

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No. 09-070136

Employee: Donna M. Blyzes
Employer: General Motors Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) occupational disease; (2) accident arising out of and in the course of employment; (3) medical causation; (4) future medical care; (5) permanent disability; and (6) Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee prevails on the issue of compensability; (2) the claim for future medical care is denied; (3) employee is awarded 53.68 weeks of permanent partial disability benefits; (4) the claim for compensation appears to have been filed within the two-year period of the statute of limitations; and (5) the Second Injury Fund is liable for 12.72 weeks of permanent partial disability benefits.

Employee, acting pro se, filed a timely application for review with the Commission alleging the administrative law judge erred because: (1) not all relevant facts that were presented at the hearing were used in determining the decision; and (2) compensation payable does not calculate.

Employer/insurer filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in referring to sources outside the record in resolving the disputed issues; (2) in concluding this was an occupational disease claim rather than an accident claim; (3) in finding in favor of employee where there was no medical evidence to support a finding employee suffered a compensable injury on September 9, 2009; (4) in relying on Dr. Meyers's opinion with respect to permanent partial disability; (5) in erroneously awarding a multiplicity factor when, under strict construction, there is no provision in the statute that provides for a multiplicity factor; and (6) in erroneously concluding that the bilateral knee replacements were part of this claim, despite the fact they were specifically pled as preexisting conditions.

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The Second Injury Fund filed a timely application for review with the Commission alleging the administrative law judge erred: (1) because employee failed to prove she suffered an accident or occupational disease related to the date of injury of September 9, 2009; (2) because employee failed to prove that her work was the cause of her knee condition; (3) because employee failed to prove that she had permanent disability associated with the date of injury of September 9, 2009; and (4) because employee failed to prove that disability from the alleged September 9, 2009, accident or occupational disease combines with some preexisting condition to create Second Injury Fund liability.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Employee worked for employer for nearly 27 years performing a variety of tasks. Employee served as a secretary in the personnel department; worked on a factory line putting on rear doors; worked in the chassis department lifting shocks and axles; worked in the body shop; performed a job requiring her to get in and out of vans, sit on a pad, and run cables through vans; drove cars off the line to a lot on employer's premises; did a front shock job using a heavy machine to compress shocks; installed left front doors; and worked on a cleaning crew.

Employee appears to advance three different theories of injury herein. First, employee alleges that, on or about September 9, 2009, she was working on a left front door install job when her body was frozen and her knees were frozen, and she experienced pain so severe that she had to call her husband to take her home from the plant. *Transcript*, pages 202-04. Alternatively, employee alleges that, on or about September 9, 2009, she tripped over a study guide, the leg of which was protruding out, and fell to the floor, landing on her knees and body. *Transcript*, pages 304-05. Finally, employee's brief filed with the Commission in this matter argues, in the alternative, that she suffered an unspecified injury to her knees by occupational disease culminating on or about September 9, 2009.

Expert medical testimony

Employee provided expert medical testimony from Dr. Jerry Meyers, who opined that employee's 20-year period of working on employer's assembly line was the prevailing and a substantial factor causing her to develop osteoarthritis requiring bilateral total knee replacements, as well as a traumatic injury to the right knee requiring meniscectomy, with continuing symptoms and impairment.¹ But Dr. Meyers did not identify any accident occurring on or about September 9, 2009, nor did he describe any traumatic event consistent with employee's testimony regarding her knees and body being frozen or tripping over a study guide and landing on her knees.

¹ We have addressed Dr. Meyers's testimony regarding the 20-year theory of occupational exposure in employee's companion claim designated as Injury No. 04-148011, and found it lacking persuasive force to establish a compensable injury by occupational disease in that claim.

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Given that employee suffered from preexisting bilateral osteoarthritis in her knees requiring total knee replacements, we would expect the medical testimony from her expert to apportion the disability (if any) referable to her claimed additional injury by accident on September 9, 2009, but employee has failed to present such evidence. We find, therefore, that employee did not suffer any medical condition or disability as a result of an accident on or about September 9, 2009.

Nor do we find Dr. Meyers's testimony sufficiently persuasive to establish that employee suffered any new injury by occupational disease culminating on or about September 9, 2009. Dr. Meyers did not address any new injury occurring after employee's total knee replacement surgeries,² but limited his testimony to identifying the injuries he believed caused employee to need those surgeries. It appears that Dr. Meyers did not consider or address any new injury or disability occurring after employee's total knee replacement surgeries. Given employee's complex medical and surgical history with regard to her knees, we find the absence of persuasive expert medical testimony on this topic to be fatal to employee's claim for injury by occupational disease. Accordingly, we find that employee did not suffer any medical condition or disability by occupational disease culminating on or about September 9, 2009.

Conclusions of Law

Medical causation

We deem the issue of medical causation to be dispositive. Employee alleges that an accident or occupational exposure caused her to suffer an injury occurring or culminating on or about September 9, 2009.

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.

Section 287.067.2 RSMo provides, in relevant part, as follows:

An injury by occupational disease is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

² We note that it is somewhat unclear from employee's multiple claims for compensation (combined with her rather confused and contradictory testimony at the hearing before the administrative law judge) which of her claimed injuries correlate to this claim for compensation. However, at oral argument in this matter, employee's counsel made clear that this claim does not include the total knee replacements.

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We have found that employee did not suffer any medical condition or disability as a result of any accident or occupational disease occurring or culminating on or about September 9, 2009. We conclude that the claimed accident and/or occupational exposure are not the prevailing factor causing employee to suffer any identifiable medical condition or disability.

