

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

Injury No.: 09-071448

Employee: Lawanda Clark  
Employer: Workforce, Inc.  
Insurer: U. S. Fidelity & Guaranty Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 27, 2013. The award and decision of Administrative Law Judge Carl Strange, issued March 27, 2013, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 6<sup>th</sup> day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Lawanda Clark

Injury No. 09-071448 & 09-092637

Employer: Workforce, Inc.

Additional Party: Second Injury Fund

Insurer: US Fidelity & Guaranty Company  
(TPA: Gallagher Bassett Services, Inc.)

Hearing Date: November 26, 2012

Checked by: CS/rm

**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? September 10, 2009 (09-071448) & November 9, 2009 (09-092637).
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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: For Injury No. 09-071448, the Employee jumped down into an empty pool and she felt an immediate pop in her knees and fell backwards. For Injury No. 09-092637, Employee slipped on a rug and fell striking her right knee and low back.

12. Did accident or occupational disease cause death? N/A.
13. Parts of body injured by accident or occupational disease: Right knee and left knee (09-071448) & low back (09-092637).
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: \$1,910.42 (09-071448) & \$0.00 (09-092637).
16. Value necessary medical aid paid to date by employer-insurer: \$42,593.64 (09-071448) & \$0.00 (09-092637).
17. Value necessary medical aid not furnished by employer-insurer: (See Findings).
18. Employee's average weekly wage: \$340.00.
19. Weekly compensation rate: \$226.67 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
  - a. Employee awarded previously incurred medical aid against the Employer-Insurer in the amount of \$566.80 (See Findings).
  - b. Employer-Insurer ordered to pay Medicaid Lien of \$3,037.86 (See Findings).
  - c. Employee awarded permanent partial disability benefits against the Employer-Insurer in the amount of \$25,387.04 in Injury No. 09-071448 (See Findings).
  - d. Employee awarded permanent partial disability benefits against the Employer-Insurer in the amount of \$13,600.20 in Injury No. 09-092637 (See Findings).
  - e. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$226.67 per week beginning September 25, 2011 (See Findings).
22. Second Injury Fund liability: No (09-071448) & Yes (09-092637).
23. Future requirements awarded: Yes (09-071448) & Yes (09-092637).

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 employee shall be subject to a lien in the amount of costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Matthew Edwards.

## FINDINGS OF FACT AND RULINGS OF LAW

On November 26, 2012, the employee, Lawanda Clark, appeared in person and by her attorney, Matthew Edwards, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Mark Kornblum. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. 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:

#### Injury #09-071448

1. On or about September 10, 2009, Workforce, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by US Fidelity & Guaranty Company with a third party administrator of Gallagher Bassett Services, Inc.
2. On or about September 10, 2009, the employee was an employee of Workforce, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about September 10, 2009, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$340.00 and her rate for temporary total disability, permanent total disability, and permanent partial disability is \$226.67.
7. The employee's injury is medically causally related to the work injury occurring on or about September 10, 2009.
8. The employer has furnished \$42,593.64 in medical aid to the employee.
9. The employer has paid temporary total disability benefits at a rate of \$226.67 per week for a total of \$1,910.42.
10. The employee reached maximum medical improvement on July 31, 2010.

#### Injury #09-092637

1. On or about November 9, 2009, Workforce, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by US Fidelity & Guaranty Company with a third party administrator of Gallagher Bassett Services, Inc.
2. On or about November 9, 2009, the employee was an employee of Workforce, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about November 9, 2009, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.

6. The employee's average weekly wage was \$340.00 and her rate for temporary total disability, permanent total disability, and permanent partial disability is \$226.67.
7. The employer has furnished no medical aid to the employee.
8. The employer has paid no temporary total disability benefits to the employee.
9. The employee reached maximum medical improvement on July 31, 2010.

**ISSUES:**

Injury #09-071448

1. Previously Incurred Medical Aid.
2. Future Medical Aid.
3. Additional Temporary Total Disability.
4. Nature and Extent of Disability.
5. Liability of the Fund.
6. Medicaid Lien.

Injury #09-092637

1. Medical Causation.
2. Previously Incurred Medical Aid.
3. Future Medical Aid.
4. Additional Temporary Total Disability.
5. Nature and Extent of Disability.
6. Liability of the Fund.
7. Medicaid Lien.

**EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Records from Sikeston Public Schools.
- B. Medical Records from Cape Girardeau Fire Department.
- C. Medical Records from Saint Francis Medical Center.
- D. Medical Records from Orthopedic Associates – Dr. Michael Nogalski.
- E. Medical Records from River City Health Clinic.
- F. Medical Records from Cape County Private Ambulance Service.
- G. Medical Records from Southeast Missouri Hospital.
- H. Medical Records from Orthopedic Associates – Dr. Keith Wilkey.
- I. Medical Records from Cape Imaging.
- J. Medical Records from Mid America Rehab.
- K. Medical Records from Cape Radiology Group.
- L. Medical Records from Cape Spine and Neurosurgery.
- M. Medical Records from Brain & NeuroSpine Clinic of Missouri.
- N. Psychological Evaluation Report from Dr. Paul Rexroat.

- O. Medical Bills from River City Health Clinic.
- P. Medical Bills from Cape Radiology Group.
- Q. Medical Bills from Broadway Prescriptions.
- R. Medical Bills from Cape County Private Ambulance Service.
- S. Medical Bills from Southeast Missouri Hospital.
- T. Medical Bills from Cape Spine and Neurosurgery.
- U. Medical Bills from St. Francis Medical Center.
- V. Medical Bills from John's Pharmacy.
- W. Medical Bills from Cape Imaging.
- X. Medical Bills from Walgreens.
- Y. Deposition of Dr. Dwight Woiteshek.
- Z. Deposition of Vincent Stock.
- AA. Deposition of Tim Lalk.
- BB. Deposition of Brad Kocher.

