

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

Injury No.: 05-085871

Employee: Melvin Boyers  
Employer: Ameren UE  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-captioned 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 and considered the whole record and we find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 20, 2010, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We believe the opinions of Drs. Lichtenfeld and Johnston establish that there is a reasonable probability that employee will need future medical care. We modify the award of future medical care to provide that employer/insurer shall provide to employee such future medical care as is reasonably necessary to cure and relieve him of the effects of his injury.

In all other respects, we affirm the award of the administrative law judge.

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

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

The award and decision of Administrative Law Judge Maureen Tilley, issued April 20, 2010, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Melvin Boyers

Injury No. 05-085871

Employer: Ameren UE

Additional Party: Second Injury Fund

Insurer: Self Insured; TPA: Corporate Claims Management Inc.

Hearing Date: February 22, 2010

Checked by: MT/rf

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? August 26, 2005.
5. State location where accident occurred or occupational disease contracted: Stoddard County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was injured on August 26, 2005 after a storm. A pole had fallen down and they were dragging a new pole across a ditch. His left foot became tangled in some debris and he slipped and fell. The employee injured his left knee and eventually received a total knee replacement.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left knee.
14. Nature and extent of any permanent disability: See findings.
15. Compensation paid to date for temporary total disability: \$31,632.30.
16. Value necessary medical aid paid to date by employer-insurer: \$67,712.10.
17. Value necessary medical aid not furnished by employer-insurer: None.
18. Employee's average weekly wage: \$1,221.60.
19. Weekly compensation rate:  
Temporary total disability and permanent total disability: \$696.97.  
Permanent partial disability: \$365.08.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: See findings.
23. Future requirements awarded: See findings.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean Christianson.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On February 27, 2007, a hearing for a temporary award was held. The Administrative Law Judge presiding over the case was Judge Carl Strange. In April of 2007, a temporary award was issued. In that award, the employer-insurer was directed to furnish additional medical aid and past temporary total disability benefits. On February 22, 2010, the employee, Melvin Boyers appeared in person and with his attorney, Dean Christianson, for a hearing for a final award. The Administrative Law Judge presiding was Judge Maureen Tilley. The employer was represented at the hearing by its attorney, John Dietrick. The Second Injury Fund was represented by attorney, Cliff Verhines. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. The employer was operating under and subject to provisions of the Missouri Workers' Compensation Act and its liability was fully insured by Ameren UE c/o Corporate Claims Management, Inc.
2. On or about the date of the alleged accident the Claimant was an employee of Ameren UE and was working under the Workers' Compensation Act.
3. On or about August 26, 2005, the Claimant sustained an accident arising out of and in the course of his employment.
4. Employer had notice of the Employee's accident.
5. Employee's Claim was filed within the time required by law.
6. The average weekly wage was \$1,221.60 resulting in a TTD rate of \$696.97 and a PPD rate of \$365.08.
7. The employee's injury was medically causally related to accident or occupational disease.
8. The Employer/Insurer paid \$67,712.10 in medical benefits.
9. The Employer/Insurer paid \$31,632.30 in Temporary Total Disability benefits for approximately forty-three and three-sevenths weeks from October 5, 2005 through November 15, 2005; October 10, 2006 through February 27, 2007 and from May 20, 2007 to October 2, 2007.
10. The employee is not claiming additional or future medical aid
11. The employee is not claiming additional temporary total disability or temporary partial disability.

### **ISSUES**

1. Additional medical care.
2. Permanent total disability.
3. Permanent partial disability benefits.
4. Liability of the Second Injury Fund.
5. Dependency.