Conclusion

We reverse the award and decision of the administrative law judge. Employee has failed to satisfy her burden of proof with respect to the issue of medical causation. For this reason, we deny the claim.

All other issues are moot.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued August 8, 2014, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 27th day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Donna M. Blyzes Injury No.: 09-070136
Dependents: N/A Before the
Employer: General Motors Corporation **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Self-Insured Jefferson City, Missouri
Hearing Date: June 2, June 5, & June 20, 2014 Checked by: EJK/lsn, 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: September 9, 2009
5. State location where accident occurred or occupational disease was contracted: St. Charles 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? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee alleged that her employer refused to honor restrictions given by a doctor and her job was outside of her restrictions and that eventually her legs and feet swelled up causing severe pain.
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: Both knees
14. Nature and extent of any permanent disability: 5 ½% permanent partial disability to the right knee, 25% permanent partial disability of the left knee plus 10% for multiplicity
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: \$884.00

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$1,177.28
- 19. Weekly compensation rate: \$784.85/\$422.97
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - 53.68 weeks of permanent partial disability from Employer \$22,705.03
- 22. Second Injury Fund liability: Yes
 - 12.72 weeks of permanent partial disability from Second Injury Fund \$ 5,380.18
- TOTAL: \$28,085.21
- 23. Future requirements awarded: None

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: Herman L. Jimerson, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Donna M. Blyzes	Injury No.: 09-070136
Dependents:	N/A	Before the
Employer:	General Motors Corporation	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/lsn, kr

This workers' compensation case raises several issues arising out of an occupational disease claim in which the claimant, an automotive assembly line worker, alleged that her employer refused to honor restrictions given by a doctor and her job was outside of her restrictions and that eventually her legs and feet swelled up causing severe pain. The issues for determination are (1) Accident or Occupational disease arising out of and in the course of employment; (2) Medical causal connection; (3) Future medical care, (4) Permanent disability, (5) Second Injury Fund liability, and (6) Statute of Limitations. The evidence supports an award for the claimant.

At the hearing, the claimant testified in person along with her husband, William Blyzes, and Rick Cavins, a social worker. The claimant also offered the following exhibits which are taken as received except as noted below:

- Claimant's Exhibit A: Mr. Cavins' letter dated October 19, 2011
- Claimant's Exhibit B: GM Wentzville Plant Special Bulletin
- Claimant's Exhibit C: George Hernia deposition transcript dated January 18, 2013
- Claimant's Exhibit D: Marlin Brown's deposition transcript dated January 18, 2003
- Claimant's Exhibit E: Jerry Meyers, M.D. deposition transcript dated October 31, 2013
- Claimant's Exhibit F: Robert Schlitt, M.D. deposition transcript dated November 8, 2013
- Claimant's Exhibit G-I: Photographs
- Claimant's Exhibit J: Kevin D. Weikart, M.D. medical report dated December 2, 2002
- Claimant's Exhibit K: Personnel Administration medical report.

The employer submitted the following exhibits, which were received except as noted below:

- Employer's Exhibit 1: Robert M. Bruce, M.D. reports dated February 1, 2005 and May 3, 2005
- Employer's Exhibit 2: Roger L. Mell, M.D. records dated July 22, 1991 through December 9, 1992
- Employer's Exhibit 3: Roger L. Mell, M.D. records dated August 29, 2000 and November 29, 2005
- Employer's Exhibit 4: General Motors plant records dated November 19, 1986 through October 19, 1995
- Employer's Exhibit 5: William Sedgwick, M.D. records dated November 19, 1985 and December 3, 1985
- Employer's Exhibit 6: Eliseo Figueroa, M.D. report of October 10, 1995
(Objection on hearsay from Second Injury Fund only sustained)
- Employer's Exhibit 7: Division of Workers' Compensation prior records
- Employer's Exhibit 8: Michael Nogalski, M.D. deposition dated July 22, 2013
- Employer's Exhibit 9: Wayne A. Stillings, M.D. deposition dated January 22, 2014
- Employer's Exhibit 10: Rick Cavins deposition dated February 24, 2006
(Only received with respect to 2003 case)
- Employer's Exhibit 11: GM Global Security Incident Report dated October 13, 2011
- Employer's Exhibit 12: Claim for Compensation - Injury Number 03-124598
- Employer's Exhibit 13: Claim for Compensation - Injury Number 04-148011
- Employer's Exhibit 14: Claim for Compensation - Injury Number 09-070136
- Employer's Exhibit 15: Deposition of Donna Blyzes dated May 24, 2010 (pgs. 86-92)

The parties stipulated that the claimant was off work on short-term disability from October 8, 2003 through March 22, 2004.

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 alleged occupational disease was alleged to have been contracted in Missouri. Any markings on the exhibits were present when offered into evidence. Exhibits G, H, and I were received in the condition as presented with whiteout and a sticky substance on the documents.

SUMMARY OF FACTS

The claimant, an automotive assembly line worker, alleged that she suffered injury and disability to her knees on two separate occasions at work:

In Injury Number 04-148011, the claimant filed a Claim for Compensation alleging an occupational disease took place from "March 2004 - May 2004". The claimant asserts that she

was ordered to work in the chassis department by management against her restrictions because she was in the process of taking GM to court. She claimed injury to her knees. See Exhibit 13. When asked whether her Claim for Compensation noted a date of injury regarding her knees to be "March 2004 - May 2004", the claimant testified that she didn't actually write out her claim but she agreed with the information in it.

