

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

Injury No.: 09-040114

Employee: Katy Dierks
Employer: Kraft Foods
a/k/a Adair Foods Company
Insurer: Indemnity Insurance Company of North America
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 January 14, 2014. The award and decision of Administrative Law Judge Vicky Ruth, issued January 14, 2014, 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 25th day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Katy Dierks	Injury No. 09-040114
Dependents:	N/A	
Employer:	Kraft Foods, also known as Adair Foods Company	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Indemnity Insurance Company of North America	Jefferson City, Missouri
Hearing Date:	October 8, 2013	Checked by: VR/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 17, 2009.
5. State location where accident occurred or occupational disease was contracted: Kirksville, Adair County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant tripped over an air hose and fell to her knees.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Left knee.
14. Nature and extent of any permanent disability: as to the employer/insurer, 25% permanent partial disability of the left knee; as to the Second Injury Fund, permanent and total disability.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$1,087.24.
17. Value necessary medical aid not furnished by employer/insurer? \$12,800.

- 18. Employee's average weekly wages: \$654.66.
- 19. Weekly compensation rate: \$404.66/\$436.44.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable from employer:

Permanent partial disability of 25% of the left knee:	\$16,186.40
<u>Unpaid temporary total disability benefits:</u>	<u>\$10,786.30</u>
Total:	\$26,972.70

- 22. Second Injury Fund liability: permanent and total disability benefits (including differential); see Award.
- 23. Future medical awarded: Yes, see award.

Said payments to begin immediately and to be payable and 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: Joshua Perkins.

Employee: Katy Dierks

Injury No. 09-040114

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Katy Dierks

Injury No. 09-040114

Dependents: N/A

Employer: Kraft Foods, also known as Adair Foods Company

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Indemnity Insurance Company of
North America

On October 8, 2013, Katy Dierks, (the claimant) and Kraft Foods Company, also known as Adair Foods, (the employer), Indemnity Insurance Company of North America (the insurer), and the Second Injury Fund appeared in Jefferson City, Missouri, for a final award hearing. Claimant was represented by attorney Joshua Perkins. The employer/insurer was represented by attorney Rick Montgomery; attorney Amanda Sterchi observed on behalf of the employer/insurer. The Second Injury Fund was represented by Adam Rowley, Assistant Attorney General. Claimant testified in person at the hearing. Mary Titterington, Dr. P. Brent Koprivica, Dr. Peter Buchert, Dr. Christopher Main, Dr. Raymond Cohen, and Gary Weimholt testified by deposition. The Administrative Law Judge set October 29, 2013, as the deadline for the filing of briefs. At the request of the employer/insurer, the deadline was extended. Claimant and the Second Injury Fund filed their briefs on November 19, 2013. The employer/insurer filed its brief on November 22, 2013.

STIPULATIONS

The parties stipulated to the following:

1. On or about January 17, 2009, Katy Dierks (the claimant) was an employee of Kraft Foods, also known as Adair Foods (the employer), when she sustained an injury by accident to her left knee while in the course and scope of her employment with the employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by the Indemnity Insurance Company of North America (the insurer).
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Adair County is proper. By agreement of the parties, the hearing was held in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's average weekly wage is \$654.66, yielding a weekly compensation rate of \$436.44 for permanent total disability and temporary total disability benefits.

Employee: Katy Dierks

Injury No. 09-040114

8. Medical aid was provided in the amount of \$1,087.24.
9. No temporary disability payments were made.

ISSUES

The issues to be resolved in this proceeding are as follows:

1. Whether claimant sustained an injury to her left knee as a result of the work accident.
2. Medical causation/whether the accident is the prevailing factor in causing the resulting medical condition to claimant's left knee.
3. Temporary total disability benefits in the amount of \$10,786.30 for 8/28/09 – 2/18/10, a period of 24 and 5/7th weeks.
4. Unpaid medical bills in the amount of \$12,800.00.
5. Future medical care.
6. Nature and extent of permanent partial disability,
7. Permanent total disability.
8. Second Injury Fund liability.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

- | | |
|-----------|-------------------------------------------------------------------------------|
| Exhibit A | Claim for Compensation, Injury No. 09-040114. |
| Exhibit B | Answer filed by the employer/insurer. |
| Exhibit C | Amended Claim for Compensation. |
| Exhibit D | Amended Answer filed by the employer/insurer. |
| Exhibit E | Amended Answer filed by the Second Injury Fund. |
| Exhibit F | Medical report of Dr. Koprivica (12/29/2010). |
| Exhibit G | Addendum to medical report of Dr. Koprivica (8/09/2011). |
| Exhibit H | Vocational Rehabilitation Evaluation Report of Mary Titterington (4/13/2011). |
| Exhibit I | Medical report of Dr. Buchert (7/09/2010). |
| Exhibit J | Medical records of Dr. Anderson. |
| Exhibit K | Medical records of Northeast Regional Medical Group. |
| Exhibit L | Medical records of Northeast Regional Medical Group. |
| Exhibit M | Medical records of Dr. Sparks. |
| Exhibit N | Medical records of Northeast Regional Medical Group. |
| Exhibit O | Medical records of New Concepts Open MRI. |
| Exhibit P | Medical records of Dr. Buchert. |
| Exhibit Q | Medical records of Dr. Buchert. |
| Exhibit R | Medical records of Dr. Wilson. |
| Exhibit S | Medical records of Dr. McMurtry. |
| Exhibit T | Medical records of Moore Hearing Clinic. |
| Exhibit U | Itemization of medical bills. |

Employee: Katy Dierks

Injury No. 09-040114

Exhibit V Columbia Orthopaedic Surgery Center bill.
Exhibit W Dr. Buchert's itemized bill.
Exhibit X Dr. Buchert's itemized bill.
Exhibit Y Deposition of Mary Titterington (10/27/2011).
Exhibit Z Deposition of Dr. Koprivica (11/9/2011).
Exhibit AA Deposition of Dr. Buchert (2/22/2012).

On behalf of the employer/insurer, the following exhibits were admitted into the record:

Exhibit 1 Deposition of Dr. Christopher Main (3/06/2013).
Exhibit 2 Deposition of Dr. Raymond Cohen (9/03/2013).
Exhibit 3 Deposition of Gary Weimholt (9/19/2013).
Exhibit 4 *Curriculum Vitae* of Dr. Robert Sparks.
Exhibit 5 Medical report dated 9/26/2012 of Dr. Sparks.
Exhibit 6 Medical records of Dr. Sparks.
Exhibit 7 FMLA form.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. All depositions were admitted subject to any objections contained therein. Unless noted otherwise, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant's date of birth was January 2, 1945. On the date of the hearing she was 68 years old. She lives in Bloomfield, Iowa.
2. Claimant is a high school graduate. She attended college for approximately one and a half years but did not receive a degree. Claimant began working for the employer on December 1, 1998. The employer is a factory located in Kirksville, Missouri that produces luncheon meats. Claimant's job title was Operation Technician. Claimant's job duties included loading meat and removing meat from coolers and placing it on pallets, running a meat slicer, monitoring the machines, checking and weighing boxes, and using pallet jacks to transport pallets of meat throughout the facility. She typically worked twelve hour shifts from 12:00 a.m. to 12:00 p.m.
3. Claimant testified that approximately 10 hours of her 12 hour shift were spent standing or walking on a concrete surface within the plant facility. Claimant's job required her to spend the majority of her day walking and being on her feet. The most she was required to lift was approximately 15 pounds. Claimant testified that she was receiving regular overtime prior to the January 17, 2009 work injury.
4. On January 17, 2009, claimant was in the pack room when her feet became entangled in an air hose that had been left on the concrete floor. Claimant tripped and fell directly

onto both of her knees and outstretched hands. Claimant testified that her left knee bore the brunt of the fall. Claimant injured her left knee from the direct blow onto the concrete floor.

