapy	G, 15	\$1,502.00	\$1,202.00	\$260.00
City Place Surgery Center	G, 16	\$21,800.00	\$18,591.50	\$2,739.00
Dr. Strickland/St. Louis Orthopedic Institute	G, 17	\$30,413.21	\$23,626.70	\$6,786.51
Professional Rehab Services	G, 19	\$432.00		\$432.00
Total	\$95.00 owed	\$91,105.50	\$60,817.02	\$29,494.98
Total Paid by Employer to these providers	10			\$3,053.68

The totals taken from the Exhibits do not balance, because some of the billing statements have internal inconsistencies. However, the claimant has submitted a prima facie case that she is entitled to \$29,494.98 for medical expenses incurred as a result of the work-related accident plus \$95.00 for a billing due and owing to Dr. Meltz. Thus, the claimant is clearly entitled to \$29,589.98 as the unchallenged value of medical services provided to cure and relieve from the claimant's injury at work. The reasonable value of medical services consists of what a willing purchaser of those services would pay a reasonable seller for those services in an open market for

such services. The best evidence of that value is found in the billing statements showing what a willing purchaser paid to a willing seller of those services. The billing statements purport to show that there is no balance due except for the \$95.00 due to Dr. Meltz. The statements from the custodian of records state that there is no balance due except for the \$95.00 due to Dr. Meltz. The affiants swore that the billing statements were true and accurate and that they had knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or transmit the information. Further, the claimant did not testify that she promised to pay the entire amount of the bill for services rendered and did not recall exactly what she signed.

The parties argue over “windfall” and object to the opposing party receiving a windfall. The claimant argues that the medical provider’s reductions in their billing practices are a product of her spouse’s group health program, a collateral source, and that that allowing the defense to benefit from that reduction would be a windfall that the defense is not entitled to under Section 287.270, RSMo Supp 2005. The defense argues that allowing payments to the claimant for sums above and beyond the amount that will be paid to the medical provider, given that the claimant has no further liability, would be a windfall to the claimant, because the claimant bears no liability to pay any additional amount for the services received according to the evidence. The more logical result is that the medical expense is the amount that a willing purchaser will pay a willing seller for the services sought. Our state system does not utilize a price list for medical services as some states use or as the Medicare and Medicaid programs utilize. To claim that a billing statement clearly showing reductions and write-offs does not reflect the medical expense in a case would deviate from the traditional concept of medical expenses:

Medical expenses are the costs of diagnosis, cure, mitigation, treatment, or prevention of disease, and the costs for treatments affecting any part or function of the body. These expenses include payments for legal medical services rendered by physicians, surgeons, dentists, and other medical practitioners. They include the costs of equipment, supplies, and diagnostic devices needed for these purposes. See IRS Publication 502.

It would be novel to include reductions and write-offs as medical expenses on an income tax return. However, this concept is the most reasonable concept to establish liability for medical expenses as opposed to establishing a penalty for malfeasance. It is especially persuasive when accompanied with the medical provider’s affidavit showing no further liability. This case is distinguishable from Maness, because in this case, the claimant did not produce records from the medical providers or testify that she agreed “to be responsible for the total charges for services rendered” by the medical providers. In short, the evidence does not prove that the claimant contracted to pay the billed price for services rendered. It is certainly true that the medical providers in this case did not indicate whether they reduced their charges for their own purposes or whether they would have made the reductions in the absence of the group insurance plan of the claimant’s spouse. However, a zero balance is a zero balance. Based on the weight of the credible evidence, the claimant is awarded \$29,589.98 as the unchallenged value of medical services provided to cure and relieve from the claimant’s injury at work.