Employer's Exhibits:

- 1. Medical Bills from Southeast Missouri Hospital.
- 2. Deposition of Dr. Michael Nogalski.
- 3. Deposition of Dr. James Doll.
- 4. Letter from Southeast Missouri Hospital releasing lien.

Second Injury Fund Exhibits:

- I. Deposition of the Employee, Lawanda Clark.

**FINDINGS OF FACT:**

Based on the testimony of Lawanda Clark ("Employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, Employee was 33 years old. Employee attended high school in Sikeston, Missouri, but only completed up to the 11<sup>th</sup> grade. Throughout high school, Employee attended special education classes and had a learning disability. Her past employment history includes working for Dairy Queen, various nursing homes, and Gilster Mary Lee. Employee first began working for Workforce, Inc. ("Employer") near the end of 2005.

On September 10, 2009, Employee jumped down into an empty pool while placing a tarp over it and injured her bilateral knees. Employee was taken to St. Francis Hospital and diagnosed with fractures to both knees (Employee's Exhibit C). Employee's care was then transferred to Dr. Michael Nogalski. On September 18, 2009, Dr. Nogalski performed an arthroscopic assisted fixation of the tibial plateau fracture of the right knee and arthroscopic assisted fixation of intercondylar eminence fracture. On November 3, 2009, Dr. Nogalski

assigned a temporary restriction of seated only work and returned Employee back to work (Employee's Exhibit D)(Employer-Insurer's Exhibit 2).

On November 9, 2009, Employee went to the bathroom and slipped on a throw rug near the sink causing her to fall to the floor. Employee went to Southeast Missouri Hospital for treatment (Employee's Exhibit G). On November 24, 2009, Employee returned to Dr. Nogalski and reported back pain following her November 9, 2009 fall. Dr. Nogalski continued Employee's seated only work and returned Employee back to work. On January 11, 2011, Employee returned to Dr. Nogalski for a supplemental evaluation and complained of continued pain, aching, and popping in her knees along with continued back pain. Dr. Nogalski placed Employee at maximum medical improvement, assigned a 15% permanent partial disability to the right knee and a 5% permanent partial disability to the left knee, and concluded that no additional injury resulted from the September 10, 2009 work injury (Employee's Exhibit D).

Employee was then sent to Dr. Keith Wilkey for evaluation of her low back. Dr. Wilkey recommended an MRI (Employee's Exhibit H). Employee also received treatment from River City Health Clinic for her low back during the delays in treatment between these doctors (Employee's Exhibit E). On April 12, 2010, Employee's care was transferred to Dr. James Doll. Dr. Doll opined that Employee's September 10, 2009 work injury was not the prevailing factor for Employee's current back complaints or pathology on the MRI (Employer-Insurer's Exhibit 3). After treating with Dr. Scott, Employee treated with Dr. Kevin Vaught who recommended physical therapy and a TENS unit (Employee's Exhibits L & M).

On July 31, 2010, Dr. Dwight Woiteshek evaluated Employee and opined that Employee's September 10, 2009 work injury was the prevailing factor in causing the Employee's "traumatic markedly comminuted displaced intra-articular tibia plateau fracture of the right knee" and "traumatic depressed comminuted fracture of the posterior lateral tibial plateau of the left knee." Further, Dr. Woiteshek testified that Employee's November 9, 2009 work injury was the prevailing factor in causing the "traumatic bulging of the L3/4 disk with L3 nerve impingement." After noting that there was a high probability that Employee would need future medical care for her right knee due to post-traumatic osteoarthritis, which would likely involve arthroscopic debridement or knee replacement surgery, Dr. Woiteshek assessed a 45% permanent partial disability of the right knee along with a 20% permanent partial disability of the left knee as a direct result of the September 10, 2009 work injury and a 30% permanent partial disability of the body as a whole at the lumbar spine as a direct result of the September 10, 2009 work injury. Finally, Dr. Woiteshek opined that Employee was permanently and totally disabled due to the combinations of the work injuries of September 10, 2009 and November 9, 2009 (Employee's Exhibit Y).

Mr. Timothy Lalk, a Vocational Rehabilitation Expert, evaluated Employee on September 28, 2010 and opined that considering the restrictions of Dr. Nogalski and Dr. Woiteshek that he would recommend unskilled entry level jobs such as a counter clerk or desk job, but Employee does not have the cognitive abilities to read or record information as it would be required in those jobs. Thus, Mr. Lalk opined that Employee was not able to secure and

maintain employment in the open labor market and that she is not able to compete for any position (Employee's Exhibit AA).

On May 25, 2011, Mr. Vincent Stock, a licensed psychologist and vocational rehabilitation expert evaluated Employee and opined that Employee had a 30% permanent partial psychological impairment of the person as a whole. After noting that Employee had a generalized anxiety disorder stemming from the September 10, 2009 work accident, Mr. Stock explained that of his assessment of permanent partial disability half was attributable to the September 10, 2009 work injury (generalized anxiety) and the other half predated the work injury (mild mental retardation). Further, Mr. Stock opined that Employee was permanently and totally disabled due to a combination of her mental and physical limitations (Employee's Exhibit AA).

At the time of the hearing, Employee offered several medical bills that she incurred for treatment related to the November 9, 2009 work injury and the various delays in care from Employer-Insurer. With regard to her bilateral knees, Employee testified that she continued to have problems that included pain, difficulty walking, decreased range of motion, popping, stiffness, and problems with stairs. Further, Employee testified that she continued to have problems with her low back that included pain, muscle spasms, radiating leg pain, and difficulty sitting. Finally, Employee noted that she continued to have psychological problems that included problems sleeping and anxiousness.