5. Claimant's fall was witnessed by co-worker, Niki Peterson, who came to claimant's aid and assisted her in getting up from the floor. An incident report was prepared the same day by claimant's supervisor, Rick Combs.
6. Claimant experienced the immediate onset of symptoms in her left knee following the fall. She noted sharp pain behind her knee cap and swelling.
7. Claimant requested medical treatment from her employer; however, she could not get into the employee health clinic until February 3, 2009. Claimant continued to work during this time period but stated that her job duties were very difficult to perform due to the pain and swelling in her left knee. Claimant stated that she would wear ice packs to and from work as she drove to work.
8. On February 3, 2009, claimant was examined by Dr. Robert Sparks. The medical records reflect that claimant complained of left knee pain and arm pain after tripping on an air hose at work.¹ Claimant complained of pain and swelling about her left knee. On physical examination, Dr. Sparks noted "discoloration secondary to bruising . . . there is some slight swelling, and there is limited flexion of the knee secondary to pain."² Dr. Sparks goes on to note that "there is a significant amount of tenderness in the prepatellar bursa area which is very tender and painful to palpitation. The discoloration extends down the anterior tibia approx. 1/3 of its way beyond...."³ Dr. Sparks diagnosed claimant with a contusion of the left knee and prescribed Aleve. He also scheduled a follow-up visit for one week.
9. On February 10, 2009, claimant returned to Dr. Sparks for a follow-up exam. Dr. Sparks continued the Aleve and prescribed home exercises to work on claimant's range of motion. He continued her at full duty and recommended a follow-up visit in two weeks.
10. Claimant returned to Dr. Sparks on February 25, 2009, wherein she was released from his care. Claimant testified that she had experienced some improvement and thought her left knee problem would resolve with time.
11. Claimant continued full duty. Her symptoms, however, did not resolve and so she requested authorization from her employer to return to Dr. Sparks for additional treatment on her left knee. The employer allowed her to return to Dr. Sparks.
12. The medical records reflect that claimant returned to Dr. Sparks on May 15, 2009. The records of Dr. Sparks indicate that claimant was complaining of "quite a bit of pain along

¹ Exh. M.

² *Id.*

³ *Id.*

the joint line and locking sensation of her left knee.”⁴ Dr. Sparks ordered an MRI of claimant’s left knee.

13. On June 02, 2009, an MRI of claimant’s left knee was performed. The MRI report indicated arthritis in claimant’s left knee and a horizontal tear of her medial meniscus.⁵
14. Claimant returned to Dr. Sparks on June 3, 2009. Dr. Sparks commented on claimant’s cartilage loss in her left knee and confirmed the medial meniscus tear. Dr. Sparks stated that “[S]he also has a medial meniscus tear in the body of the meniscus, **that I think could certainly be work related.** I do not think that the cartilage loss of her tibia and femur are work related. I think she has 2 ongoing processes here, i.e. the tear of the medial meniscus **could in fact be work related,** the loss of cartilage from the femur and tibia and patellar are not work related and I think that those are processes that have been going on for a while.”⁶ Dr. Sparks referred claimant to an orthopedic surgeon for further treatment.
15. On June 8, 2009, claimant was evaluated by Dr. Christopher Main, an orthopedic surgeon, at the request of the employer. Dr. Main diagnosed claimant with a left knee contusion, work related, and osteoarthritis of the left knee, non-work related.⁷ Dr. Main recommended surgery on claimant’s left knee to repair the torn meniscus but suggested that the surgery be performed under claimant’s private health insurance. Dr. Main released claimant to return to work without restrictions on June 8, 2009.
16. Claimant was not provided additional treatment from the employer. Claimant testified that her left knee continued to remain symptomatic and was not improving. She was having difficulty performing her job duties. As such, she sought treatment on her own with Dr. Peter Buchert with the Columbia Orthopedic Group. Claimant was familiar with Dr. Buchert as he had performed surgery on her right knee in 2006.
17. Claimant was seen by Dr. Buchert on July 7, 2009, less than 30 days after being informed that she needed surgery by Dr. Main.⁸ Dr. Buchert’s medical records from July 7, 2009, indicate that claimant was in his office because “**in January 2009 while at work, she tripped over a hose and since that time, she has had significant left knee pain.**”⁹ Dr. Buchert’s notes are consistent with claimant’s testimony regarding her ongoing complaints in her left knee. Dr. Buchert administered a steroid injection and told claimant to follow up in one month.
18. Claimant returned to Dr. Buchert on August 18, 2009, and arthroscopic surgery was recommended.

⁴ Exh. M.

⁵ Exh. O.

⁶ Exh. M.

⁷ Exh. 1.

⁸ Exh. P.

⁹ *Id.*

Employee: Katy Dierks

Injury No. 09-040114

19. On August 28, 2009, claimant underwent arthroscopic surgery with Dr. Buchert. The doctor took claimant off of work following her August 28, 2009 left knee surgery, and placed her on crutches.¹⁰
20. Claimant saw Dr. Buchert in a follow up visit on August 31, 2009. He continued her on crutches and off of work.
21. The medical records reflect that claimant followed up with Dr. Buchert on September 21, 2009, October 12, 2009, November 2, 2009, and December 2, 2009. Dr. Buchert kept claimant off of work through each of these follow up visits.
22. In Dr. Buchert's December 2, 2009 office note, there was a discussion about claimant returning to work on December 24, 2009; however, claimant was not allowed to do so by Dr. Buchert.
23. Claimant was eventually released to return to work on February 18, 2010. Claimant attempted to return to work but was unable to perform her job duties to her knee pain. Claimant has not been gainfully employed since her last day of work with employer.
24. Dr. Buchert in a July 9, 2010 letter to claimant's attorneys indicated that claimant was relatively asymptomatic prior to her January 17, 2009 injury.¹¹ It is Dr. Buchert's opinion within a reasonable medical certainty that the fall claimant had at her employer's was the prevailing factor in causing her to have surgery and also for her follow-up care. He also notes that "[w]hile Ms. Dierkes certainly had significant arthritis prior to this fall, it is my opinion that if she had not had this fall she would have gone a long period of time before her knee would have become symptomatic."¹² Dr. Buchert also opined that claimant will need additional medical treatment in the future, including a total knee replacement, although he cannot say when she will need it. Dr. Buchert noted that claimant would no longer be able to work a job that involved standing for a substantial period of time.

Pre-existing injures

25. Although claimant did have some pre-existing degeneration to her left knee, such condition caused claimant few if any problems.
26. Claimant had a prior serious injury to her right knee, which was diagnosed in late 2005. She was diagnosed with severe degenerative joint disease and a meniscus tear in her right knee.¹³ She underwent steroid injections and then had arthroscopic surgery on the knee in 2006. Although she was able to return to work, she continued to experience pain and swelling in the right knee; she took Aleve to help with these symptoms. Her right knee condition progressively worsened following her surgery in 2006.

¹⁰ Exh. P.

¹¹ Exh. I.

¹² *Id.*

¹³ Exh. J.