### **FUTURE MEDICAL CARE**

Pursuant to section 287.140.1, an employer is required to provide care "as may be reasonably required to cure and relieve from the effects of the injury." This includes allowance for the cost of future medical treatment. Pennewell v. Hannibal Regional Hospital, 390 S.W.3d 919, 926 (Mo. App. E.D. 2013) citing Poole v. City of St. Louis, 328 S.W.3d 277, 290-91 (Mo. App. E.D. 2010). An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related injury. Id. Future care to relieve [an employee's] pain should not be denied simply because he may have achieved [maximum medical improvement]. Id. Therefore, a finding that an employee has reached maximum medical improvement is not necessarily inconsistent with the employee's need for future medical treatment. Id.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care "flow[s] from the accident." Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001)(quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997).

In determining whether medical treatment is "reasonably required" to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

Dr. Gross opined that the claimant sustained a right knee contusion, prepatellar bursitis, and traumatic tears to the medial femoral condyle and medial facet of the patella as a result of the accident. See Dr. Gross deposition, pages 11, 14-15, 17-19; Deposition Exhibit 2. After Dr. Gross' June 23, 2010, surgery, the claimant experienced residual right knee pain that Dr. Gross related to the partial thickness cartilage damage in her medial femoral condyle. Dr. Gross examined the claimant on September 21, 2010, and opined other than use of injections to decrease any remaining inflammation, the claimant did not require further medical management and that the claimant had received appropriate treatment, and had reached maximum medical improvement for her work injuries. See Dr. Gross deposition, pages 23-25; Deposition Exhibit 2.

Dr. Gross opined that the claimant sustained three injuries to her right knee from the August 2009 fall: (1) prepatellar bursitis, (2) a partial thickness tear of the medial facet of the patella, and (3) a partial thickness lesion on the medial femoral condyle and that both of these tears were traumatic in nature. Dr. Gross performed surgery on June 23, 2010, to cure and relieve those injuries. See Dr. Gross deposition, pages 46-49. He opined that the February 28,

2011 MRI arthrogram showed a tear in the lateral patellar facet and that portion of the knee was normal during his surgical procedure. No medical record before February 28, 2011 mentioned a tear in the lateral patellar facet. Therefore, Dr. Gross opined that the damage to the cartilage in the lateral patellar facet developed between his June 23, 2010, surgery and the February 28, 2011 MRI arthrogram, and was unrelated to the work injuries. See Dr. Gross deposition, pages 52-55. Dr. Gross opined that all the surgical procedures performed by Dr. Strickland, including the total knee replacement, were not causally related to the August 2009 work injuries, but rather, the progression of the pre-existing degeneration in employee's right knee, which occurred after Dr. Gross' surgery. See Dr. Gross deposition, Deposition Exhibit 2.

On the other hand, Dr. Strickland opined that the damage to the claimant's knee from additional degeneration after the accident flowed from the 2009 accident at work. See Dr. Strickland deposition, pages 21, 31, 44, 63. He opined that "the August 2009 work-related accident would be the prevailing factor in necessitating any future treatment" that he outlined. See Dr. Strickland deposition, page 45. He discussed future surgical procedures that may be necessary. Dr. Volarich opined that additional pain relief medications were indicated. See Dr. Volarich deposition, page 43. Both Dr. Strickland and Dr. Volarich opined that the additional degeneration in the claimant's knee after Dr. Gross' surgical procedure caused the need for additional medical care and flowed from the accident.

The defense argues that the need for future medical care constitutes further degeneration of the claimant's right knee over time, which occurred as she continued to age, was not caused by the accident and should not be an obligation for the defense to bear. The essential question is who should bear the burden of a new knee replacement, because the current knee will deteriorate within fifteen to twenty years. A finding that the defense would bear that burden would relieve Medicare from that cost.

The claimant's evidence establishes a prima facie case that the claimant will require additional medical care that flows from the 2009 accident. The defense presented strong evidence that the additional medical care was caused by substantial and continuing degeneration after Dr. Gross' surgical repair of the claimant's knee. Both surgeons closely examined the interior and exterior of the claimant's knee and have a very clear understanding of the claimant's condition with divergent interpretations. Based on the weight of the evidence, the claimant is awarded such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required to cure and relieve from the injury.