#### **APPLICABLE LAW:**

- Section 287.020.3(2) RSMo. states “an injury shall be deemed to arise out of and in the course of employment only if: (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.”
- Under Section 287.140.1., “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”. Further, the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select her own physician at her own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo.2003) makes it clear that the employer is not liable for medical expenses if the health care providers allowed write-offs and reductions and the employee is no longer legally subject to additional liability. The Supreme Court noted, “It is a defense of Personnel Pool, as

employer, to establish that Ms. Farmer-Cummings was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished and that the reason that her liability was extinguished does not otherwise fall within the provisions of Section 287.270.” *Id.*

- 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).
- Temporary total disability benefits are intended to cover the healing period and are not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after her condition has reached the point where further progress is not expected. *Brookman v Henry Transportation*, 924 S.W. 2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company*, 694 S.W. 2d 488, 489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in her present physical condition. *Brookman Id.* at 290.
- 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).

## **RULINGS OF LAW:**

### ***Issue 1. Medical Causation (09-092637)***

Employer-Insurer has disputed the claim of Employee that her low back injury was medically and causally related to her work injuries. In support of their position, they have offered the opinion of Dr. James Doll and Dr. Michael Nogalski (Employer-Insurer's Exhibits 2 & 3). Both Dr. Doll and Dr. Nogalski opined that Employee's work injury of September 10, 2009 did not cause Employee's low back injury, but also failed to fully address whether or not Employee's November 9, 2009 work injury caused Employee's low back injury. Conversely, Dr. Dwight Woiteshek reviewed all of Employee's records and opined that Employee's November 9, 2009 work injury was the prevailing factor in causing the "traumatic bulging of the L3/4 disk with L3 nerve impingement" (Employee's Exhibit Y). Dr. Nogalski's records also verify that Employee mentioned her low back complaints at her first appointment following the November 9, 2009 work injury (Employee's Exhibit D)(Employer-Insurer's Exhibit 2). Based the evidence, I therefore find the opinions of Dr. Nogalski and Dr. Doll to be not credible and find that the opinions of Dr. Woiteshek to be more credible than any conflicting opinion.

Employee's testimony of a work related November 9, 2009 injury is also corroborated by the evidence, and Employer-Insurer cannot point to sufficient credible evidence to contradict Employee's version of the work related accident. Consequently, I find Employee credible. Based on the evidence and my above findings, I further find that Employee has satisfied her burden of proof regarding medical causation. Therefore, I find that Employee's November 9, 2009 work injury was the prevailing factor in causing Employee's traumatic bulging of the L3/4 disk with L3 nerve impingement.

### ***Issue 1. Previously Incurred Medical Aid & Issue 6. Medicaid Lien (09-071448); Issue 2. Previously Incurred Medical Aid & Issue 7. Medicaid Lien (09-092637)***

Employee has requested an award of the medical bills totaling \$14,505.83 for treatment that she incurred for treatment related to the initial November 9, 2009 work injury and the various delays in care from Employer-Insurer (Employee Exhibits O-X). Employer has disputed these bills on the basis of medical causation. Based on the evidence and my above rulings regarding causation, I find that the evidence also supports a finding that the charges were reasonable and the treatment was causally related to Employee's work injuries.

Many of these bills unequivocally establish that the health care providers accepted partial payment by Medicaid, and as required by law, adjusted the balances. The facts in this case do not support a finding that Employee remains personally liable for any of the adjustments or

reductions, nor is there any evidence to indicate that these reductions resulted from payment by a collateral source, independent of the Employer. To the contrary, when physician agree to accept payment from Medicaid, they are legally prohibited from collecting the remaining balance due from the Medicaid patient. In this case, the bills themselves confirm that the health care professional who received Medicaid payments has adjusted their bills and Employee is no longer legally liable for the amount of those adjustments. Based on this evidence, I find that all of these bills must be reduced by the amount of the Medicaid adjustments.

After a thorough review of the bills, I find that Employee is entitled to recover her out of pocket expenses and outstanding balances related to this treatment in the total amount of \$566.80 (Exhibit O - \$2.00, Exhibit Q - \$71.50, Exhibit R - \$460.50, Exhibit T - \$0.50, Exhibit V - \$1.50, Exhibit W - \$25.80, Exhibit X - \$5.00). Employer-Insurer is therefore directed to the pay to Employee the sum of \$566.80 for the medical bills related to the treatment of Employee's work injuries.

As previously noted, the Department of Social Services, Division of Medical Services, has filed a lien dated June 21, 2012, in the total amount of \$1,500.76 in Injury No. 09-071448 and a lien dated June 21, 2012, in the total amount of \$1,537.10 in Injury No. 09-092637. After reviewing the evidence and liens, I find that all of the charges reflected therein appear to be related to treatment for Employee's two work injuries. Based on the evidence, I find that the Department of Social Services, Division of Medical Services, is entitled to repayment of their lien in the amount of \$3,037.86 by the Employer-Insurer. Therefore, Employer-Insurer is directed to the pay to Department of Social Services, Division of Medical Services, the sum of \$3,037.86 for its lien related to the treatment of Employee's work injuries.

***Issue 2. Future Medical Aid (09-071448); Issue 3. Future Medical Aid (09-092637)***

Employee has alleged that she will require future medical aid to cure and relieve her from the effects of her September 10, 2009 or November 9, 2009 work related injuries. In support of her position, Employee has offered the opinion of Dr. Dwight Woiteshek who opined that there was a high probability that Employee would need future medical care for her right knee due to post-traumatic osteoarthritis, which would likely involve arthroscopic debridement or knee replacement surgery. Based on my above findings and the evidence, I find that the medical evidence supports a finding that Employee will require future medical treatment to cure and relieve her from the effects of her September 10, 2009 work related injury in accordance with Dr. Woiteshek's opinions. Employer is therefore directed to furnish additional medical treatment related to Employee's September 10, 2009 work related right knee condition in accordance with Section 287.140 RSMo.