Dr. P. Brent Koprivica – Independent Medical Examination

27. On or about December 29, 2010, Dr. P. Brent Koprivica examined claimant for an Independent Medical Examination (IME). Dr. Koprivica noted that claimant complained of severe pain in both knees. Claimant reported that as to her work injury, her left knee pain is so severe that she has to use a cane. She indicated she cannot squat, crawl, kneel, or climb ladders because of the left knee pain alone. Stairs are difficult for her and she must rely on the railing to go up or down stairs. She told Dr. Koprivica that she was limited to standing or walking for only 15 minutes. As to her past medical history, claimant reported that she had a right knee arthroscopy in 2006. She has also had radioactive iodine ablation of the thyroid and is gravida II, para II. Claimant reported that she did not have a significant industrial disability before her January 17, 2009 work injury. Dr. Koprivica recorded that “[h]er perception is that she was capable of doing all activities without hindrance or limitation. She does not believe she had any significant obstacle as to employment.”¹⁴ Claimant also reported that before the 2009 accident, she worked without restrictions and did not have any accommodations in her work; she even worked overtime.
28. Upon examination, Dr. Koprivica noted that claimant had a severe limp on the left and used a cane in her right hand. Claimant had severe patellofemoral compartment pain bilaterally and severe medial compartment pain bilaterally. The doctor noted varus deformity in both knees. Dr. Koprivica indicated that claimant has a “complex presentation” and that it is clear from the records that she did have significant joint disease involving multiple joints, including both knees, before the January 2009 work injury.¹⁵ Dr. Koprivica, however, opined that claimant’s history would indicate degenerative joint disease in her knees at the time of the accident. He noted that claimant was working without absences, was even working overtime without the need for accommodations, and there were no hindrances or limitations in her abilities. Dr. Koprivica noted that the January 2009 injury was the “direct, proximate and prevailing factor in the disabling symptoms involving the left knee . . . that necessitated the arthroscopic intervention.”¹⁶ He indicated that the partial medial meniscectomy, which was based on a medial meniscus tear, did aggravate, accelerate, and intensify the degenerative joint disease and resultant disability.
29. Dr. Koprivica opined that the medical treatment claimant received for her left knee after the January 2009 accident was medically reasonable and a direct necessity in an attempt to cure and relieve claimant of the effects of the permanent injuries she sustained on January 17, 2009.¹⁷ Dr. Koprivica found that claimant was at maximum medical improvement (MMI). He also noted, however, that if claimant is felt to be a candidate for a total knee arthroplasty on the left, he would consider the January 2009 injury and the subsequent care and treatment necessitated by the January 2009 injury to be the prevailing factors in the need for total arthroplasty.¹⁸ He recorded that “[a]lthough it is possible that Ms. Dierks would have developed symptoms from degenerative joint disease in the left knee and ultimately would

¹⁴ Exh. F, p. 5.

¹⁵ Exh. F, p. 14.

¹⁶ Exh. F.

¹⁷ Exh. F, p. 15.

¹⁸ Exh. F, pp 15-16.

have needed a total knee arthroscopy on the left knee, it is speculative to state when or if that would have occurred without the intervening injury of January 17, 2009.”¹⁹

30. Dr. Koprivica indicated that in reference to the January 2009 injury, claimant would be restricted from squatting, crawling, kneeling, or climbing, and that she would be limited to primarily seated activities. He recommended that standing and walking intervals be limited to less than 30 minutes with the flexibility of standing when necessary. Ideally, she should limit cumulative standing and walking activities to two hours or less on an eight-hour basis. She should also be allowed to use a cane.²⁰ In general, he would restrict claimant to the sedentary physical demand level of activities as defined by *The Dictionary of Occupational Titles*, Fourth Edition, Revised 1991.²¹ He noted that claimant believes that she is totally disabled; Dr. Koprivica, however, recommended a vocational evaluation. He indicated that if the vocational expert found claimant to be permanently totally disabled based on his restrictions from the January 2009 accident, then **he would consider claimant to be permanently totally disabled based on the residuals attributable to the January 17, 2009 injury considered in isolation. He reiterated that he has not identified any pre-existent industrial disabilities of any significance.**²² However, the doctor also noted that it would be unusual to have permanent total disability based on “the impairment involving the left knee considered in isolation.”²³ Dr. Koprivica indicated that claimant can no longer perform her job with the employer.²⁴

Mary Titterington - Vocational Evaluation

31. On or about April 6, 2011, Mary Titterington, a vocational consultant, provided a vocational evaluation of claimant.²⁵ In her April 13, 2011 report, Ms. Titterington noted that claimant was observed to walk with a cane and to have significant difficulty hearing. Claimant wore a hearing aid in her left ear. She indicated that one had also been prescribed for her right ear but she could not afford it and she wanted to determine if the hearing aid would actually help before she spent the money. Ms. Titterington noted that claimant has been diagnosed and/or treated for the following medical conditions: severe osteoarthritis of the left knee, left knee contusion, bilateral carpal tunnel syndrome, hypo-thyroidism, sleep apnea, degenerative medial meniscus, intrapatella bursitis, inflammatory arthritis of the right wrist, and possible rheumatoid arthritis. Claimant has had arthroscopic surgery of the left knee and a thyroid ablation. Claimant reported significant anxiety since being off work; she cried frequently when talking about her problems. Claimant reported substantial trouble with focus and attention, which has been a problem since high school. Claimant reported that she must be very careful when taking showers, and that she has not attempted a tub bath in years as she had difficulty prior to her work injury taking a tub bath.²⁶

¹⁹ Exh. F, p. 16.

²⁰ *Id.*

²¹ Exh. F.

²² Exh. F, p. 17.

²³ *Id.*

²⁴ Exh. F, p. 18.

²⁵ Exh. H.

²⁶ Exh. H, p. 4.

32. Ms. Titterington noted that claimant has worked in a variety of unskilled and low semi-skilled labor-oriented jobs throughout her life. All of these jobs required sustained standing and walking throughout the day, as well as frequent bending, twisting, reaching, and lifting up to 50 pounds. Claimant cannot perform these jobs within the restrictions of Dr. Koprivica or Dr. Buchert. Ms. Titterington noted that claimant possesses no transferable skills within the restrictions established by either doctor.²⁷ Ms. Titterington indicated that claimant is an unskilled worker. She also opined that with claimant's overall low functioning, both mentally and physically, her hearing deficits, her low academic scores, and her low intellectual scores, her work base is eroded and there are no jobs available to her in the open labor market when all of these deficits and difficulties are considered.²⁸ According to Ms. Titterington, claimant is not a good candidate for vocational retraining given her impairments, low functioning level, and her age of 66 years. Ms. Titterington opined that claimant is unemployable on the open labor market.

Dr. P. Brent Koprivica – Addendum to Independent Medical Examination

33. On August 9, 2011, Dr. Koprivica provided an addendum to his report after reviewing numerous additional records.²⁹ He noted that Mary Titterington found claimant to be permanently and totally disabled. With Ms. Titterington's input, Dr. Koprivica opined that claimant is permanently and totally disabled, although he believed this was due to the January 2009 injury in isolation.

CONCLUSIONS OF LAW

Based upon the findings of fact, the stipulations, and the applicable law, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.³⁰ Proof is made only by competent and substantial evidence, and may not rest on speculation.³¹ Medical causation not within lay understanding or experience requires expert medical evidence.³² When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.³³

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.³⁴ Where there are conflicting medical opinions, the fact finder may

²⁷ Exh. H, p. 8.

²⁸ Exh. H, p. 9

²⁹ Exh. G.

³⁰ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

³¹ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

³² *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

³³ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

³⁴ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

Employee: Katy Dierks

Injury No. 09-040114

reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.³⁵

The fact finder is encumbered with determining the credibility of witnesses.³⁶ It is free to disregard that testimony which it does not hold credible.³⁷

Issue 1: Whether claimant sustained an injury to her left knee as a result of the accident.
Issue 2: Medical causation/whether the accident is the prevailing factor in causing the resulting medical condition to claimant's left knee.