In Injury Number 09-070136, the claimant filed a Claim for Compensation alleging an injury occurred on September 9, 2009, to her legs and feet. The claimant alleged that this employer refused to honor restrictions given to the claimant by a doctor and had the claimant do a job that was outside of her restrictions which caused her legs and feet to swell. See Exhibit 14.

The claimant began working for this employer in 1985. Her history of knee injuries began shortly after beginning work for this employer. On November 19, 1985, Dr. Sedgwick examined the claimant and took a history of the claimant stepping off a curb and jolting her right knee. See Exhibit 5. She suffered a hyper-extension type injury and twisted her right ankle. She developed swelling in the knee. The claimant was diagnosed with a strain to the right knee along with posterior tibial tendinitis. Dr. Sedgwick prescribed Naprosyn and physical therapy. She was released from his care on December 3, 1985. See Exhibit 5.

On July 9, 1991, the claimant injured her right knee at work. See Exhibit 7. Dr. Mell initially examined the claimant on July 22, 1991, and took a history of her right foot getting caught in a grate and twisting her right knee. See Exhibit 2. She went to plant medical where she was treated conservatively and then placed in a brace. An MRI of her right knee revealed a torn medial meniscus and torn anterior cruciate ligament. See Exhibit 2. On August 29, 1991, Dr. Mell performed an arthroscopy and arthroscopic excision of a bucket-handle tear of medial meniscus, removal of loose bodies and articular cartilage and shaved areas of chondromalacia. Dr. Mell released the claimant in December 1992 from that work injury. See Exhibit 2. The claimant settled her workers' compensation claim on the basis of a 22 ½% permanent partial disability of the right knee on December 28, 1992. See Exhibit 7.

Since 1999 and leading up to May 2004, the claimant testified that she was having problems with her right knee. She testified that in 2000 it was hard for her to be on the line and on her feet 10 to 12 hours a day. On August 29, 2000, the claimant returned to Dr. Mell and reported that she was doing well until about 1997 when she began having right knee pain. See Exhibit 3. She was walking with a limp. At that time, Dr. Mell diagnosed bilateral degenerative arthritis to the medial compartments of both knees, worse in the right than the left. He injected the right knee and gave her a prescription for Naprosyn. He recommended a job which does not require her to walk or stand continuously, but to be able to periodically sit. See Exhibit 3.

With respect to the time frame leading up to March 2004, the claimant testified that she was off work from October 8, 2003 until March 22, 2004 (per stipulation of the parties). The claimant testified that from March 2004 through May 2004, she was working in the chassis department and her knees got worse. During the period of March 2004 through May 2004, she only worked six weeks. On April 1, 2004, the claimant's knee problems returned with swelling in both knees when she was placed on a job which required her to get in and out of a van. She testified that the job required her to sit on a pad which was on studs and then run a cable through the van. She testified that during this time, she had restrictions which included no bending,

squatting, lifting over 30 pounds, but they were not honored and therefore she had to go out on sick leave.

The claimant testified that on November 14, 2005, Dr. Schaberg recommended a total right knee replacement. On November 29, 2005, the claimant returned to Dr. Mell at which time, she noted that she had pain off and on since 1990 but over the last several months, it had gotten worse. Dr. Mell noted that she was there for a second opinion because another physician had recommended surgery. He gave her the option of injections. See Exhibits 2, 3. On December 11, 2005, the claimant received total right knee replacement surgery. She returned to work around May 2006 and testified that her knee pain was better following the surgery, but the swelling was still sporadic.

The claimant testified that she returned to the body shop and had the same work restrictions after the knee replacement that she had while on the van job, which were again violated. This caused her to be "frozen" from the neck down and on September 9, 2006, she went to plant medical and received an injection.

With respect to her September 9, 2009 claim, the claimant testified that because her employer refused to honor her restrictions, her legs swelled up. She clarified that the September 9, 2009, claim also involved her knees.

The claimant testified that on February 15, 2011, she was removed from her position because her work restrictions could not be accommodated. In 2012, she was placed on NJAWR (no job available with restrictions) until November 2012, when she was put on a job in the chassis department aligning carriers underneath of the van. This required her to apply stress and pressure to her shoulders and knees. Later that same month, she went to the emergency room because of an anxiety attack. Upon her return, the employer placed her with the cleaning crew. However, she is currently on sick leave for unrelated shoulder injuries. The claimant testified that she has been off work since December 12, 2012, for injuries related to her shoulders, which are not part of the claims in these cases.

The claimant testified that she owned two properties with her current husband, one in Warrenton and one in Friedheim and that all of the animals are located at the Friedheim property. They have dogs, alpacas, goats, geese, ducks and eight donkeys. She stated that at the Friedheim farm she cuts the grass, waters flowers and feeds the animals in their bunks. She enjoys the animals and they make her feel good. She denied any incident where a goat knocked her over, per Mr. Cavins' testimony.

The claimant testified that at the time of the hearing she was taking Lexapro, Trazodone, Jantoven (for a blood clot), and Abilify. She testified that those medications were impairing her concentration and memory. She testified that prior to 2002 she only had a 1% absent rate at work.

The claimant testified that her involvement in litigation has been stressful because she felt violated, confused and lost. The claimant testified that she was frustrated with her employer and the union because she felt the union should have done more.