With regard to any remaining request by Employee for future medical aid to cure and relieve her from the effects of her September 10, 2009 or November 9, 2009 work related injuries, I find that Employee has failed to meet her burden of proof and that the evidence does not support any additional award of future medical aid.

***Issue 3. Additional Temporary Total Disability (09-071448); Issue 4. Additional Temporary Total Disability (09-092637)***

Employee is requesting an award for temporary total disability from November 9, 2009 to July 31, 2010 in the amount of \$8,483.93. It is important to note that Employee has failed to offer a sufficient credible medical opinion that the reason she was taken off of work by her primary care physician was from the effects of her September 10, 2009 or November 9, 2009 work related injuries. Additionally, Employer-Insurer has offered sufficient evidence that Employer would have provided Employee with light duty that accommodated her restrictions. After a thorough review of all the evidence, I therefore find that Employee has failed to meet her burden of proof that she was temporarily and totally disabled during that period as a result of her September 10, 2009 or November 9, 2009 work related injuries. Employer-Insurer is not required to pay and Employee is not entitled to receive any further temporary total disability benefits in this matter.

***Issue 4. Nature and Extent of Disability & Issue 5. Liability of the Fund (09-071448); Issue 5. Nature and Extent of Disability & Issue 6. Liability of the Fund (09-092637)***

Employee has alleged that either Employer or the Second Injury Fund is liable for permanent and total disability benefits as a result of her September 10, 2009 or November 9, 2009 work related injuries. In addition to Dr. Woiteshek's opinions, Employee has offered the opinion of Mr. Timothy Lalk, a vocational rehabilitation expert, and Mr. Vincent Stock, a licensed psychologist and vocational rehabilitation expert. It is important to note that the Employer-Insurer and the Second Injury Fund have failed to offer sufficient credible evidence to discredit the opinions of Mr. Lalk and Mr. Stock. Therefore, I find the opinions of Mr. Lalk and Mr. Stock to be credible. Dr. Woiteshek's, Mr. Lalk's, and Mr. Stock's opinions along with the medical records unequivocally support a finding of permanent and total disability as a result of a combination of Employee's September 10, 2009 and November 9, 2009 work related injuries. Consequently, I find that the Employer-Insurer is not liable for permanent total disability benefits as a result of Employee's September 10, 2009 work related injury or Employee's November 9, 2009 work related injury.

Although Employer is not liable for permanent total disability benefits, Employer is still liable for permanent partial disability. Based on this evidence, I find that as a result of the September 10, 2009 work related injury that Employee suffered a 10% permanent partial disability of her body as a whole at the 400 week level referable to her anxiety condition; a 35% permanent partial disability of her right lower extremity at the 160 week level; and a 10% permanent partial disability of her right lower extremity at the 160 week level. This equals 112 weeks of disability. Employer is therefore directed to pay to Employee the sum of \$226.67 per week for 112 weeks for a total award of permanent partial disability relating to the September 10, 2009 work related injury of \$25,387.04. Based on this evidence, I find that as a result of the November 9, 2009 work related injury that Employee suffered a 15% permanent partial disability of her body as a whole at the 400 week level referable to her lumbar spine. This equals 60 weeks of disability. Employer is therefore directed to pay to Employee the sum of \$226.67 per week for

60 weeks for a total award of permanent partial disability relating to the November 9, 2009 work related injury of \$13,600.20. The total award of permanent partial disability benefits awarded to Employee against Employer-Insurer is \$38,987.24. Based on the evidence and stipulation of the parties, I find that Employee reached her maximum level of medical improvement and the end of the healing period on July 31, 2010. Since Employer-Insurer's liability for permanent partial disability benefits has accrued prior to the date of the award, the Employer-Insurer shall make a lump sum payment for the total past due amount.

Based on the evidence and my above findings, the Second Injury Fund is clearly liable for permanent total disability benefits related to the November 9, 2009 work related injury combined with her pre-existing injuries in accordance with Dr. Woiteshek's, Mr. Lalk's, and Mr. Stock's opinions. With regard to the September 10, 2010 work related injury, I find that Employee has failed to her burden of proof that she is entitled to any benefits against the Second Injury Fund. Although her primary injury of September 10, 2010 met the statutory threshold to qualify her for Second Injury Fund benefits, I find that all of Employee's pre-existing injuries including her pre-existing 10% permanent partial disability referable to her mild mental retardation fail to meet the applicable statutory thresholds required for an award of permanent partial disability benefits against the Second Injury Fund. Thus, Employee's claim against the Second Injury Fund in Injury No. 09-071448 is denied. I further find that the preexisting disabilities to November 9, 2009 were a hindrance or obstacle to Employee's employment or reemployment and that these preexisting disabilities and her November 9, 2009 work related disabilities combined synergistically causing Employee to be permanently and totally disabled.

In accordance with my above findings, Employer-Insurer's liability for permanent partial disability was 60 weeks of compensation for the November 9, 2009 work related injury covering the time period of August 1, 2010 to September 24, 2011. Since Employee's permanent partial disability rate (\$226.67) is the same as the agreed rate of compensation for permanent total disability, the Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing September 25, 2011. The Second Injury Fund is therefore directed to pay to Employee the sum of \$226.67 per week commencing on September 25, 2011, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of Employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to her regular work or its equivalent as provided in Section 287.200.2. Since part of the Second Injury Fund's liability has accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for the appropriate amount that is past due.

#### **ATTORNEY'S FEE:**

Matthew Edwards, attorney at law, is allowed a fee of costs plus 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.