## **EXHIBITS**

The following exhibits were offered and admitted into evidence:

### Employee's Exhibits

- A) Deposition of Dr. Hertel
- B) Medical records of Orthopedic Associates
- C) Medical records of MSH Family Medical
- D) Medical records of HealthSouth
- E) Medical records of Missouri Bone & Joint
- F) Medical records of Barnes West County Hospital
- G) Certified records from Division of Workers' Compensation
- H) Demand for medical care
- I) Deposition of Dr. Lichtenfeld
- J) Medical records of Parkcrest Orthopedics
- K) Certificate of Marriage

### Employer-Insurer's Exhibits

- 1. Deposition of Dr. Schafer
- 2. Deposition of Dr. Johnston
- 3. Medical records from Select Physical Therapy

Employee's Exhibits A-H and Employer-Insurer's Exhibit 1 were admitted into evidence on February 27, 2007 at the temporary hearing. At the final award hearing, ALJ took judicial notice of those exhibits. Those exhibits are therefore listed on the exhibit list.

## **FINDINGS OF FACT**

### **History of case before temporary hearing**

- The employee's birthday is June 27, 1951. The employee was injured on August 26, 2005 after a storm. A pole had fallen down and they were dragging a new pole across a ditch. His foot became tangled in some debris and he slipped and fell, twisting his left knee and felt a pop and pain in his knee. He continued working until they finished the job. He then returned to the home office and reported the injury. Rather than continue working that day, he went home and rested his knee. On the next Monday, he was sent for medical care to the company physician, Dr. Fox. He was provided with a brace and placed on light duty. Eventually an MRI was performed and he was then referred to an orthopedic surgeon, Dr. Schafer.
- Dr. Schafer evaluated the employee and noted he had some pre-existing arthritis as well as acute tears of his medial and lateral meniscus. Dr. Schafer performed arthroscopic surgery on October 10, 2005 to repair the meniscus tears. The procedure included

menisectomies, chondroplasty, debridement and a synovectomy. After the surgery, the employee received physical therapy but continued to have ongoing complaints to his left knee. Dr. Schafer believed that part of the problem was going to be his pre-existing arthritis which he thought would slow his recovery.

- On January 17, 2006, Dr. Schafer opined that the employee was at maximum medical improvement and could work with permanent restrictions. He also noted that the employee sustained a permanent partial disability of 5% of the knee.
- The employee continued to have problems with his knee and was evaluated by Dr. Ronald Hertel. Dr. Hertel opined that the injury of August 26, 2005 brought on the onset of symptoms and the need for a joint replacement and indicated that the employee was a candidate for a total knee replacement.
- Dr. Schafer later opined that a total knee replacement may help the employee but the need for a total knee replacement was a result of the pre-existing arthritis and therefore, he did not believe he needed further medical treatment to cure and relieve the effects of the August 26, 2005 injury.

### **Temporary Hearing and treatment from Dr. Johnston**

- A temporary hearing was held on February 27, 2007 and treatment was awarded. The employee was referred to Dr. Richard Johnston for additional medical treatment. Dr. Johnston diagnosed severe degenerative joint disease of the left knee. On June 20, 2007 Dr. Johnston performed a left total knee replacement using Zimmer components. The post operative diagnosis was severe degenerative joint disease, medial compartment of the left knee.
- On July 24, 2007, Dr. Johnston noted that the employee had a good range of motion, good strength, near full flexion and good stability. Dr. Johnston took x-rays which showed the prosthesis was in good position and alignment. Dr. Johnston was pleased with his progress and recommended continued physical therapy.
- Dr. Johnston saw the employee on September 18, 2007 and at that time noted excellent range of motion of the left knee, good stability, and some moderate quadricep atrophy. Dr. Johnston indicated at that time he found out that there was light duty available which would involve driving and very light lifting. He subsequently changed his recommendation for two weeks of work hardening and re-evaluation in two weeks and probable return to light duty.
- Dr. Johnston re-evaluated the employee on October 2, 2007. At that time he noted that the employee had done very nicely with the work hardening program and that he had reached most of the requirements of his job description except for the requirement of constant standing and walking on uneven ground. He noted excellent range of motion and excellent strength in the left knee. He noted it was reasonable for him to return to light duty work with no squatting, no kneeling, no pole climbing, no constant standing for more than one hour and no shoveling.
- Dr. Johnston saw the employee again on November 13, 2007. At that time, he stated that he did not need further orthopedic follow up and was at the point of maximum medical improvement. He noted that the employee was retired and told him he should avoid kneeling and squatting. He also noted that he decided to retire rather than return to the

job activities offered to him. He also stated that he scraped up his knee last week when he fell when he was out deer hunting and otherwise, he had been doing nicely.