The claimant testified that she is not sure if she wants to go back to work, because she is afraid of getting hurt. She wondered whether she would be able to retire or quit and doesn't even know how to look into these options. Besides spending time with her animals, she spends her free time watching TV, mowing the grass on a riding mower and watering her flowers. At the Friedheim residence, it takes her about 2 to 2 ½ hours to mow the entire farm, while the Warrenton residence takes about 1 ½ hours. The Friedheim property is located on nine acres and she does take breaks during mowing to get up and move. She uses a riding mower.

George Hernia

Mr. Hernia has been employed with this employer for 33 years and his current position is Labor Relations Manager. Mr. Hernia did not recall any specific grievances filed by the claimant but testified generally that a grievance is when an employee and a supervisor cannot work out a situation and they get an opportunity to request their committee person to get involved. If the committee person can't work it out with the supervisor or group leader, then a complaint is generated in the form of a grievance. There are several steps involved in filing a grievance. See Hernia deposition, pages 10-11. Mr. Hernia testified that if a person had higher seniority and they bid on a job, they would get it over those with lower seniority. See Hernia deposition, page 16.

Mr. Hernia testified that when a person returns to work with restrictions, the ADAPT Program is implemented to assist in finding another job within those restrictions. The employee has joint representatives from the UAW as well as management, attempt to find them a job that they can do within their restrictions so they can be actively employed. See Hernia deposition, page 22.

Mr. Hernia testified that the employer's plant is currently a non-smoking plant and that people have been disciplined for smoking in the plant in the past. He testified that smoking is not tolerated, because it is State law and they are required to enforce the law. See Hernia deposition, page 28. With respect to placement after work restrictions, Mr. Hernia testified that the plant physician is the final authority on restrictions. See Hernia deposition, page 33. He testified that if an outside physician provides restrictions for an employee, the employer's physician reviews those and either confirms or questions it. The employer's plant physician makes the final determination. See Hernia deposition, page 40.

Marlon Brown

Mr. Brown has worked for this employer for over 27 years and is currently the District Two Committee Person. See Brown deposition, page 6. He is an elected official that has the ability to interpret the local agreement and the national agreement and to represent employees that are in his district if they have any situations with management. He testified that part of the resolution process is the filing of a grievance. See Brown deposition, page 6. He defined a grievance as a document that is used to get information in order to retrieve a loss or disadvantage of a union worker. See Brown deposition, page 7. Mr. Brown testified that he has written many grievances on behalf of the claimant. See Brown deposition, page 8. Mr. Brown testified that seniority does not guarantee that you get easier jobs. It does allow you to pick better jobs but there are no guarantees. See Brown deposition, page 12. Mr. Brown testified that this plant is a

smoke-free plant but he did not know the exact date when that policy went into effect. See Brown deposition, page 24.

Jerry Meyers, M.D.

Dr. Meyers examined the claimant on March 28, 2010, and took a medical history from the claimant including her 1985 and 1991 prior knee injuries and also her visit with Dr. Mell in 2000, wherein he diagnosed osteoarthritis of both knees. See Dr. Meyers' deposition, page 21. When he examined the claimant, she weighed 255 pounds and was 5' 9" tall. See Dr. Meyers' deposition, page 13. Dr. Meyers only evaluated the claimant's knees. Dr. Meyers testified that in 2002, the claimant was transferred to a job which exceeded the restrictions Dr. Mell placed on her in 2000 which were no prolonged standing or walking and during that six-week period on the new job, she experienced increasing pain and swelling in her knees. See Dr. Meyers' deposition, page 22. Dr. Meyers noted that in December 2005, Dr. Schaberg performed a right total knee replacement and in December 2006 a left total knee replacement.

Dr. Meyers concluded that "her 20-year period of working on the assembly line of General Motors was the prevailing factor, substantial factor, in causing her to develop bilateral osteoarthritis, requiring bilateral total knee replacements and a traumatic injury to the right knee, requiring a meniscectomy, with continuing symptoms and impairment." See Dr. Meyers' deposition, page 27. Dr. Meyers opined that the claimant suffered a 28% permanent partial disability to her right knee, 10% of which was pre-existing. He also opined that she suffered a 28% permanent partial disability of the left knee. See Dr. Meyers' deposition, page 29. Dr. Meyers gave permanent restrictions of avoiding repetitive bending, kneeling, climbing steps and ladders and she should not lift more than 30 pounds nor walk on uneven surfaces. She also should avoid walking longer than 40 minutes at a time. See Dr. Meyers' deposition, pages 31-32.

Dr. Meyers testified that the injury the claimant sustained to her right knee in 1991 was a torn medial meniscus which was a bucket-handle type tear and also a torn anterior cruciate ligament. See Dr. Meyers' deposition, page 44. He agreed that Dr. Mell performed surgery on the right knee on August 29, 1991 which included arthroscopy and arthroscopic incision of a bucket-handle tear of the medial meniscus, removal of loose bodies of articular cartilage and shaved areas of chondromalacia. The post-op diagnosis was bucket-handle tear, medial meniscus; chondromalacia; medial femoral condyle; and tibial plateau; articular cartilage loose body; and anterior cruciate ligament deficit, right knee. See Dr. Meyers' deposition, pages 45-46. Chondromalacia is a thinning of the cartilage and in the claimant's case it was located inside of the knee joint. An anterior cruciate deficit is an abnormal ligament. The doctor agreed that she had a pretty "banged up knee." He further agreed with Dr. Mell's conclusions in his December 9, 1992 report which noted that the cruciate ligament had become fibrotic and diminished in size and therefore had to be compensated for by other ligaments and therefore in essence, it had fibrosed and degenerated. He further agreed with Dr. Mell's conclusions that the deficit in the anterior cruciate ligament had created instability in the knee in 1992. See Dr. Meyers' deposition, page 47.