### **TEMPORARY DISABILITY**

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus,

TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

There is no controversy about the claimant's eligibility for temporary total disability benefits after the first and last surgical procedures. After Dr. Gross' surgical procedure, the claimant was off work and received temporary total disability benefits from June 23, 2010 through August 20, 2010. After she lost her job in November 2011, she applied for and received unemployment benefits from November 11, 2011 through June 8, 2012. After her fourth surgery in January 2012, Dr. Strickland recommended that she stay off work for 4 months after which she returned to full duty. See Dr. Strickland deposition, page 36. However, the claimant was receiving unemployment benefits during that time (December 3, 2011 through June 8, 2012).

The confusion lies regarding the Dr. Strickland's two 2011 surgical procedures that he performed on June 23, 2011 and September 29, 2011. Dr. Strickland recommended that the claimant be off work for 5 to 6 weeks followed by 4 weeks on limited duty. See Dr. Strickland deposition, page 36. He also testified that he would have recommended 5 to 6 weeks off work following Dr. Gross' June 2010 surgery. See Dr. Strickland deposition, page 36. Thus, the claimant seeks to recover temporary total disability for two periods: June 23, 2011 to August 1, 2011, (5 5/7 weeks), the period following Dr. Strickland's first surgery; and September 29, 2011 to October 31, 2011, (4 5/7 weeks) the period following Dr. Strickland's second surgery.

The claimant received short-term disability benefits from the employer from July 14, 2011, to July 29, 2011. Short-term disability was a benefit provided to the claimant by the employer. The claimant did not pay anything for short-term disability. Nor did she have anything taken out of her paycheck for that benefit. Similarly, Dr. Strickland authorized the claimant to be off work for 6 weeks following the September 29, 2011, surgery. The claimant received short-term disability benefits from the employer from October 6, 2011, through November 11, 2011.

The factual situation is quite a quagmire. However, the claimant adequately addressed the matter in her brief:

Therefore, claimant is entitled to eleven weeks of TTD which equates to \$4,932.51. Employer did provide claimant \$6,316.72 in short term disability benefits. ... Based on the totality of the evidence, employer is entitled to a credit of \$1,384.21 after claimant's short term disability benefits are offset against her unpaid TTD benefits. See claimant's brief.

The case is so awarded.

### **PERMANENT DISABILITY**

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders

v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is “permanent” if “shown to be of indefinite duration in recovery or substantial improvement is not expected.” Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

The claimant has worked in a medical office performing medical billing and coding, since June 11, 2012, and is able to perform all her job duties, despite her right knee condition. Currently, the claimant is not under any active medical treatment for right knee pain or taking any prescription medications for her right knee. The claimant does not use a cane or walker or wear a splint or brace for her right knee. The claimant has a normal gait, and is able to walk. While the claimant can go up and down stairs, she has to be careful in doing so and experiences more difficulty going upstairs than she does descending stairs. She is able to perform normal

activities of daily living doing housework, laundry, and grocery shopping. On the other hand, she cannot perform house chores which require bending or kneeling. The claimant can drive.

The claimant has stiffness, swelling, and difficulty bending her right knee. She is unable to kneel on the right knee, squat, or perform high impact exercises. Generally, she cannot stand or walk for more than 30 minutes at a time. She has difficulty walking on uneven ground. Driving long distances causes her to experience right knee stiffness and swelling. Due to her right knee condition, the claimant has difficulty getting in and out of the bathtub and using a stepladder. If she is on the floor, she has to hold on to something to pull herself to a standing position. After sitting for any significant period, the claimant experiences right knee stiffness and has to get up and walk. At its worst, the claimant's right knee stiffness is 7-8/10, tightness is 8/10, and soreness is 6 to 7/10.