- The employee last saw Dr. Johnston on June 17, 2008. At that time, he noted he had excellent range of motion, good stability, no tenderness and no effusion. He took x-rays which showed the prosthesis was in good position. Dr. Johnston testified that the employee had a permanent partial disability of 18% of the left knee and that a substantial portion of that would be related to his pre-existing condition because of advanced arthritis. Dr. Johnston noted that he was capable of working with restrictions and he noted that it would limit him to a medium job activity with no lifting over 40 to 45 pounds on a usual basis, and to avoid squatting. He noted that 30% of people cannot return to kneeling, but many people can. He then stated that there are no limitations on walking, golf, hunting and those types of activities. He also noted that when he performed his rating that the employee really did not have any subjective complaints.
- Dr. Johnston recommended a follow up visit every three years for x-rays of his left total knee replacement. Dr. Johnston testified that current research indicated that the failure rate was 10% by twenty to twenty-five years. He estimated the employee's life expectancy to be in the "late 70's".
- When asked within a reasonable degree of medical certainty whether or not he was going to need any future medical treatment besides the follow up visits every three years for x-rays, Dr. Johnston responded, "No, other than just applying statistical probabilities to him, I wouldn't anticipate anything."

#### **Dr. Lichtenfeld**

- Dr. Lichtenfeld testified that the employee sustained a permanent partial disability of 60% of the left knee as a result of the August 26, 2005 injury. He noted that how long the knee replacement lasts depends on the activity level and that if someone is fairly sedentary it could last fifteen years, but if someone is extremely active playing basketball, volleyball or running or jogging, or climbing up and down poles or ladders all day, maybe eight to ten years. He noted that with respect to the August 26, 2005 injury the employee would benefit from treatment with anti-inflammatory medication on an as needed basis and he should perform range of motion exercises on a regular basis and walk as much as possible. He noted that the employee might actually need to have another knee arthroplasty if this one wears out.
- Dr. Lichtenfeld stated that the employee should perform no digging or shoveling or stand no more than forty-five minutes to an hour without alternating between sitting and standing. He also indicated that the employee should avoid climbing stairs and ladders. The employee should limit his lifting to fifteen to twenty pounds on a one-time basis. He noted that the employee should avoid repetitive lifting and that the lifting should be performed only between the waist and shoulder height. He stated that the employee should perform no squatting or kneeling and perform no movements that cause impact on either lower extremity, including avoiding jumping. He also indicated that the employee should avoid walking on uneven or slick surfaces and avoid working at heights, being on unstable surfaces such as pitched roofs and scaffolding and should avoid prolonged standing, walking and sitting.

- Dr. Lichtenfeld opined that the employee had an 85% permanent partial disability at the level of the right ankle, a 30% permanent partial disability to the level of the left elbow, and a 40% permanent partial disability of the person as a whole due to the cervical spine fusion. He noted that the employee's pre-existing injuries combined and concurred with one another, as well as with the August 26, 2005 injury to form an overall disability that is greater than the simple sum of the disabilities combined. He also noted that the pre-existing injuries create a significant obstacle and/or hindrance to the employee obtaining employment and/or re-employment. He stated that taking into consideration his pre-existing medical conditions along with the condition caused by the August 26, 2005 injury as well as his educational background and vocational history, the employee is permanently and totally disabled and unable to compete in the open labor market.
- Dr. Lichtenfeld stated that prior to the August 26, 2005 injury the employee should not have been climbing poles with the right ankle fusion. He also pointed out the employee should not have been working at heights or on unstable or uneven surfaces because of his ankle.

### **Employee's work history**

- The employee testified that he is married to Sandra Boyers and has been married to her for sixteen years. The employee identified Employee's Exhibit K as his marriage certificate to Sandra Boyers. He stated that they were living together at the time of his injury. He has no children from this marriage. He has two children from a prior marriage. None of his children were living with him at the time of the August 26, 2005 injury. None of his children were under the age of eighteen and none of his children were dependent upon him for support at the time of the August 26, 2005 injury. He did support his wife, Sandra Boyers by providing for food, housing, clothing and utilities.
- The employee testified further that he graduated from high school and was in the Army from 1971 to 1973 and then the National Guard for sixteen years thereafter. He received communications training in the Army. In the National Guard he was in the Combat Engineers. He was honorably discharged. He was never injured while in the military.
- The employee stated that he is unable to type, but that he has a computer and is able to access e-mail. He has had no other formal schooling, but did do some class work to become a lineman. Most of his experience was learned through on-the-job training. He noted that his work as a lineman started while he was in the Army. He began working full-time as a lineman in the private sector in 1980.
- The employee testified that he is not currently employed and that he stopped working as of October 31, 2007. He saw Dr. Johnston in early October, 2007 and took three weeks of vacation before retiring from Ameren UE.
- The employee testified he began working at Ameren UE in 1988. When he stopped working there he was working as a line foreman. A line foreman was a supervisory position, but he also performed lineman work as well. He has also done work around the farm, including building fences and performing routine upkeep and maintenance of his farm. He noted he owns 40 acres of property. He stated that this is an open farm and he rents it out for hay and runs horses on the farm.
- The employee stated that he has not looked for work since he has had his surgery.

**Employee's primary injury complaints**

- The employee continues to have problems with the left knee. He has trouble with bending, squatting, running and walking on uneven ground. He gets pain and swelling if he is active. He can't twist his knee. His pain symptoms are sometimes in the entirety of his knee. He felt that he could stand for approximately one hour and said that he also can't sit very long. Walking must be on level ground and he is unable to carry anything more than approximately twenty pounds because of his knee. He takes Tylenol Arthritis everyday and also uses heat and cold packs. The employee has never injured his left knee before this accident.
- In a typical day the employee has difficulty sleeping. This is especially true if he has been active, because he then has problems in his left knee. When he gets up in the morning he has to spend some time stretching and getting limbered up. This takes approximately thirty minutes to an hour. He tries to be active in that he does mow the grass with a riding mower, though he has to rest after one hour. This is caused by problems that he develops in his neck and left knee. He does perform some work around his home and recently tried to put up a piece of paneling. He said that this hurt him for two days and that he was swelled up afterwards. He indicated that all of his conditions cause him problems with increased activity. He said he has not put in an eight hour day at work since he had his knee replacement. He said that he knows that if he pushes himself then he will have further problems which require him to rest and take further medication.
- The employee stated that he still hunts and fishes, though he limits this. For example, when he fishes, he simply sits in a boat. He does not stand on a bank because of difficulty in standing and with walking on uneven terrain. When the employee hunts, he only walks a short distance on flat ground and waits for an animal to walk by. The employee also stated that he does not hunt every year. The employee stated that he has not been able to shoot a deer since he has had his surgery.

**Pre-existing injuries**

- Prior to the work accident the employee had an injury to his neck in 2004. That occurred while he was digging in a ditch. He had surgery which fused two vertebrae in his cervical spine. Afterwards, he continued to have problems in that he developed headaches because he would have to watch workers working above him. Looking above him caused pain in not only his head, but also his neck and left shoulder area. He had problems with wearing a hard hat as well. He said that he still has a knotting of the muscles in his left shoulder, for which his wife helps him with trying to work it out. He also goes to a chiropractor because of these problems. He is left-handed so use of his dominant arm creates more problems. He has difficulty turning his head to the right and to the left, which makes it difficult for him to drive.
- The employee has a pre-existing left elbow injury from when he slipped on the side of a ditch and hit his elbow on some gravel. He had surgery performed by Dr. Schafer in September of 2003. Dr. Schafer took out some fragments of bone and a bursa sac. The employee stated that while working at Ameren he would have to watch what he carried and how he carried things in order to keep from further injuring his left elbow.