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."³⁸

An "injury" is defined to be "an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."³⁹ An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and 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 non-employment life.⁴⁰

In this case, the employer admits that claimant suffered an "accident" on or about January 17, 2009. The employer also admits that the January 17, 2009 work injury resulted in a bone contusion of the left knee. The dispute between the parties is over the "prevailing factor" in causing claimant's torn medical meniscus and need for surgery performed by Dr. Buchert. I find that the testimony of claimant's treating orthopedic surgeon, Dr. Buchert, is more credible than that of Dr. Main and Dr. Sparks on this issue. As such, I find that the January 17, 2009 work injury is the prevailing factor in causing claimant's torn medial meniscus and her need for surgery as provided by Dr. Buchert for the reasons discussed below.

a) Claimant sustained an acute, identifiable injury to her left knee.

The parties agree that claimant sustained injury to her left knee when she tripped and fell directly onto her left knee. Although the employer argues that claimant suffered only a knee

³⁵ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

³⁶ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).

³⁷ *Id.* at 908.

³⁸ Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

³⁹ Section 287.020.3(1).

⁴⁰ Section 287.020.3(c).

contusion, the medical records indicate otherwise. Specifically, claimant was initially examined by Dr. Sparks on February 03, 2009, which was 17 days after the injury.⁴¹ Claimant complained of pain and swelling about her left knee. On physical examination, Dr. Sparks noted “discoloration secondary to bruising . . . there is some slight swelling, and there is limited flexion of the knee secondary to pain.”⁴² Dr. Sparks also recorded that “there is a significant amount of tenderness in the prepatellar bursa area which is very tender and painful to palpitation. The **discoloration extends down the anterior tibia approx. 1/3 of its way beyond....**”⁴³ [Emphasis added.] I find the impact from the fall was significant and that claimant’s injury was more than a simple knee contusion.

b) The medical opinion of claimant’s treating orthopedic surgeon, Dr. Buchert, is more credible than those of Dr. Main, Dr. Cohen, and Dr. Sparks.

Claimant’s June 2, 2009 MRI showed a medial meniscus tear in her left knee. The dispute between the parties is whether this medial meniscus tear is degenerative or traumatic in nature. In other words, did the January 17, 2009 direct blow to claimant’s left knee cause the medial meniscus tear identified on the MRI film? Dr. Buchert opined that the January 2009 work injury was the prevailing factor in causing claimant’s torn medial meniscus and was the prevailing factor in causing her need for the arthroscopic surgery. He also opined that such surgery was reasonable and necessary to treat the medial meniscus tear.⁴⁴

The employer points out that the radiologist, Dr. Adams, interpreted the MRI film and felt that the torn meniscus was degenerative in nature. This is also the opinion of Dr. Main, Dr. Cohen, and Dr. Sparks. It is thus the employer’s position that the torn meniscus was present prior to the January 17, 2009 work injury. Dr. Buchert acknowledges that the MRI film suggests the tear is degenerative; however, he testified that once he got inside claimant’s knee with the scope and personally examined the medial meniscus, he found the tears to be **acute** and not degenerative. Dr. Buchert provided the following testimony on cross examination on the issue of acute versus degenerative tears:

- Q: So is it fair to say that at least Dr. Adams, who is interpreting the film there, felt the meniscus problem was degenerative?
 A: No.
 Q: No?
 A: Because you need to read the rest of it. It says, [t]he tear of the posterior horn region is a horizontal tear near the free edge; in the body region there’s a vertical tear of the superior surface, so the – he was talking about the medial meniscus, both is degenerative, that [its] aging as it would in a 64-year-old person, but also there’s tears in there that are – that are in there that are significant.
 Q: And can that –

⁴¹ Exh. M.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Exh. AA, pp. 11-12.

Employee: Katy Dierks

Injury No. 09-040114

A: It not only degenerated but it also has tears.⁴⁵

Q: Is there somewhere that you're referring to where you would be able to tell whether it was acute or degenerative?

A: **I think it's a combination of the patient's history as well as the arthroscopic findings that are consistent with having this being a tear from her injury as opposed to just a wear-and-tear degenerative tear.**⁴⁶ [Emphasis added.]

I find that Dr. Buchert was in the best position to provide an opinion on whether the medial meniscus tear is acute or degenerative and I find his opinion more credible. Dr. Buchert had the benefit of being inside claimant's knee and personally examining the meniscal tears. Dr. Buchert is more familiar with the condition of claimant's left knee as he is her treating orthopedic surgeon. Dr. Buchert saw the tears first hand during the arthroscopic procedure and found the tears to be acute in nature. I find his opinion on this matter to be credible and convincing.

In addition, Dr. Koprivica also evaluated claimant and opined that the January 17, 2009 work injury was the direct, proximate, and prevailing factor in claimant's disability of the left knee. He noted that claimant did have pre-existing degenerative joint disease in her left knee, but that condition was asymptomatic and not disabling in any way before the 2009 work injury. Dr. Koprivica opined that the January 2009 work injury provided a "new structural change with the medial meniscus tear that was identified. That injury is the prevailing factor in needing to perform the surgery. And the outcome of that surgery is one that aggravated, accelerated and intensified the degenerative process of the knee that leads to the disability at this point."⁴⁷

The employer/insurer offered the medical opinion of Dr. Main. Dr. Main evaluated claimant on a single occasion, June 8, 2009, and was not claimant's treating physician. He did not have the benefit of being inside claimant's left knee and personally examining the meniscus tears. Dr. Main agreed that claimant had a torn medial meniscus and that she could benefit from surgery. Dr. Main, however, was of the opinion that the medial meniscus tear was degenerative and therefore pre-existed the January 2009 work event.⁴⁸ Dr. Main's opinion as to causation is not persuasive.

The employer/insurer had claimant evaluated by Dr. Raymond Cohen on September 3, 2013. Dr. Cohen's specialty is neurology, but the issue of causation in this case is orthopedic. Dr. Cohen has no orthopedic training other than a one year internship in medical school in 1980, and he has never actively practiced in the area of orthopedic surgery.⁴⁹ Dr. Cohen acknowledged that did not review claimant's June 2, 2009 MRI film and instead reviewed only the radiologist's

⁴⁵ Exh. AA, p. 31.

⁴⁶ Exh. AA, p. 32.

⁴⁷ Exh., pp. 15-16.

⁴⁸ Exh. 1.

⁴⁹ Exh. 2.

Employee: Katy Dierks

Injury No. 09-040114

report.⁵⁰ In his deposition, Dr. Cohen agreed that Dr. Buchert had the benefit of seeing the meniscal tears first hand.⁵¹ Importantly, Dr. Cohen offered the following testimony when posed a hypothetical:

- Q: Okay, I want you to assume hypothetically, Doctor, that the evidence at trial will be that Ms. Dierks had no improvement with respect to her left knee from the date that she last saw Dr. Sparks until July 7, 2009, when she first sees Dr. Buchert complaining of left knee pain. If that is the history that is believed, would that change your opinion, Doctor, about the causation of these meniscus tears; either horizontal or vertical?
- A: I believe she also saw a Dr. Anderson also. But if you're asking me to assume that she fell and injured her left knee and had no improvement for that entire period of time, **that would be the type of injury a person could have that would be consistent with a meniscal tear.**⁵² [Emphasis added.]

Claimant did not improve after being released by Dr. Sparks and Dr. Main. In fact, she made an appointment with Dr. Buchert on July 7, 2009, which is 29 days after being evaluated and released by Dr. Main on June 8, 2009. Dr. Cohen agrees that if the claimant remained symptomatic through her treatment with Dr. Buchert that the January 17, 2009 work injury could be the cause of her meniscal tear. I find that Dr. Cohen's opinion is not credible on the issue of causation.