Dr. Meyers testified that the plant medical records indicated that in 1998 or 1999 the claimant fell, landed on both knees, and developed popping in her left knee with locking. See Dr. Meyers' deposition, page 49. He further agreed that the claimant was diagnosed by Dr. Mell in

2000 with pain and symptoms in both knees along with osteoarthritis. Dr. Meyers defined osteoarthritis as a bony abnormality causing a change in the joint. See Dr. Meyers' deposition, page 49. Dr. Meyers agreed that Dr. Mell ordered x-rays of the claimant's knees in August 2000 that showed bone on bone in both knees with extension. See Dr. Meyers' deposition, pages 49-50. Finally, Dr. Meyers testified that he was unaware of the claimant being paid 22 ½% permanent partial disability for the right knee referable to her 1991 case. See Dr. Meyers' deposition, page 51.

Michael P. Nogalski, M.D.

Dr. Nogalski, an orthopedic surgeon licensed to practice in Missouri, who generally treats patients with knee and shoulder problems, examined the claimant and took a medical history that she had prior knee problems beginning in the 1990's at which time she underwent right knee surgery. He notes that she then had a position that allowed her to work four to five jobs on the assembly line, but then would allow her to sit down. She did well with this for about three to four years. She was then moved to a different job that involved lifting shocks and axles as well as continuously walking on her legs. She was on this particular job for only six weeks and then she was moved back to her old job. Her old job allowed her to sit for a period of time. See Dr. Nogalski deposition, pages 6-7.

Dr. Nogalski advised that the claimant told him that her knees did not hurt before the job with the axles and shocks and again, it lasted about six weeks. He noted that she took this job around March 2004. It involved constantly moving to several stations without an opportunity to sit. She would have to pick up shocks and use guns to tighten the front springs. There were no unusual positions. She did not have to squat but had to walk a lot. She did not relate any specific twisting or other types of activities within the job that stressed her knees. See Dr. Nogalski deposition, pages 7-8.

Dr. Nogalski opined that the claimant's job duties were not a substantial factor causing her knee condition. He diagnosed bilateral knee arthritis which necessitated bilateral total knee replacements. He opined that the claimant's knee replacements were not necessary to cure and relieve the effects of her job duties nor that she needed any additional treatment referable to her job. (p. 13). He opined that the claimant suffered from a 15% permanent partial disability in her right knee and an 18% permanent partial disability in her left knee but was not related to her job duties. See Dr. Nogalski deposition, page 12.

Dr. Nogalski testified that osteoarthritis occurs over a period of time and takes years to develop. He stated that this condition existed prior to the claimant's claimed injuries. See Dr. Nogalski deposition, page 35. Dr. Nogalski opined that the claimant experienced symptoms of osteoarthritis during her work activities, but the work itself wasn't what caused it, it just caused her to have symptoms. See Dr. Nogalski deposition, page 36. Dr. Nogalski opined that any activity could cause a symptom to be experienced in an osteoarthritic knee, but the symptoms are just a manifestation of the problem, but not the problem. See Dr. Nogalski deposition, page 41. Dr. Nogalski opined that low impact repetitive use could not accelerate arthritis. See Dr. Nogalski deposition, page 42.

COMPENSABILITY

The statute provides that an occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease. . .” Section 287.067.1, RSMo Supp. 2005. An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 & 3 of section 287.020. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable. Section 287.067.3, RSMo 2000.

An informative legal analysis of occupational diseases pursuant to Missouri law is found in Kelley v. Banta and Stude Const. Co., Inc., 1 S.W.3d 43 (Mo. App. E.D. 1999), from which the following legal principles are cited:

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Claimant must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. The opinion may be based on a doctor’s written report alone. Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. Where there are conflicting medical opinions, the fact finder may reject all or part of one party’s expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant’s expert.

In conformity with the above-cited case law, the instant case is controlled by the “last exposure rule”, sometimes referred to as the “rule of convenience” which has been the law in Missouri for many years. In a workers’ compensation case in Missouri, based upon occupational disease, liability accrues and attaches to the employer as of the date of the disability. The test for determining when compensation accrues is the time when incapacity from occupational disease

occurs, and not when the exposure commences or the disease begins and continues to develop. It is disability after exposure in the employer's business that creates the obligation to compensation. Because the development of occupational diseases is characteristically gradual, but variable in different diseases and with different persons, the earlier stages being frequently undetectable, the only rule which ensures the benevolent legislative objective of recovery in every meritorious case is one which fixes liability at the single and easily determinable point when there is inability to work.

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, “logic and common sense,” or an ALJ's personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

In this case, the claimant filed a Claim for Compensation alleging that on September 9, 2009, the claimant's employer refused to honor restrictions given by a doctor and her job was outside of her restrictions and that eventually her legs and feet swelled up causing severe pain. Neither forensic expert identified a specific accident that occurred on that date to support a compensable claim for a work-related accident occurring on that date.