Dr. Gross performed medical and surgical treatment for the claimant's knee condition. On August 16, 2010, he examined the claimant and found that the claimant had a normal range of right knee motion, decreased pain with patella mobilization, and normal motor function and sensation. Dr. Gross returned the claimant to regular duty work. See Dr. Gross deposition, pages 20-22; Deposition Exhibit 2. On September 13, 2010, the claimant reported pain in the anterior and medial aspects of the right knee. On exam, Dr. Gross opined that the claimant had normal knee range of motion, motor function, and sensation with no significant swelling in the knee. On September 21, 2010, Dr. Gross opined that the claimant had attained maximum medical improvement from the work-related injury and opined that the claimant sustained a 5% permanent partial disability from the accident. See Dr. Gross deposition, pages 22-25, Deposition Exhibit 2. Dr. Gross reexamined the claimant on June 20, 2013, after the extensive surgical procedures from Dr. Strickland and opined that the claimant had a normal range of motion, no knee instability, normal motor function, and sensation of the bilateral lower extremities. Right knee x-rays showed changes consistent with total knee replacement. The components were in appropriate position. There was no early loosening or wear of the components. See Dr. Gross deposition, Deposition 2. Dr. Gross' rating did not include the subsequent arthroscopic procedures and total knee replacement Dr. Strickland performed. See Dr. Gross deposition, page 73; Deposition Exhibit 2.

Dr. Volarich evaluated the claimant on May 5, 2011, and February 25, 2013. During the 2011 evaluation, the claimant reported that Dr. Gross' surgery and injections had not alleviated her right knee complaints. Her right knee continued to pop and felt as though it was going to buckle. After being on the right knee for an hour, the claimant experienced swelling. Climbing stairs increased employee's knee pain. She could not stoop, squat, crawl, kneel, or get down to floor level. If claimant drove for a prolonged period, her right knee ached. See Dr. Volarich deposition, pages 10-12; Ex. I. After his examination, Dr. Volarich found she continued to have significant right knee problems and opined that the claimant was not at maximum medical improvement. He opined that the claimant required additional treatment, including injections and a repeat orthopedic evaluation. See Dr. Volarich deposition, pages 15-17, 36-37; Ex. I.

Dr. Volarich re-evaluated the claimant on February 25, 2013, and the claimant reported that prolonged sitting caused her right knee to become stiff. Periodically during the workday, the claimant had to stand up and stretch the knee. While the total knee replacement improved the claimant's right knee pain, she experienced ongoing stiffness, aching, and swelling in the right

knee when she walked for more than an hour. The claimant had difficulty ascending and descending stairs, getting down to floor level, and was unable to kneel directly on the right knee. The claimant's gait was more fluid since undergoing total knee replacement. Range of right knee motion had improved. See Dr. Volarich deposition, pages 19, 21-26; Exhibit K. Dr. Volarich opined that the claimant sustained a 65% permanent partial disability of the right knee, due to internal derangement which required four separate surgical repairs, including three arthroscopies and a total knee replacement all as a result of the accident. This disability rating accounted for ongoing discomfort, weakness, swelling, and crepitus in the right lower extremity. Dr. Volarich placed the claimant under the following work restrictions: avoid all stooping, squatting, crawling, kneeling, pivoting, climbing and impact maneuvers; to be cautious navigating uneven terrain, slopes, steps, and ladders, especially if she had to handle weight; to limit prolonged weight bearing, including standing or walking, to 60 minutes or to tolerance; if employee had to be on her knee for any reason, she should pad the surface on which she was kneeling. See Dr. Volarich deposition, pages 28-31; Exhibit K.

The defense vigorously attacks Dr. Volarich contending that his findings do not constitute probative evidence, because Dr. Volarich was not a treating physician, is not an orthopedic physician, and attributed the medical care subsequent to Dr. Gross and the effect on the claimant's condition as attributable to the occurrence. The defense also attacks Dr. Volarich's evaluation of the extent of permanent disability. One could also argue that Dr. Gross' evaluation of the extent of permanent disability as inadequate and could suggest that an independent examination could be more objective and less defensive as to the outcome. Even more shocking is the revelation that each of the experts providing forensic medical evaluations were paid by the party that offered the expert's report.

On the other hand, a more reasonable approach is that the claimant suffered a 40% permanent partial disability to her right knee from the accident based on the totality of the evidence.

Made by: /s/ EDWIN J. KOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*