The employer/insurer also offered the September 26, 2012 report of Dr. Robert Sparks. Dr. Sparks agreed with Dr. Main and Dr. Cohen on the issue of causation as to the meniscal tear. Dr. Sparks has not seen the claimant since June 3, 2009. It should be noted that in his last office visit after reviewing the MRI from June 2, 2009, Dr. Sparks commented on claimant's cartilage loss in her left knee and confirmed the medial meniscus tear. Dr. Sparks stated that "She also has a medial meniscus tear in the body of the meniscus, **that I think could certainly be work related.** I do not think that the cartilage loss of her tibia and femur are work related. I think she has 2 ongoing processes here, i.e. the tear of the medial meniscus **could in fact be work related,** the loss of cartilage from the femur and tibia and patellar are not work related and I think that those are processes that have been going on for a while."⁵³ Dr. Sparks then changed his opinion in his September 26, 2012 report, issued over three years after he released the patient on June 3, 2009. I do not give any weight to the opinion of Dr. Sparks on the matter of causation.

c) Claimant's left knee condition did not constitute an obstacle or hindrance to her employment prior to the January 17, 2009 work injury.

Claimant testified credibly that prior to her January 17, 2009 work injury she was asymptomatic with respect to her left knee with the exception of two office visits to

⁵⁰ Exh. 2, p. 38.

⁵¹ Exh. 2, p. 39.

⁵² Exh. 2, pp. 41-42.

⁵³ Exh. M.

Employee: Katy Dierks

Injury No. 09-040114

Dr. Anderson in 2004.⁵⁴ Claimant presented to Dr. Anderson on March 30, 2004, with complaints of left pain due to an increase of activity at work. She followed with Dr. Anderson on September 7, 2004, when an x-ray was ordered and no additional treatment was provided. Claimant did not seek any treatment for her left knee from September 7, 2004, through her primary injury of January 17, 2009, which is a gap of over 4 and ½ years. She saw her family doctor on only two occasions and no treatment, other than an x-ray, was performed on the left knee. There is no evidence that claimant's alleged preexisting left knee condition ever presented an obstacle or hindrance to her employment prior to January 17, 2009. Dr. Main agreed with this fact during his deposition.⁵⁵ Claimant did not have any permanent work restrictions on her left knee prior to the January 17, 2009, work injury. In fact, claimant was performing a physically demanding job that required her to be on her feet for 10 hours per day and walk long distances prior the January 17, 2009 work injury. She was able to perform her job duties without difficulty prior to the January 2009 work injury to her left knee.

I find the testimony of claimant's treating orthopedic surgeon, Dr. Buchert, to be the most reliable and credible on the issue of whether the January 17, 2009 work injury is the prevailing factor in causing claimant's left knee injury and need for surgery. I find that the January 17, 2009 direct trauma to claimant's left knee was the prevailing factor in causing her torn meniscus. I agree with Dr. Buchert that the arthroscopic surgery performed on August 28, 2009, was reasonable and necessary to cure and relieve claimant from her meniscal injury.

Issue 3: Temporary Total Disability

Claimant contends she is owed temporary total disability (TTD) for the period of August 28, 2009, through her release by Dr. Buchert on February 18, 2010, a period of 24 and 5/7 weeks. The employer/insurer denies liability for any TTD benefits.

Temporary total disability is provided for in Section 287.170, RSMo. This section provides, in pertinent part, that "the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made." The term "total disability" is defined in Section 287.020.6, as the "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." The purpose of temporary total disability is to cover the employee's healing period, so the award should cover only the time before the employee can return to work.⁵⁶ Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress."⁵⁷ Thus, TTD benefits are not intended to encompass disability after the condition has reached the point

⁵⁴ Exh. J.

⁵⁵ Exh. 1, p. 42.

⁵⁶ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. Banc 2003). See also *Birdsong v. Waste Management*, 147 S.W.3d, 132, 140 (Mo.App. S.D. 2004).

⁵⁷ *Cooper* at 575.

where further progress is not expected.⁵⁸ This is reflected in the language that TTD benefits last only “during the continuance of such disability.”⁵⁹

If an employee’s employer refuses to give work to an employee when it has work available to perform, the employee may be deemed to be unable to find reasonable employment and thus temporarily totally disabled, if the employee cannot compete for employment in the open labor market.⁶⁰ In *Herring v. Yellow Freight System, Inc.*, the court noted that factors that may be relevant to an employee’s employability on the open labor market include, but are not limited to, the following: 1) the anticipated length of time until the employee’s condition will reach the point of maximum medical progress; 2) the nature of the employee’s continuing course of medical treatment; and 3) whether there is a reasonable expectation that the employee will return to the employee’s former employment with the employer.⁶¹ If the anticipated length of time that remains until an employee’s condition will reach the point of maximum medical progress is very short, it will always be reasonable to infer that the employee cannot compete for employment in the open labor market.⁶² The ability or inability of an employee to return to employment refers to an employee’s ability to perform the usual duties of the employee’s regular employment in the manner that such duties are customarily performed by the average person engaged in those duties.⁶³

Claimant continued working full duty through the date of her left knee surgery with Dr. Buchert on August 28, 2009. The medical records from Dr. Buchert show that he took claimant off of work following her surgery on August 28, 2009, and placed her on crutches.⁶⁴ Claimant returned to Dr. Buchert on September 21, 2009, approximately three weeks post-surgery, and Dr. Buchert stated “we will keep her off of work for three more weeks.”⁶⁵ Claimant returned to Dr. Buchert on October 12, 2009, and Dr. Buchert stated “[w]e are going to keep her off of work for three weeks.”⁶⁶ Claimant returned on November 2, 2009, with continued complaints of swelling and pain in her left knee. Dr. Buchert’s office notes from this visit state “[a]t this point, we will keep her off work for another month.”⁶⁷ Dr. Buchert’s February 16, 2010 office notes indicate that the claimant was maintained off of work through February 18, 2010, when the claimant requested to return to work. Claimant testified that she attempted to return to work on about February 18, 2010, and only worked partial shifts for less than two weeks because she was unable to physically perform her job duties due to her left knee.

I find that the medical records show that claimant was kept off of work by her treating orthopedic surgeon, Dr. Buchert, from the date of her surgery, August 28, 2009, through her attempted return to work on February 18, 2010. Claimant did not receive any compensation

⁵⁸ *Cooper* at 575; *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo. App. E.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

⁵⁹ Section 287.170.1, RSMo.

⁶⁰ *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816 (Mo.App. W.D. 1995).

⁶¹ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570 (Mo.App. W.D. 1997).

⁶² *Id.*

⁶³ *Caldwell v. Melbourne Hotel*, 116 S.W.2d 232 (Mo.App. 1938).

⁶⁴ Exh. P.

⁶⁵ Exh. P.

⁶⁶ Exh. P.

⁶⁷ Exh. P.

Employee: Katy Dierks

Injury No. 09-040114

from the employer during this time period and was not compensated by any outside source. Although Dr. Main placed claimant at maximum medical improvement on June 8, 2009, this is contrary to the medical evidence. Dr. Buchert saw claimant on July 7, 2009, less than 30 days after seeing Dr. Main, and recommended additional treatment for claimant, including knee surgery that was performed on August 18, 2009.

I find that claimant did not reach maximum medical improvement until her release by Dr. Buchert on February 18, 2010. I further find that claimant was temporarily totally disabled from August 28, 2009, through her release by Dr. Buchert on February 18, 2010. This time period equals 24 and 5/7 weeks, for a total of \$10,786.30 in past due temporary total disability benefits when using a temporary total disability rate of \$436.44. I order the employer to pay past due temporary total disability compensation to claimant in the amount of \$10,786.30.

Issue 4: Unpaid medical bills**Issue 5: Future medical treatment**

Claimant requests reimbursement from the employer for medical expenses for treatment related to her left knee injury in the amount of \$12,800. Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury.