Made by:

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Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*

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

Injury No.: 09-092637

Employee: Lawanda Clark  
Employer: Workforce, Inc.  
Insurer: U. S. Fidelity & Guaranty Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 27, 2013. The award and decision of Administrative Law Judge Carl Strange, issued March 27, 2013, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 6th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Lawanda Clark

Injury No. 09-071448 & 09-092637

Employer: Workforce, Inc.

Additional Party: Second Injury Fund

Insurer: US Fidelity & Guaranty Company  
(TPA: Gallagher Bassett Services, Inc.)

Hearing Date: November 26, 2012

Checked by: CS/rm

**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? September 10, 2009 (09-071448) & November 9, 2009 (09-092637).
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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: For Injury No. 09-071448, the Employee jumped down into an empty pool and she felt an immediate pop in her knees and fell backwards. For Injury No. 09-092637, Employee slipped on a rug and fell striking her right knee and low back.

12. Did accident or occupational disease cause death? N/A.
13. Parts of body injured by accident or occupational disease: Right knee and left knee (09-071448) & low back (09-092637).
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: \$1,910.42 (09-071448) & \$0.00 (09-092637).
16. Value necessary medical aid paid to date by employer-insurer: \$42,593.64 (09-071448) & \$0.00 (09-092637).
17. Value necessary medical aid not furnished by employer-insurer: (See Findings).
18. Employee's average weekly wage: \$340.00.
19. Weekly compensation rate: \$226.67 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
  - a. Employee awarded previously incurred medical aid against the Employer-Insurer in the amount of \$566.80 (See Findings).
  - b. Employer-Insurer ordered to pay Medicaid Lien of \$3,037.86 (See Findings).
  - c. Employee awarded permanent partial disability benefits against the Employer-Insurer in the amount of \$25,387.04 in Injury No. 09-071448 (See Findings).
  - d. Employee awarded permanent partial disability benefits against the Employer-Insurer in the amount of \$13,600.20 in Injury No. 09-092637 (See Findings).
  - e. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$226.67 per week beginning September 25, 2011 (See Findings).
22. Second Injury Fund liability: No (09-071448) & Yes (09-092637).
23. Future requirements awarded: Yes (09-071448) & Yes (09-092637).

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 employee shall be subject to a lien in the amount of costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Matthew Edwards.

## FINDINGS OF FACT AND RULINGS OF LAW

On November 26, 2012, the employee, Lawanda Clark, appeared in person and by her attorney, Matthew Edwards, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Mark Kornblum. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. 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:

#### Injury #09-071448

1. On or about September 10, 2009, Workforce, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by US Fidelity & Guaranty Company with a third party administrator of Gallagher Bassett Services, Inc.
2. On or about September 10, 2009, the employee was an employee of Workforce, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about September 10, 2009, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$340.00 and her rate for temporary total disability, permanent total disability, and permanent partial disability is \$226.67.
7. The employee's injury is medically causally related to the work injury occurring on or about September 10, 2009.
8. The employer has furnished \$42,593.64 in medical aid to the employee.
9. The employer has paid temporary total disability benefits at a rate of \$226.67 per week for a total of \$1,910.42.
10. The employee reached maximum medical improvement on July 31, 2010.

#### Injury #09-092637

1. On or about November 9, 2009, Workforce, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by US Fidelity & Guaranty Company with a third party administrator of Gallagher Bassett Services, Inc.
2. On or about November 9, 2009, the employee was an employee of Workforce, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about November 9, 2009, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.

6. The employee's average weekly wage was \$340.00 and her rate for temporary total disability, permanent total disability, and permanent partial disability is \$226.67.
7. The employer has furnished no medical aid to the employee.
8. The employer has paid no temporary total disability benefits to the employee.
9. The employee reached maximum medical improvement on July 31, 2010.

**ISSUES:**

Injury #09-071448

1. Previously Incurred Medical Aid.
2. Future Medical Aid.
3. Additional Temporary Total Disability.
4. Nature and Extent of Disability.
5. Liability of the Fund.
6. Medicaid Lien.

Injury #09-092637

1. Medical Causation.
2. Previously Incurred Medical Aid.
3. Future Medical Aid.
4. Additional Temporary Total Disability.
5. Nature and Extent of Disability.
6. Liability of the Fund.
7. Medicaid Lien.

**EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Records from Sikeston Public Schools.
- B. Medical Records from Cape Girardeau Fire Department.
- C. Medical Records from Saint Francis Medical Center.
- D. Medical Records from Orthopedic Associates – Dr. Michael Nogalski.
- E. Medical Records from River City Health Clinic.
- F. Medical Records from Cape County Private Ambulance Service.
- G. Medical Records from Southeast Missouri Hospital.
- H. Medical Records from Orthopedic Associates – Dr. Keith Wilkey.
- I. Medical Records from Cape Imaging.
- J. Medical Records from Mid America Rehab.
- K. Medical Records from Cape Radiology Group.
- L. Medical Records from Cape Spine and Neurosurgery.
- M. Medical Records from Brain & NeuroSpine Clinic of Missouri.
- N. Psychological Evaluation Report from Dr. Paul Rexroat.

- O. Medical Bills from River City Health Clinic.
- P. Medical Bills from Cape Radiology Group.
- Q. Medical Bills from Broadway Prescriptions.
- R. Medical Bills from Cape County Private Ambulance Service.
- S. Medical Bills from Southeast Missouri Hospital.
- T. Medical Bills from Cape Spine and Neurosurgery.
- U. Medical Bills from St. Francis Medical Center.
- V. Medical Bills from John's Pharmacy.
- W. Medical Bills from Cape Imaging.
- X. Medical Bills from Walgreens.
- Y. Deposition of Dr. Dwight Woiteshek.
- Z. Deposition of Vincent Stock.
- AA. Deposition of Tim Lalk.
- BB. Deposition of Brad Kocher.