- The employee has a pre-existing right ankle from an injury in 1970. The employee eventually had a right ankle fusion . He has very little motion in the ankle. A review of his legs at trial showed that his right calf was much smaller than the left calf. He says that if he is on his legs too long he gets a limp in his right leg and that causes him to rely more on the left side. He did still climb poles even with his right ankle injury, though he had to be sure that he put most of his weight on his left side. He also had to watch where he stepped on uneven ground.
- The employee had a number of rib fractures in the past, though those seem to have healed without problems.

### APPLICABLE LAW

- The burden is on the employee to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968).
- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee’s disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the

degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.”

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

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the “Second Injury Fund” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

- The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- Under Section 287.240 RSMo, a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. Under Section 287.240 RSMO, a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support.

## **RULINGS OF LAW:**

### ***Issue 1. Future medical aid***

Dr. Johnston recommended a follow up visit every three years for x-rays of the employee’s left total knee replacement. Dr. Johnston testified that current research indicated that the failure rate was 10% by twenty to twenty-five years. He estimated the employee’s life expectancy to be in the “late 70’s”. When asked within a reasonable degree of medical certainty whether or not he was going to need any future medical treatment besides the follow up visits every three years for x-rays, Dr. Johnston responded, “No, other than just applying statistical probabilities to him, I wouldn’t anticipate anything.”

Dr. Lichtenfeld stated that how long the knee replacement lasts depends on the activity level and that if someone is fairly sedentary it could last fifteen years, but if someone is extremely active playing basketball, volleyball or running or jogging, or climbing up and down poles or ladders all day, maybe eight to ten years. He noted that with respect to the August 26, 2005 injury the employee would benefit from treatment with anti-inflammatory medication on an as needed basis and he should perform range of motion exercises on a regular basis and walk as much as possible. He noted that the employee might actually need to have another knee arthroplasty if this one wears out.

Based on the evidence presented, I find that the employer-insurer is responsible for providing the follow up visits as recommended by Dr. Johnston. However, with regard to the employer-insurer providing anti-inflammatory medication and additional medical treatment, including another knee arthroscopy, the employee did not meet his burden of proof. The employee did not prove that there was a “reasonable probability” that he would need anti-inflammatory medication or additional medical treatment other than visiting the doctor once every three years. Based on the

evidence presented, I direct the employer-insurer to provide follow up visits to the doctor every three years for x-rays. However; future medical care in the form of anti-inflammatory medication and additional medical treatment, including another knee arthroplasty, is denied.

***Issue 3. Permanent partial disability***

I find that the employee suffered an accident on August 26, 2005 which resulted in the employee injuring his left knee. The employee eventually received a total knee replacement on his left knee. This injury produced a disability of 40% of the left knee at the 160 week level. The 40% disability of the left knee is equal to 64 weeks. Accordingly, the employer and the insurer are directed to pay the employee the sum of \$365.08 per week for 64 weeks for a total of \$23,365.12.

***Issue 2. Permanent total disability and Issue 4. Liability of the Second Injury Fund***

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing injuries and conditions and the employee's last injury of August 26, 2005. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or reemployment.

The employee testified that he continues to have problems with his left knee. He has trouble with bending, squatting, running and walking on uneven ground. He gets pain and swelling if he is active. He can't twist his knee. His pain symptoms are sometimes in the entirety of his knee. He felt that he could stand for approximately one hour and said that he also can't sit very long. Walking must be on level ground and he is unable to carry anything more than approximately twenty pounds because of his knee. He takes Tylenol Arthritis everyday and also uses heat and cold packs. The employee has never injured his left knee before this accident.

The employee also testified about his pre-existing injuries. He stated that because of his cervical spine injury, he has pain in his head, neck and shoulders when he looks up. He also has difficulty turning his head to the right and left. The employee stated that he has little motion in his right ankle. Furthermore, during the trial the employee displayed his right ankle which was substantially smaller than his left ankle. The employee also stated that he needs to watch how he carries things in order to avoid further injuring his left elbow.

At the final award hearing, the employee testified to his work history. The employee testified further that he graduated from high school and was in the Army from 1971 to 1973 and then the National Guard for sixteen years thereafter. He received communications training in the Army. In the National Guard he was in the Combat Engineers. He was honorably discharged. The employee stated that he is unable to type, but that he has a computer and is able to access e-mail. He has had no other formal schooling, but did do some class work to become a lineman. Most of his experience was learned through on-the-job training. He noted that his work as a lineman started while he was in the Army. He began working full time as a lineman in the private sector in 1980. The employee testified that he is not currently employed and that he stopped working as of October 31, 2007. He saw Dr. Johnston in early October, 2007 and took three weeks of

vacation before retiring from Ameren UE. He has also done work around the farm, including building fences and performing routine upkeep and maintenance of his farm. He noted he owns 40 acres of property. He stated that this is an open farm and he rents it out for hay and runs horses on the farm. The employee also stated that he has not looked for work since he has had his surgery.

Two doctors gave opinions regarding whether the employee could continue to work. Dr. Johnston opined that the employee was capable of working with restrictions and he noted that it would limit him to a medium job activity with no lifting over 40 to 45 pounds on a usual basis and to avoid squatting. He noted that 30% of people cannot return to kneeling, but many people can.

Dr. Lichtenfeld opined that based on the employee's pre-existing medical conditions along with the condition caused by the August 26, 2005 injury as well as his educational background and vocational history, the employee is permanently and totally disabled and unable to compete in the open labor market.

Based on a review of all of the evidence, I find that the opinion of Dr. Lichtenfeld more credible than Dr. Johnston regarding the employee's ability to work.

In addition to the medical evidence, I find that the employee was a very credible and persuasive witness on the issue of permanent total disability. His testimony supports a conclusion that the employee will not be able to compete in the open labor market.

Based on the credible testimony of the employee and the supporting medical evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and is permanently and totally disabled.

Based upon the evidence I find that as a direct result of the last injury the employee sustained a permanent partial disability of 40% of the knee. I find that the last injury alone did not cause the employee to be permanently and totally disabled.

Based on a review of the evidence, I find that the employee's pre-existing disability and conditions regarding his cervical spine, right ankle, and left elbow constituted a hindrance or obstacle to his employment or to obtaining re-employment.

I find that the prior injuries to the employee's cervical spine, right ankle and left elbow combined synergistically with the primary injury to the left knee to cause the employee's overall condition and symptoms. Based on the supporting medical evidence and the employee's testimony, I find that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries and condition and the August 26, 2005 injury and condition.

Based on the evidence presented, I find that the employee reached maximum medical improvement on October 2, 2007. The employer-insurer's permanent partial disability payments would therefore have commenced on October 3, 2007 and would have continued for 64 weeks through December 24, 2008.

Since the Second Injury Fund is liable for the difference between the permanent partial disability rate (\$365.08) and the agreed rate of compensation for permanent total disability (\$696.97), the Second Injury Fund is liable under Section 287.220.1 for the difference between the amount paid by the employer-insurer for permanent partial disability and the amount due for permanent total disability. The difference between the permanent total disability rate and the permanent partial disability rate is \$331.89. The Second Injury Fund is therefore directed to pay to the employee the sum of \$331.89 per week commencing on October 3, 2007 and continuing through December 24, 2008 for a total of \$21,240.96. Since the full amount of this total accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for this amount.

The Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing on December 25, 2008. The Second Injury Fund is therefore directed to pay the employee the sum of \$696.97 per week commencing on December 25, 2008 and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 282.200.2

### ***Issue 5. Dependency***

Under Section 287.240 RSMo, a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. Under Section 287.240 RSMO, a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support.

The employee testified that on the date of his accident he was married to Sandra Boyers. He identified their certificate of marriage and established that Sandra was dependent upon his income for things such as food, housing, utilities and clothing.

Based on the evidence presented, I find that Sandra Boyers, the wife of the employee, was a total dependent at the time of the employee's occupational disease and injury.

### **ATTORNEY'S FEE**

Dean Christianson, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

### **INTEREST**

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: \_\_\_\_\_

Made by:

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Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Naomi Person  
*Division of Workers' Compensation*