Claimant introduced Exhibit U, which contains certain medical bills for which she seeks reimbursement. The medical bills relate directly to claimant's left knee injury for treatment with Dr. Buchert and the Columbia Orthopedic Group. The medical bills total \$12,800, and were submitted by medical records affidavit and admitted into evidence without objection.

Under Missouri Workers' Compensation Law, the employer has the right to direct medical care. It is only when the employer stops or fails to do so that the employee is free to pick his/her own provider and assess those costs against his/her employer.⁶⁸ In this case, the employer provided limited medical treatment with Dr. Sparks, authorized an MRI of claimant's left knee, and provided an evaluation with Dr. Christopher Main. Dr. Main saw claimant on a single occasion on June 8, 2009. Dr. Main agreed that claimant could benefit from arthroscopic surgery to her left knee, but he did not believe that her torn meniscus was related to the January 17, 2009 fall. As such, Dr. Main released claimant on June 8, 2009, and placed her at maximum medical improvement. The employer denied medical treatment from that date forward.

Claimant remained symptomatic and was forced to seek treatment on her own through Dr. Buchert. Claimant testified that upon her release by Dr. Main on June 8, 2009, she called Dr. Buchert's office and took the first available appointment which was July 7, 2009, *less than*

⁶⁸ *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 84 (Mo. App. 1995)

Employee: Katy Dierks

Injury No. 09-040114

30 days after seeing Dr. Main. The employer made a conscious decision to deny medical treatment following Dr. Main's evaluation. Once the denial was made, Missouri law holds that the employer waived its right to control medical treatment from that day forward.⁶⁹

Claimant submitted the medical bills associated with left knee injury and treatment by medical records affidavit. Claimant presented a sufficient factual basis to award reimbursement of the medical expenses when she submitted the accompanying medical records documenting that the medical expenses were incurred in connection with treatment of her compensable left knee injury.⁷⁰ The employer's liability for claimant's medical bills cannot be decreased by the amount of write-offs or fee adjustments allowed by claimant's private health insurance. Section 287.270 mandates that any such reductions or payments made by a collateral source shall not be considered, and accordingly, claimant's recovery shall not be diminished by them.⁷¹ I direct the employer to reimburse claimant for the medical bills identified in claimant's Exhibits V, W, and X in the amount of \$12,800.00 for reasonable and necessary medical treatment rendered for claimant's left knee injury. The employer is further ordered to make payment of the \$12,800.00 directly to claimant and her counsel, Joshua P. Perkins.

As for future medical care, the employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]."⁷² This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.⁷³ "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt.⁷⁴ Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.⁷⁵

In analyzing the issue of future medical treatment, one must look at the *Tillotson v. St. Joseph Medical Center* case from the Western District Court of Appeals.⁷⁶ The *Tillotson* case highlights the material distinction between determining whether a compensable injury has occurred and determining the medical treatment required to be provided to treat a compensable injury. *Tillotson* holds that first it must be determined whether claimant suffered a compensable injury. Second, if a compensable injury has been sustained by the employee, the appropriate compensation to be furnished must be determined.⁷⁷ The determination of whether the claimant sustained a compensable injury is governed by Section 287.020 and has been already been resolved in this case. I previously found that the January 17, 2009 work injury was the prevailing factor in causing claimant's torn medial meniscus and her need for treatment with

⁶⁹ *Id.*

⁷⁰ See *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W. 2d 105, 112 (Mo. banc 1989).

⁷¹ See also *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003) (emphasis added).

⁷² *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

⁷³ *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418 (Mo.App. W.D. 2000).

⁷⁴ *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995).

⁷⁵ *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. D. D. 2004).

⁷⁶ *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. App. E.D. 2011).

⁷⁷ *Id.* at 517.

Dr. Buchert. Per *Tillotson*, once a compensable injury is found, the inquiry then turns to the calculation of compensation or benefits to be awarded to claimant.⁷⁸ In this case, the benefits sought by claimant are future medical treatment for her left knee injury, including but not limited to a total knee replacement procedure.

The *Tillotson* Court pointed out that Section 287.140.1 makes no reference to a “prevailing factor” test, and presumes the presence of a compensable injury under Section 287.020.3(1) (which does require application of the “prevailing factor” test) has already been demonstrated.⁷⁹ Therefore, the legal standard for determining an employer’s obligation to afford medical care is articulated in 287.140.1 as whether the treatment is **reasonably required to cure and relieve the effects of the injury**.⁸⁰ Claimant does **not** have to prove that her torn medial meniscus was the prevailing factor in requiring her need for a total knee replacement. Rather, she must only prove that future medical treatment will reasonably be required to cure and relieve the effects of her January 17, 2009 work injury.

Importantly, *Tillotson* holds that in determining whether medical treatment is “reasonably required” to cure and relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of preexisting conditions, or that the treatment will benefit both the compensable injury and a preexisting condition.⁸¹ Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury.⁸² The fact that the medication or treatment may also benefit a non-compensable or earlier condition is irrelevant.⁸³

In the present case, there is no real dispute that claimant will most likely require a total knee replacement in the future. Dr. Buchert’s initial office visit of July 7, 2009, states that “[e]ventually, she is going to need a total knee replacement.”⁸⁴ Dr. Buchert’s August 31, 2009 office notes state again “[e]ventually, she will need a total knee....”⁸⁵ On March 30, 2010, Dr. Buchert even discussed with claimant the possibility of moving forward with a total knee replacement.⁸⁶ The employer’s medical experts, Dr. Main and Dr. Cohen, agree that claimant will require a total knee replacement in the future.⁸⁷

Claimant was evaluated by Dr. Brent Koprivica on December 29, 2010.⁸⁸ Dr. Koprivica is of the opinion that the January 17, 2009 work injury, and the subsequent care and treatment necessitated by the work injury, is the prevailing factor in the need for claimant’s total knee replacement.⁸⁹ Dr. Koprivica testified that the January 17, 2009 accident caused a new structural injury to the left knee, i.e. the torn meniscus, thereby destabilizing claimant’s left knee and

⁷⁸ *Id.*

⁷⁹ *Tillotson* at 519.

⁸⁰ *Tillotson* at 521.

⁸¹ Also see *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo. App. S.D. 2006).

⁸² *Bowers* at 83.

⁸³ *Id.*

⁸⁴ Exh. P. See also Exh. AA.

⁸⁵ Exh. P.

⁸⁶ *Id.*

⁸⁷ Exhs. 1 and 2.

⁸⁸ Exh. F.

⁸⁹ *Id.*

Employee: Katy Dierks

Injury No. 09-040114

causing an aggravation and an acceleration of the degenerative process. Specifically, Dr. Koprivica stated:

And on my testimony, I'm not trying to testify to absolute certainty, but within a reasonable degree of medical certainty, where it's more -- with all the factors that are known, it's more probably than not that she would -- the need for the knee replacement is because she suffered the new structural injury, had to have the surgery, and that the structural change and surgery has accelerated that degenerative process to the point that she now has bone on bone in the knee. That's the reason why I believe it's the prevailing factor and more probable than not that she will need that knee replacement.⁹⁰

When questioned by claimant's attorney, claimant's treating physician, Dr. Buchert, testified as follows on the issue of future medical treatment:

Q: All right, Doctor, in your opinion, is the January 17, 2009, work event the prevailing factor in causing her need for arthroscopic surgery that you performed?

A: Yes, it is.

Q: Doctor, in your medical opinion, as Ms. Dierk's treating physician, will she require additional medical treatment in the future?