Employer's Exhibits:

- 1. Medical Bills from Southeast Missouri Hospital.
- 2. Deposition of Dr. Michael Nogalski.
- 3. Deposition of Dr. James Doll.
- 4. Letter from Southeast Missouri Hospital releasing lien.

Second Injury Fund Exhibits:

- I. Deposition of the Employee, Lawanda Clark.

**FINDINGS OF FACT:**

Based on the testimony of Lawanda Clark ("Employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, Employee was 33 years old. Employee attended high school in Sikeston, Missouri, but only completed up to the 11<sup>th</sup> grade. Throughout high school, Employee attended special education classes and had a learning disability. Her past employment history includes working for Dairy Queen, various nursing homes, and Gilster Mary Lee. Employee first began working for Workforce, Inc. ("Employer") near the end of 2005.

On September 10, 2009, Employee jumped down into an empty pool while placing a tarp over it and injured her bilateral knees. Employee was taken to St. Francis Hospital and diagnosed with fractures to both knees (Employee's Exhibit C). Employee's care was then transferred to Dr. Michael Nogalski. On September 18, 2009, Dr. Nogalski performed an arthroscopic assisted fixation of the tibial plateau fracture of the right knee and arthroscopic assisted fixation of intercondylar eminence fracture. On November 3, 2009, Dr. Nogalski

assigned a temporary restriction of seated only work and returned Employee back to work (Employee's Exhibit D)(Employer-Insurer's Exhibit 2).

On November 9, 2009, Employee went to the bathroom and slipped on a throw rug near the sink causing her to fall to the floor. Employee went to Southeast Missouri Hospital for treatment (Employee's Exhibit G). On November 24, 2009, Employee returned to Dr. Nogalski and reported back pain following her November 9, 2009 fall. Dr. Nogalski continued Employee's seated only work and returned Employee back to work. On January 11, 2011, Employee returned to Dr. Nogalski for a supplemental evaluation and complained of continued pain, aching, and popping in her knees along with continued back pain. Dr. Nogalski placed Employee at maximum medical improvement, assigned a 15% permanent partial disability to the right knee and a 5% permanent partial disability to the left knee, and concluded that no additional injury resulted from the September 10, 2009 work injury (Employee's Exhibit D).

Employee was then sent to Dr. Keith Wilkey for evaluation of her low back. Dr. Wilkey recommended an MRI (Employee's Exhibit H). Employee also received treatment from River City Health Clinic for her low back during the delays in treatment between these doctors (Employee's Exhibit E). On April 12, 2010, Employee's care was transferred to Dr. James Doll. Dr. Doll opined that Employee's September 10, 2009 work injury was not the prevailing factor for Employee's current back complaints or pathology on the MRI (Employer-Insurer's Exhibit 3). After treating with Dr. Scott, Employee treated with Dr. Kevin Vaught who recommended physical therapy and a TENS unit (Employee's Exhibits L & M).

On July 31, 2010, Dr. Dwight Woiteshek evaluated Employee and opined that Employee's September 10, 2009 work injury was the prevailing factor in causing the Employee's "traumatic markedly comminuted displaced intra-articular tibia plateau fracture of the right knee" and "traumatic depressed comminuted fracture of the posterior lateral tibial plateau of the left knee." Further, Dr. Woiteshek testified that Employee's November 9, 2009 work injury was the prevailing factor in causing the "traumatic bulging of the L3/4 disk with L3 nerve impingement." After noting that there was a high probability that Employee would need future medical care for her right knee due to post-traumatic osteoarthritis, which would likely involve arthroscopic debridement or knee replacement surgery, Dr. Woiteshek assessed a 45% permanent partial disability of the right knee along with a 20% permanent partial disability of the left knee as a direct result of the September 10, 2009 work injury and a 30% permanent partial disability of the body as a whole at the lumbar spine as a direct result of the September 10, 2009 work injury. Finally, Dr. Woiteshek opined that Employee was permanently and totally disabled due to the combinations of the work injuries of September 10, 2009 and November 9, 2009 (Employee's Exhibit Y).

Mr. Timothy Lalk, a Vocational Rehabilitation Expert, evaluated Employee on September 28, 2010 and opined that considering the restrictions of Dr. Nogalski and Dr. Woiteshek that he would recommend unskilled entry level jobs such as a counter clerk or desk job, but Employee does not have the cognitive abilities to read or record information as it would be required in those jobs. Thus, Mr. Lalk opined that Employee was not able to secure and

maintain employment in the open labor market and that she is not able to compete for any position (Employee's Exhibit AA).

On May 25, 2011, Mr. Vincent Stock, a licensed psychologist and vocational rehabilitation expert evaluated Employee and opined that Employee had a 30% permanent partial psychological impairment of the person as a whole. After noting that Employee had a generalized anxiety disorder stemming from the September 10, 2009 work accident, Mr. Stock explained that of his assessment of permanent partial disability half was attributable to the September 10, 2009 work injury (generalized anxiety) and the other half predated the work injury (mild mental retardation). Further, Mr. Stock opined that Employee was permanently and totally disabled due to a combination of her mental and physical limitations (Employee's Exhibit AA).

At the time of the hearing, Employee offered several medical bills that she incurred for treatment related to the November 9, 2009 work injury and the various delays in care from Employer-Insurer. With regard to her bilateral knees, Employee testified that she continued to have problems that included pain, difficulty walking, decreased range of motion, popping, stiffness, and problems with stairs. Further, Employee testified that she continued to have problems with her low back that included pain, muscle spasms, radiating leg pain, and difficulty sitting. Finally, Employee noted that she continued to have psychological problems that included problems sleeping and anxiousness.

#### **APPLICABLE LAW:**

- Section 287.020.3(2) RSMo. states “an injury shall be deemed to arise out of and in the course of employment only if: (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.”
- Under Section 287.140.1., “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”. Further, the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select her own physician at her own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo.2003) makes it clear that the employer is not liable for medical expenses if the health care providers allowed write-offs and reductions and the employee is no longer legally subject to additional liability. The Supreme Court noted, “It is a defense of Personnel Pool, as

employer, to establish that Ms. Farmer-Cummings was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished and that the reason that her liability was extinguished does not otherwise fall within the provisions of Section 287.270.” *Id.*

- 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).
- Temporary total disability benefits are intended to cover the healing period and are not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after her condition has reached the point where further progress is not expected. *Brookman v Henry Transportation*, 924 S.W. 2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company*, 694 S.W. 2d 488, 489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in her present physical condition. *Brookman Id.* at 290.
- 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).

## **RULINGS OF LAW:**

### ***Issue 1. Medical Causation (09-092637)***

Employer-Insurer has disputed the claim of Employee that her low back injury was medically and causally related to her work injuries. In support of their position, they have offered the opinion of Dr. James Doll and Dr. Michael Nogalski (Employer-Insurer's Exhibits 2 & 3). Both Dr. Doll and Dr. Nogalski opined that Employee's work injury of September 10, 2009 did not cause Employee's low back injury, but also failed to fully address whether or not Employee's November 9, 2009 work injury caused Employee's low back injury. Conversely, Dr. Dwight Woiteshek reviewed all of Employee's records and opined that Employee's November 9, 2009 work injury was the prevailing factor in causing the "traumatic bulging of the L3/4 disk with L3 nerve impingement" (Employee's Exhibit Y). Dr. Nogalski's records also verify that Employee mentioned her low back complaints at her first appointment following the November 9, 2009 work injury (Employee's Exhibit D)(Employer-Insurer's Exhibit 2). Based the evidence, I therefore find the opinions of Dr. Nogalski and Dr. Doll to be not credible and find that the opinions of Dr. Woiteshek to be more credible than any conflicting opinion.

Employee's testimony of a work related November 9, 2009 injury is also corroborated by the evidence, and Employer-Insurer cannot point to sufficient credible evidence to contradict Employee's version of the work related accident. Consequently, I find Employee credible. Based on the evidence and my above findings, I further find that Employee has satisfied her burden of proof regarding medical causation. Therefore, I find that Employee's November 9, 2009 work injury was the prevailing factor in causing Employee's traumatic bulging of the L3/4 disk with L3 nerve impingement.

### ***Issue 1. Previously Incurred Medical Aid & Issue 6. Medicaid Lien (09-071448); Issue 2. Previously Incurred Medical Aid & Issue 7. Medicaid Lien (09-092637)***

Employee has requested an award of the medical bills totaling \$14,505.83 for treatment that she incurred for treatment related to the initial November 9, 2009 work injury and the various delays in care from Employer-Insurer (Employee Exhibits O-X). Employer has disputed these bills on the basis of medical causation. Based on the evidence and my above rulings regarding causation, I find that the evidence also supports a finding that the charges were reasonable and the treatment was causally related to Employee's work injuries.

Many of these bills unequivocally establish that the health care providers accepted partial payment by Medicaid, and as required by law, adjusted the balances. The facts in this case do not support a finding that Employee remains personally liable for any of the adjustments or

reductions, nor is there any evidence to indicate that these reductions resulted from payment by a collateral source, independent of the Employer. To the contrary, when physician agree to accept payment from Medicaid, they are legally prohibited from collecting the remaining balance due from the Medicaid patient. In this case, the bills themselves confirm that the health care professional who received Medicaid payments has adjusted their bills and Employee is no longer legally liable for the amount of those adjustments. Based on this evidence, I find that all of these bills must be reduced by the amount of the Medicaid adjustments.

After a thorough review of the bills, I find that Employee is entitled to recover her out of pocket expenses and outstanding balances related to this treatment in the total amount of \$566.80 (Exhibit O - \$2.00, Exhibit Q - \$71.50, Exhibit R - \$460.50, Exhibit T - \$0.50, Exhibit V - \$1.50, Exhibit W - \$25.80, Exhibit X - \$5.00). Employer-Insurer is therefore directed to the pay to Employee the sum of \$566.80 for the medical bills related to the treatment of Employee's work injuries.

As previously noted, the Department of Social Services, Division of Medical Services, has filed a lien dated June 21, 2012, in the total amount of \$1,500.76 in Injury No. 09-071448 and a lien dated June 21, 2012, in the total amount of \$1,537.10 in Injury No. 09-092637. After reviewing the evidence and liens, I find that all of the charges reflected therein appear to be related to treatment for Employee's two work injuries. Based on the evidence, I find that the Department of Social Services, Division of Medical Services, is entitled to repayment of their lien in the amount of \$3,037.86 by the Employer-Insurer. Therefore, Employer-Insurer is directed to the pay to Department of Social Services, Division of Medical Services, the sum of \$3,037.86 for its lien related to the treatment of Employee's work injuries.

***Issue 2. Future Medical Aid (09-071448); Issue 3. Future Medical Aid (09-092637)***

Employee has alleged that she will require future medical aid to cure and relieve her from the effects of her September 10, 2009 or November 9, 2009 work related injuries. In support of her position, Employee has offered the opinion of Dr. Dwight Woiteshek who opined that there was a high probability that Employee would need future medical care for her right knee due to post-traumatic osteoarthritis, which would likely involve arthroscopic debridement or knee replacement surgery. Based on my above findings and the evidence, I find that the medical evidence supports a finding that Employee will require future medical treatment to cure and relieve her from the effects of her September 10, 2009 work related injury in accordance with Dr. Woiteshek's opinions. Employer is therefore directed to furnish additional medical treatment related to Employee's September 10, 2009 work related right knee condition in accordance with Section 287.140 RSMo.