In this case, the claimant had a prior history of injury to her right knee. In 1985, she went to plant medical and told them she hurt her right knee stepping off a curb after completing her shift. Dr. William Sedgwick evaluated her on November 19, 1985, at which time he diagnosed posterior tibial tendinitis and a strain to the right knee. He placed the claimant on Naprosyn and ordered physical therapy. See Exhibit 5.

The claimant suffered a second injury to her right knee on July 10, 1991, and consulted Dr. Mell on July 22, 1991, with a history of getting her right foot caught on a grate and twisting her right knee. She initially went to the plant facility and had ice applied, was placed in a brace, and had x-rays. On August 29, 1991, Dr. Mell performed an arthroscopy and arthroscopic excision for a right bucket-handle tear of the medial meniscus, along with removal of loose bodies and articular cartilage and he shaved areas of chondromalacia. See Exhibit 2. Dr. Mell's post-op diagnosis for the 1991 surgical procedure was a medial meniscus bucket-handle tear; chondromalacia of the medial femoral condyle and tibial plateau; articular cartilage loose bodies; and anterior cruciate ligament deficit. See Exhibit 2. The claimant filed a Claim for Compensation for the 1991 injury and settled her case on the basis of a 22 ½% permanent partial disability. See Exhibit 7.

The claimant testified that she continued having problems with her right knee leading up to May 2004. On August 29, 2000, she returned to Dr. Mell with a history of doing well until three years prior when she began having right knee pain. The doctor notes that she was walking with a limp and experiencing catching, locking, grinding and swelling in the knee. Dr. Mell

diagnosed bilateral degenerative arthritis in the medial compartments of both knees, the right worse than the left. On that visit, Dr. Mell injected the right knee and gave her a prescription for Naprosyn. He noted that the claimant was not interested in having more aggressive treatment at that time and he advised that she should work at a job which does not require her to walk or stand continuously, but to be able to sit periodically. See Exhibit 3. The evidence is clear that the claimant suffers from osteoarthritis and that the condition degenerated to the point that the claimant required bilateral knee replacement surgery in 2005 and 2006.

The claim alleges that the claimant suffered an injury to her knees from working for six weeks in the employer's chassis department from March 2004 through May 2004. The claimant testified that during March through May 2004, she had been transferred to the chassis department. She worked six weeks during that period of time. The parties stipulated that she was off work on short-term disability from October 8, 2003 until March 22, 2004. See Exhibit 13.

The forensic medical evidence diverges on whether the claimant's work during that period meets the criteria stated above to constitute a compensable case. Dr. Meyers opined that the claimant's "20-year period of working on the assembly line of General Motors was the prevailing factor, substantial factor, in causing her to develop bilateral osteoarthritis, requiring bilateral total knee replacements and a traumatic injury to the right knee, requiring meniscectomy, with continuing symptoms." See Dr. Meyers' deposition, page 27. "It is my opinion that they were work related." See Dr. Meyers' deposition, page 28. He opined that "activities of daily living and your work activities do indeed relate to the development of arthritis; it can certainly aggravate – and depending on the rapidity with which it may occur." See Dr. Meyers' deposition, page 27.

Dr. Nogalski also diagnosed bilateral knee osteoarthritis and opined that the claimant underwent bilateral total knee replacements as a result of that condition. However, he opined that the claimant's job duties were not a substantial factor causing her symptoms or her diagnosis and that the claimant's knee replacements were not needed to cure and relieve the effects of her job duties. See Dr. Nogalski deposition, pages 9-10. Dr. Nogalski based his conclusions on a detailed medical history that during the three to four year period leading up to the date of her claim, she worked four or five jobs on an assembly line and then had an opportunity to sit down, when needed. Then she was transferred to a job involving lifting shocks and axles as well as continuously walking on her legs, but he noted that the job lasted for only six weeks and then she was moved back to her old job. He noted that her old job allowed her to sit down for periods of time, but the six-week position did not. See Dr. Nogalski deposition, pages 6-7. Additionally, the claimant did not relate any specific twisting or other types of activities within that job that would have stressed her knees. See Dr. Nogalski deposition, page 8.

In comparing the two evaluations, the claimant's medical expert, Dr. Meyers, concluded that she suffered knee injuries from working at the plant for a 20-year period, which covers the span of most of her employment with this employer and at least three claims for compensation regarding her knee condition, 1991, 2004, and 2009. He did not identify a specific history relating to September 9, 2009, that is the subject of this claim. In addition, he stated that various aspects of the claimant's work and activities of daily living that he opined can contribute to osteoarthritis. However, he did not opine (1) whether there was an exposure to the disease which

was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. He did not address the specific contribution, if any, of the work performed on the date specified in the claim filed by the claimant. Dr. Meyers could not identify how often the claimant had to bend or squat or how long the claimant had to walk at work. See Dr. Meyers' deposition, pages 41-43.

Looking at the central question relating to osteoarthritis from the standpoint of the Mayo Clinic, the condition "occurs when the cartilage that cushions the ends of bones in joints deteriorates over time. Cartilage is a firm, slippery tissue that permits nearly frictionless joint motion. In osteoarthritis, the slick surface of the cartilage becomes rough. Eventually, if the cartilage wears down completely, one may be left with bone rubbing on bone." According to the same source, the risk factors for osteoarthritis include:

- **Older age.** The risk of osteoarthritis increases with age.
- **Sex.** Women are more likely to develop osteoarthritis, though it isn't clear why.
- **Bone deformities.** Some people are born with malformed joints or defective cartilage, which can increase the risk of osteoarthritis.
- **Joint injuries.** Injuries, such as those that occur when playing sports or from an accident, may increase the risk of osteoarthritis.
- **Obesity.** Carrying more body weight puts added stress on your weight-bearing joints, such as your knees.
- **Certain occupations.** If your job includes tasks that place repetitive stress on a particular joint, that joint may eventually develop osteoarthritis.
- **Other diseases.** Having diabetes, underactive thyroid, gout or Paget's disease of bone can increase your risk of developing osteoarthritis.