A: It's -- it's my opinion with reasonable degree of medical certainty that this patient eventually, providing nothing else medically happens to her -- that she eventually will need a total knee replacement on the left side.⁹¹

The issue in this case is not whether claimant will require a total knee replacement, but rather, whether the employer should be liable for claimant's future medical expenses including the total knee replacement procedure. The medical evidence presented establishes that claimant will require future medical treatment to cure and relieve the effects of her torn meniscus as well the arthritic process in her left knee. The *Tillotson* case clearly holds that the "prevailing factor" test shall not be a part of the analysis on this issue. Rather, claimant need only prove that the need for treatment and medication flow from January 17, 2009 work injury. The fact that the medication or treatment may also benefit a non-compensable or earlier condition is irrelevant.⁹² I find that claimant has met her burden of proof on the issue of future medical care and hereby direct the employer to provide future medical treatment reasonably necessary to cure and relieve claimant of her left knee injury.

Issue 6: Whether claimant is permanently and totally disabled, or

Issue 7: Nature and extent of permanent partial disability.

Issue 8: Second Injury Fund liability, if any.

⁹⁰ Exh. Y, p. 33.

⁹¹ Exh. AA, p. 12.

⁹² *Bowers* at p. 83.

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.⁹³ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.⁹⁴ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.⁹⁵ It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.⁹⁶

Section 287.020.7, RSMo, provides that “total disability” is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.⁹⁷ The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.⁹⁸ The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.⁹⁹ When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.¹⁰⁰ If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.¹⁰¹

As to permanent partial disability, Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities.¹⁰² When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.¹⁰³ In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.¹⁰⁴ Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury.¹⁰⁵ In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative

⁹³ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

⁹⁴ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

⁹⁵ *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

⁹⁶ *Rana* at 626.

⁹⁷ See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

⁹⁸ *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

⁹⁹ *Id.*

¹⁰⁰ Section 287.200.1, RSMo.

¹⁰¹ *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

¹⁰² Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

¹⁰³ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

¹⁰⁴ Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

¹⁰⁵ *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo. App. 1992).

law judge must determine the extent of the compensable injury first.¹⁰⁶ If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.¹⁰⁷ Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability.

Various factors have been considered by courts attempting to determine whether or not an employee is permanently totally disabled. It is not necessary that an injured employee be rendered, or remain, wholly or completely inactive, inert or helpless in order to be entitled to receive compensation for permanent total disability.¹⁰⁸ An employee's ability or inability to perform simple physical tasks such as sitting,¹⁰⁹ bending, twisting,¹¹⁰ and walking¹¹¹ may prove that the employee is permanently totally disabled. An employee's age may also be taken into consideration.¹¹²

As previously noted, claimant sustained a compensable injury to her left knee on January 17, 2009. This injury occurred during the course and scope of her employment with the employer. Claimant presented the rating report of Dr. Koprivica, who rated claimant's disability at 75% of the left knee at the 160 week level.¹¹³ Dr. Koprivica stated that claimant's permanent disability "would be consistent with an individual with a poor result from a total arthroplasty."¹¹⁴ Claimant had no disabling symptoms in her left knee prior to the January 17, 2009, despite the presence of degenerative joint disease prior to the work injury. As stated previously, claimant did seek treatment on two occasions in 2004 for her left knee; however, only x-rays and anti-inflammatory medication was prescribed and she received no other treatment for her knee. Claimant's left knee condition did not become a disability until *after* the January 2009 work injury.

Claimant's current left knee complaints are significant. She continues to have severe pain in her left knee. She has been prescribed a cane to ambulate due to the severity of pain in her left knee. She cannot squat, crawl, kneel, or climb ladders based on the severity of the disability involving her left knee in isolation. Stairs are difficult and she must use the hand rail when going up or down stairs. She is limited to standing and walking less than 15 minutes. Claimant testified that the disability in her left knee requires her to use an electric cart while shipping at Wal-Mart. Claimant's treating orthopedic surgeon, Dr. Peter Buchert, restricted her to sedentary duty in light of the severely disabling nature of her left knee condition. The medical

¹⁰⁶ *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).

¹⁰⁷ *Id.*

¹⁰⁸ *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936); *Grgic v. P & G. Const.*, 904 S.W.2d 464 (Mo.App. E.D. 1995); *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274 (Mo.App. S.D. 1994); *Groce v. Pyle*, 315 S.W.2d 482 (Mo.App. 1958).

¹⁰⁹ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. E.D. 1990).

¹¹⁰ *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

¹¹¹ *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

¹¹² *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. S.D. 1997); *Reves v. Kindell's Mercantile Co., Inc.* 793 S.W.2d 917 (Mo.App. S.D. 1990). See also *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo.App. S.D. 1982).

¹¹³ Exh. F.

¹¹⁴ *Id.*

Employee: Katy Dierks

Injury No. 09-040114

records from Dr. Buchert also establish that claimant continued experiencing ongoing and disabling symptoms with respect to her left knee following her release on February 18, 2010.

The employer offered medical testimony from Dr. Main, who assigned zero permanent partial disability of claimant's left knee. I do not find Dr. Main's opinion credible on this matter as the medical evidence and the testimony of the claimant clearly establish that she has significant permanent disability in her left knee.

The employer also offered the medical opinion of Dr. Cohen, who evaluated claimant on April 1, 2013. Dr. Cohen disagreed with the employer's other expert, Dr. Main, and rated claimant's disability at "1-2%" due to the January 17, 2009, work injury."¹¹⁵ Dr. Cohen rated claimant's overall left knee disability at 45% and attributed 43-44% to claimant's severe arthritis, despite the fact that this condition was not disabling prior the January 17, 2009 work injury. I do not find Dr. Cohen's opinion on the issue of permanent partial disability to be credible. He assigned 43-44% permanent disability to claimant's preexisting joint disease even though it had been asymptomatic for nearly five years. The evidence does not support this high of a rating for claimant's preexisting left knee condition. It is true that claimant was diagnosed with degenerative joint disease in her left knee in 2004. However, there is no credible evidence that this condition became an obstacle or hindrance until after the January 17, 2009 work injury.

It is clear that claimant sustained a torn medial meniscus as a result of her January 17, 2009 work injury. The surgery to repair her torn meniscus was reasonable and necessary to cure said condition. The injury and surgery accelerated and exacerbated the arthritis condition of claimant's left knee to the extent that she now requires a total knee replacement. She has been permanently restricted to sedentary duty by her treating orthopedic surgeon. In light of the foregoing evidence, I assign permanent partial disability in this case as follows: 25% of the left lower extremity at the 160 week level (40 weeks X \$404.66) = \$16,186.40. While serious, this injury did not, by itself, render claimant permanently and totally disabled. However, at the time of her January 2009 work injury, claimant had a significant pre-existing disability to her right knee.

The records of Dr. Anderson from December 29, 2005, note severe degenerative joint disease of the right knee. Dr. Anderson provided two steroid injections in claimant's right knee. After an MRI scan revealed severe degenerative joint disease and a torn medial meniscus, claimant underwent arthroscopic right knee surgery, performed by Dr. Buchert. Claimant testified in her deposition that she continued to experience pain in her right knee following her release from Dr. Buchert in late 2006. Claimant testified that she continued to take Aleve for swelling in her right knee following her release in 2006 and return to work. She was able to return to work at Adair Foods following her right knee surgery; however, she experienced pain and swelling and took Aleve for these symptoms. Her right knee condition progressively worsened following her surgery in 2006. I find that claimant's pre-existing right knee condition is of such seriousness as to constitute a hindrance or obstacle to the claimant's employment or reemployment.

¹¹⁵ Exh. 1.

Employee: Katy Dierks

Injury No. 09-040114

Claimant has significant permanent work restrictions placed on her by her treating orthopedic surgeon, Dr. Buchert, as well as Dr. Koprivica and Dr. Cohen. Dr. Buchert permanently restricted claimant to sedentary duty with only intermittent periods of standing.¹¹⁶ Dr. Buchert prescribed a cane for ambulation as it helps eliminate stress on her left knee.¹¹⁷ Dr. Koprivica placed permanent restrictions on the claimant of primarily seated activities only, with standing and walking interval limitations of less than 30 minutes and ad lib ability to sit whenever necessary.¹¹⁸ Dr. Koprivica indicated that cumulatively she could be on her feet for less than two hours per day and agreed with Dr. Buchert's prescription of the cane for gait assistance.