With regard to any remaining request by Employee for future medical aid to cure and relieve her from the effects of her September 10, 2009 or November 9, 2009 work related injuries, I find that Employee has failed to meet her burden of proof and that the evidence does not support any additional award of future medical aid.

***Issue 3. Additional Temporary Total Disability (09-071448); Issue 4. Additional Temporary Total Disability (09-092637)***

Employee is requesting an award for temporary total disability from November 9, 2009 to July 31, 2010 in the amount of \$8,483.93. It is important to note that Employee has failed to offer a sufficient credible medical opinion that the reason she was taken off of work by her primary care physician was from the effects of her September 10, 2009 or November 9, 2009 work related injuries. Additionally, Employer-Insurer has offered sufficient evidence that Employer would have provided Employee with light duty that accommodated her restrictions. After a thorough review of all the evidence, I therefore find that Employee has failed to meet her burden of proof that she was temporarily and totally disabled during that period as a result of her September 10, 2009 or November 9, 2009 work related injuries. Employer-Insurer is not required to pay and Employee is not entitled to receive any further temporary total disability benefits in this matter.

***Issue 4. Nature and Extent of Disability & Issue 5. Liability of the Fund (09-071448); Issue 5. Nature and Extent of Disability & Issue 6. Liability of the Fund (09-092637)***

Employee has alleged that either Employer or the Second Injury Fund is liable for permanent and total disability benefits as a result of her September 10, 2009 or November 9, 2009 work related injuries. In addition to Dr. Woiteshek's opinions, Employee has offered the opinion of Mr. Timothy Lalk, a vocational rehabilitation expert, and Mr. Vincent Stock, a licensed psychologist and vocational rehabilitation expert. It is important to note that the Employer-Insurer and the Second Injury Fund have failed to offer sufficient credible evidence to discredit the opinions of Mr. Lalk and Mr. Stock. Therefore, I find the opinions of Mr. Lalk and Mr. Stock to be credible. Dr. Woiteshek's, Mr. Lalk's, and Mr. Stock's opinions along with the medical records unequivocally support a finding of permanent and total disability as a result of a combination of Employee's September 10, 2009 and November 9, 2009 work related injuries. Consequently, I find that the Employer-Insurer is not liable for permanent total disability benefits as a result of Employee's September 10, 2009 work related injury or Employee's November 9, 2009 work related injury.

Although Employer is not liable for permanent total disability benefits, Employer is still liable for permanent partial disability. Based on this evidence, I find that as a result of the September 10, 2009 work related injury that Employee suffered a 10% permanent partial disability of her body as a whole at the 400 week level referable to her anxiety condition; a 35% permanent partial disability of her right lower extremity at the 160 week level; and a 10% permanent partial disability of her right lower extremity at the 160 week level. This equals 112 weeks of disability. Employer is therefore directed to pay to Employee the sum of \$226.67 per week for 112 weeks for a total award of permanent partial disability relating to the September 10, 2009 work related injury of \$25,387.04. Based on this evidence, I find that as a result of the November 9, 2009 work related injury that Employee suffered a 15% permanent partial disability of her body as a whole at the 400 week level referable to her lumbar spine. This equals 60 weeks of disability. Employer is therefore directed to pay to Employee the sum of \$226.67 per week for

60 weeks for a total award of permanent partial disability relating to the November 9, 2009 work related injury of \$13,600.20. The total award of permanent partial disability benefits awarded to Employee against Employer-Insurer is \$38,987.24. Based on the evidence and stipulation of the parties, I find that Employee reached her maximum level of medical improvement and the end of the healing period on July 31, 2010. Since Employer-Insurer's liability for permanent partial disability benefits has accrued prior to the date of the award, the Employer-Insurer shall make a lump sum payment for the total past due amount.

Based on the evidence and my above findings, the Second Injury Fund is clearly liable for permanent total disability benefits related to the November 9, 2009 work related injury combined with her pre-existing injuries in accordance with Dr. Woiteshek's, Mr. Lalk's, and Mr. Stock's opinions. With regard to the September 10, 2010 work related injury, I find that Employee has failed to her burden of proof that she is entitled to any benefits against the Second Injury Fund. Although her primary injury of September 10, 2010 met the statutory threshold to qualify her for Second Injury Fund benefits, I find that all of Employee's pre-existing injuries including her pre-existing 10% permanent partial disability referable to her mild mental retardation fail to meet the applicable statutory thresholds required for an award of permanent partial disability benefits against the Second Injury Fund. Thus, Employee's claim against the Second Injury Fund in Injury No. 09-071448 is denied. I further find that the preexisting disabilities to November 9, 2009 were a hindrance or obstacle to Employee's employment or reemployment and that these preexisting disabilities and her November 9, 2009 work related disabilities combined synergistically causing Employee to be permanently and totally disabled.

In accordance with my above findings, Employer-Insurer's liability for permanent partial disability was 60 weeks of compensation for the November 9, 2009 work related injury covering the time period of August 1, 2010 to September 24, 2011. Since Employee's permanent partial disability rate (\$226.67) is the same as the agreed rate of compensation for permanent total disability, the Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing September 25, 2011. The Second Injury Fund is therefore directed to pay to Employee the sum of \$226.67 per week commencing on September 25, 2011, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of Employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to her regular work or its equivalent as provided in Section 287.200.2. Since part of the Second Injury Fund's liability has accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for the appropriate amount that is past due.

#### **ATTORNEY'S FEE:**

Matthew Edwards, attorney at law, is allowed a fee of costs plus 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.

Made by:

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Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*