This analysis presents a complicated question that is not clearly answered by the claimant's forensic expert. The narrow question in this case based on the claim as filed is whether the work performed by the claimant on September 9, 2009, was the prevailing factor in causing both the resulting medical condition and disability in her legs and feet. Clearly, the claimant had bilateral degenerative arthritis as early as August 2000. See Exhibit 3. By that time, she had pain and swelling, walked with a limp, and had catching, locking, grinding, and swelling in her knee, but no giving way. See Exhibit 3. Also at that time, x-rays revealed bone on bone in both knees with the knees in extension. See Exhibit 3. Dr. Meyers testified that "her twenty-year period of working on the assembly line of General Motors was the prevailing factor, substantial factor, in causing her to develop bilateral osteoarthritis, requiring bilateral total knee replacements, and a traumatic injury to the right knee, requiring meniscectomy, with continuing symptoms and impairment." See Dr. Meyers' deposition, page 27. He did not specify when the 20-year period began or when it ended nor did he identify the specific features of the claimant's work that increased her exposure to osteoarthritis. If one could recast the claim for compensation to suggest a period that fits the claimant's forensic evidence, the situation might be different. For instance, would the claimant be entitled to recover in for her osteoarthritis in both her 2004 case, in her 2009 case, and in claim alleging that attributed her osteoarthritis to a twenty-four year period? However, the claims for the prior occurrences have been resolved, and one can determine the extent of pre-existing permanent partial disability attributable to those occurrences.

Moreover, if one can conclude that the 2009 claim requests compensation for the period suggested in Dr. Meyers' report, one could attempt to determine which of the forensic analyses is more credible in this situation.

The record is thin on the claimant's actual occupational duties. However, the U.S. Department of Labor Dictionary of Occupational Titles describes the position of motor vehicle assembler as:

806.684-010 ASSEMBLER, MOTOR VEHICLE (auto. mfg.) alternate titles: quality worker; team member

Assembles motor vehicles, such as automobiles, trucks, buses, or limousines, at assigned work stations on moving assembly line, performing any combination of following repetitive tasks according to specifications and using hand tools, power tools, welding equipment, and production fixtures: Loads stamped metal body components into automated welding equipment that welds together components to form body subassemblies. Positions and fastens together body subassemblies, such as side frames, underbodies, doors, hoods, and trunk lids, to assemble vehicle bodies and truck cabs preparatory to body welding process. Bolts, screws, clips, or otherwise fastens together parts to form subassemblies, such as doors, seats, instrument control panels, steering columns, and axle units. Installs mechanical and electrical components and systems, such as engine, transmission, and axle units; pumps; wire harnesses; instrument control panels; and exhaust, brake, and air-conditioning systems. Fits and adjusts doors, hoods, and trunk lids. Seals joints and seams, using caulking gun. Fastens seats, door paneling, headliners, carpeting, molding, and other trim into position. Fills vehicle systems with brake and transmission fluids, engine coolant, and oil. May apply precut and adhesive coated vinyl tops and pads to vehicle roofs. May verify quality of own work and write description of defects observed on documents attached to vehicle bodies. May enter and retrieve production data, using computer terminals. May work as member of assembly group (team) and be assigned different work stations as production needs require or shift from one station to another to reduce fatigue factor. May participate in group meetings to exchange job related information. May be designated according to component assembled or installed as Assembler, Engine (auto. mfg.); Assembler, Seat (auto. mfg.); or stage of assembly as Assembler, Body (auto. mfg.); Assembler, Chassis (auto. mfg.); Assembler, Final (auto. mfg.); Assembler, Trim (auto. mfg.).

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The same publication describes the position as a medium work physical demand position:

M-Medium Work - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

The conclusion is that the claimant moved objects weighing 10 to 25 pounds frequently over her 24-year career as an automotive assembler for this employer. Based on the above

criteria from the Mayo Clinic, Dr. Meyers' evaluation suggests that the claimant's work activities were a factor in developing osteoarthritis in her knees. He opined that it was the most important factor in comparison to all other factors causing the condition. The other factors are age and gender that are relevant. The record did not provide evidence to support a finding that the claimant suffered from obesity before the occurrence or any other injury or systemic disease listed. The clinical records suggest that the claimant was overweight, but not obese. See Exhibits 4, 5, 6. Thus, Dr. Meyers concluded that the claimant's occupational exertion on a repetitive basis was more important than her age or gender. Dr. Nogalski opined that repetitive use is not a trauma, but can cause osteoarthritis to become symptomatic. He opined that repetitive activities were not the substantial cause of the injury. See Dr. Nogalski deposition, pages 40, 41. One would conclude from the deposition that Dr. Nogalski opined that the claimant's occupational activities were not important as any other factor, but he did not address the question of what caused the condition. He opined that the claimant's occupational activities were not the prevailing or substantial factor causing the claimant's osteoarthritis. Both positions are certainly understandable and logical. Dr. Nogalski does not address the cause of the condition, whereas Dr. Meyers' conclusion seems to be in accordance with known risk factors for the condition.

The critical question in this case is whether the claim for compensation addresses the claimant's twenty-plus years as an automotive assembler or whether the claim addresses one particular day or month. Claims for Compensation are not fact pleading, but provide notice of the injury and circumstances. The conclusion is that the claim addresses the claimant's knee injury from her repetitive medium exertional activities at work ending on the date of injury.

Based on this analysis, the claimant prevails on the issue of compensability.

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.

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

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.

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.

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).

Of course, the claimant bears the burden to prove an entitlement to benefits for such care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). To prove an entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. *Id.* However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. *Id.* Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a "reasonable probability." *Id.* "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Id.* "In determining whether this standard has been met, the court should resolve all doubt in favor of the employee." *Id.* "[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care." *Id.* Such a requirement could "put an impossible and unrealistic burden" upon the claimant. *Id.* The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. *Id.*

Dr. Meyers opined that the claimant’s knee replacements are permanent resolutions for her knee condition unless she suffers a fall or an unrelated disease such as diabetes or she lives longer than the expected life of the knee replacement joints. See Dr. Meyers’ deposition, pages 55, 56. The concern is whether the employer bears the burden of the unforeseen injury of deterioration or whether Medicare bears the burden of an additional surgery many years down the road. It would seem that the employer would not be liable for additional medical care that resulted from ordinary degeneration or an additional injury or unrelated disease. Dr. Meyers’ testimony suggests that there is possibility of an additional procedure, but none is expected

unless the claimant has an additional accident, suffers ordinary degeneration of her medical condition, or suffers an unrelated disease. Therefore the claim for future medical care is denied.

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.

A multiplicity factor is "a special or additional allowance for cumulative disabilities resulting from a multiplicity of injuries." Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). The commission has the discretion to include a multiplicity factor in assessing cumulative disabilities but is not required to do so. Id.

Dr. Meyers opined that the claimant suffered a 28% permanent partial disability to her right knee, 10% of which was pre-existing. He also opined that she suffered a 28% permanent partial disability of the left knee. See Dr. Meyers' deposition, page 29. Dr. Nogalski opined that the claimant suffered from a 15% permanent partial disability in her right knee and an 18% permanent partial disability in her left knee but was not related to her job duties. See Dr. Nogalski deposition, page 12. The records reflect a pre-existing 22 ½% permanent partial disability to her right knee. See Exhibit 7. Based on the evidence, the claimant has a 28% permanent partial disability to her right knee, 22 ½% of which was pre-existing. Thus, the claimant suffered a 5 ½% permanent partial disability from reasons other than her 1991 accident at work. The claimant appears to have a 25% permanent partial disability of the left knee. Dr. Meyers opined that a loading factor for multiplicity is appropriate. Based on a 10% loading factor for multiplicity, the claimant is awarded 53.68 weeks of permanent partial disability benefits.

STATUTE OF LIMITATIONS

The claim for compensation alleges that the occurrence on September 9, 2009, and the claim was filed on October 7, 2009, less than two years after the alleged occurrence. The claim appears to have been filed within the two-year period of the statute of limitations.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

- (1) The claimant has a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment;
- (2) The percentage of disability attributable to the preexisting disability equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury. There must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund's liability;
- (3) The combination of the preexisting disability and the disability resulting from the last injury equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury; and
- (4) The combined disability is substantially greater than the disability that would have resulted from the last injury considered alone. Treasurer of the State of Missouri, etc., v Witte, Slip Op., 414 S.W.3d 455, 462 (Mo.Banc 2013).

When these requirements are met, the employer at the time of the last injury is liable for only the degree of disability that would have resulted from the last injury if there was no preexisting disability. Id. All preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable. However, there is no threshold requirement for the last injury. Id. In that case, the court found that there must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund's liability and there is no threshold requirement for the last injury. Additionally, all preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable.

Based on the evidence, the claimant suffered a 25% permanent partial disability to her left knee (40 weeks) and a 5 ½% permanent partial disability to his right knee (8.8 weeks) from the 2009 occurrence. At the time the last injury was sustained, the claimant had a 22 ½% pre-existing permanent partial disability to her right knee (36 weeks). Dr. Meyers prescribed extensive restrictions regarding the claimant's orthopedic condition and opined that the claimant's injuries to her knees combine synergistically to create an overall greater disability than the simple sum of the individual disabilities. See Dr. Meyers' deposition, pages 29-31.

Additional evidence revealed a pre-existing psychiatric permanent partial disability. Dr. Schlitt, a psychologist, opined that the claimant had a 16 percent permanent partial disability from a mood disorder. See Dr. Schlitt deposition, pages 73, 85. He placed the claimant at maximum medical improvement for her psychiatric condition in his report, dated February 10, 2011, well after either the 2004 or 2009 alleged injury. See Dr. Schlitt deposition, Exhibit 2. Dr. Stillings found the claimant to have a 30 to 35% permanent partial disability for her "preexisting and ongoing" psychiatric diagnoses. See Dr. Stillings' deposition, page 15.

However, the evidence did not disclose whether the pre-existing psychiatric permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to employment or whether the combined disability is substantially greater than the disability that would have resulted from the last injury considered alone. The claimant had an opportunity to present such evidence but the record does not disclose the same.

The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 15%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how she performs many activities both at home due to the combination of the problems.

Therefore, the Second Injury Fund bears liability for 12.72 weeks of permanent partial disability benefits.

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