The employer's medical expert, Dr. Cohen, also placed significant permanent restrictions on claimant's left and right knee. With regards to the left knee, Dr. Cohen indicated no kneeling or squatting, no ladder or climbing, no standing greater than 30 minutes without a rest period of a sitting change of 30 minutes.¹¹⁹ Dr. Cohen restricted claimant from walking more than 15 minutes without stopping to rest for at least 15 minutes and limited her lifting to 15 pounds except on an occasional basis. With regards to the right knee, Dr. Cohen placed identical restrictions on claimant's right knee as he placed on her left knee.

The medical restrictions placed by Dr. Cohen, Dr. Buchert, and Dr. Koprivica establish that the claimant is unable to return to the employment in which she was previously engaged at the time of her January 17, 2009 work injury. Claimant's job duties at the time of her January 17, 2009 work injury required her to be on her feet for 10 hours per day, walk long distances throughout the plant on concrete surfaces, and pull pallet jacks loaded with luncheon meat throughout the plant. The medical restrictions established by Dr. Buchert, Dr. Koprivica, and Dr. Cohen prevent her return to her previous employment with the employer. Dr. Buchert testified in his deposition that claimant is physically unable to return to her employment with the employer.¹²⁰ Claimant made a good faith effort to return to work for a brief period but was physically unable to perform her job duties. Her left and right knee injuries prohibit her from walking long distances or remaining on her feet for extended periods of time. Dr. Buchert offered the following comments about claimant's employability during the claimant's final office visit of August 18, 2010:

Katy Dierks comes back now and his about eleven months status post left knee scope. She can now walk maybe a block and is on a cane, has a lot of pain, has been to the ER for her knee. . . [I] talked to her that I thought she needed a total knee replacement. She wants to put up with it which is certainly her choice. **Certainly I don't see how she can work with her knee.** I think she needs a total knee replacement. We have tried everything conservative without relief. She will call us when she desires a total knee, otherwise at this point I don't have anything else to offer her.¹²¹

¹¹⁶ Exh. I.

¹¹⁷ Exh. AA.

¹¹⁸ Exh. Z.

¹¹⁹ Exh. 2.

¹²⁰ Exh. AA.

¹²¹ Exh. Q.

In addition, claimant offered the vocational opinion of Mary Titterington. Ms. Titterington is of the opinion that claimant possesses no transferrable work skills within the restrictions established by the medical doctors.¹²² She notes that claimant is an unskilled worker who has worked in a variety of unskilled and low, semi-skilled labor oriented jobs throughout her entire work history. She worked primarily in the fields of machine operator, kitchen aide, and as a cashier. All of claimant's previous employment required sustained standing and walking. Ms. Titterington testified that the restrictions placed on claimant by Dr. Buchert, Dr. Koprivica, and Dr. Cohen eliminate all of claimant's prior jobs.¹²³ Ms. Titterington found claimant to be unemployable in the open labor market due to a combination of her functional limitations and the permanent work restrictions placed on her right and left knees.

The employer's medical expert, Dr. Cohen, is also of the opinion that claimant is permanently and totally disabled.¹²⁴ Dr. Cohen testified that he does not believe the January 17, 2009 work injury, in isolation, was the prevailing factor in causing the permanent and total disability. However, Dr. Cohen does agree that the claimant is unemployable in the open labor market and that she is permanently and totally disabled due to the combination of the severe arthritis in her knees, as well as her rheumatoid arthritis, her carpal tunnel syndrome, and her low back pain.¹²⁵ Dr. Cohen placed significant restrictions on claimant's left and right knees. He did not restrict her hands or low back. Claimant has no permanent work restrictions placed on her hands or low back by any medical doctor.

Dr. Buchert originally permanently restricted claimant to sedentary duty, but then at the final office visit of August 18, 2010, stated that claimant was incapable of working.

The employer offered the vocational opinion of Gary Weimholt. Mr. Weimholt testified that claimant would be employable in the open labor market if one looked solely at the restrictions placed on claimant's left knee. However, when asked about claimant's overall employability when all restrictions are considered, Mr. Weimholt opined that claimant would "quite likely" not be employable in the open labor market.¹²⁶

Both vocational experts in this case, Ms. Titterington and Mr. Weimholt, agree that claimant is unemployable in the open labor market and is permanently and totally disabled due to a combination of the permanent restrictions placed on her left and right knee and her overall level of functioning. I find these opinions credible. The Second Injury Fund offered no evidence to impeach or contradict the medical and vocational testimony. I find that claimant has met her burden of proof that she is permanently and totally disabled due to a combination of the disability she sustained in the January 17, 2009 work injury and her pre-existing right knee condition. As such, the Second Injury Fund is liable for the PTD benefits. The next question is the timing of those benefits. Dr. Buchert, claimant's treating physician, released claimant to return to work without restrictions on February 18, 2010. I find that February 18, 2010, is the date claimant's disability from the January 17, 2009 work injury became permanent. Thus,

¹²² Exh. I.

¹²³ *Id.*

¹²⁴ Exh. 2.

¹²⁵ *Id.*

¹²⁶ Exh. 3.

Employee: Katy Dierks

Injury No. 09-040114

claimant's employer became liable for permanent partial disability benefits effective February 19, 2010.

I have ordered the employer to pay 25% permanent partial disability of the left knee at the 160 week level for the January 17, 2009, work injury. As such, the employer is liable for 40 weeks of compensation for permanent partial disability. The permanent partial disability rate is \$404.66 per week in benefits for the 40 weeks covering the period of February 19, 2010 through approximately November 26, 2010. As previously noted, claimant reached maximum medical improvement on February 18, 2010. The Second Injury Fund is liable for the rate differential of \$31.78 (\$436.44 PTD rate - \$404.66 PPD rate) from February 19, 2010, through November 26, 2010, a period of 40 weeks; the total amount of this rate differential is \$1,271.20. The Second Injury Fund is liable for permanent and total disability benefits of \$436.44 per week beginning November 27, 2010, and continuing for claimant's lifetime subject to review and modification pursuant to statute.

Summary

In summary, the issues and their resolutions are as follows:

1. **Whether claimant sustained an injury to her left knee as a result of the work accident?** Yes.
2. **Medical causation/whether the accident is the prevailing factor in causing the resulting medical condition to claimant's left knee?** Claimant established that her injury is medically causally related to the work accident and that the accident was the prevailing factor in causing the resulting medical condition to her left knee.
3. **Whether the employer/insurer is liable for temporary total disability benefits in the amount of \$10,786.30 for 8/28/09 – 2/18/10, a period of 24 and 5/7th weeks?** Yes.
4. **Whether the employer/insurer is liable to claimant for unpaid medical bills in the amount of \$12,800?** Yes.
5. **Whether the employer/insurer is liable for future medical care?** Yes.
6. **What is the nature and extent of claimant's permanent partial disability?** Claimant sustained permanent partial disability of 25% of the left knee.
7. **Whether claimant is permanently and totally disabled?** Yes. (And if so, is the employer/insurer liable? No, the employer/insurer is not liable for the PTD.)
8. **Whether the Second Injury Fund bears any liability for benefits?** Yes, the Second Injury Fund is liable for PTD benefits as noted in the Award.

Employee: Katy Dierks

Injury No. 09-040114

Any pending objections not expressly ruled on in this award are overruled. This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of the claimant's attorney, Joshua Perkins, for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation