

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

Injury No. 08-064252

Employee: Deirdre Francis
Employer: School District of Kansas City, Missouri
Insurer: Wausau Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) medical causation; (2) the need for future medical care; (3) the compensation rate; (4) the nature and extent of disability; and (5) the liability of the Second Injury Fund.

The administrative law judge rendered the following determinations: (1) employee's average weekly wage is \$273.27; (2) the injury of July 3, 2008, resulted in right knee partial lateral meniscus tear requiring arthroscopic surgery, but employee does not have reflex sympathetic dystrophy or depression; (3) employee has sustained a permanent partial disability to her right knee of 20%; (4) there is no evidence of the need for future medical treatment related to the July 3, 2008, accident; and (5) there is no evidence of Second Injury Fund liability.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in using the wrong statutory provision to determine employee's average weekly wage; and (2) in ignoring the uncontroverted evidence and failing to apply the correct legal standard for permanent total disability.

In her brief, employee raised an additional allegation of error on the part of the administrative law judge with regard to the issue of employer's liability for future medical benefits. Employer, in its brief, has responded to employee's argument with regard to the issue of future medical benefits, and has not argued that we are precluded from reaching this issue as a result of employee's failure to include it in her application for review. Accordingly, we conclude that considerations of due process do not prevent us from reaching the issue of future medical benefits, because the parties have had a chance to brief and be heard with respect to this issue. See *Stonecipher v. Poplar Bluff R1 Sch. Dist.*, 205 S.W.3d 326 (Mo. App. 2006).

Employee: Deirdre Francis

- 2 -

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) medical causation; (2) nature and extent of disability; and (3) future medical benefits. We also provide a supplemental analysis with respect to the issue of the appropriate compensation rate.

Discussion

Medical causation

Section 287.020.3(1) RSMo sets forth the relevant test for medical causation, and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Employee advances the expert medical opinion of Dr. P. Brent Koprivica, who believes that the accident of July 3, 2008, was the prevailing factor causing employee to suffer internal derangement of the right knee, but that employee does not suffer from complex regional pain syndrome. Dr. Koprivica rated a 30% permanent partial disability of the right knee for employee's physical impairments resulting from the work injury.

In addition, Dr. Koprivica determined that, separate from the physical impairments attributable to the work injury, employee has developed probable chronic pain syndrome with an underlying major depressive disorder. Dr. Koprivica indicated that he would defer to a mental health expert with regard to validating such diagnoses, but noted that he would add to his permanent partial disability rating any additional disability referable to the psychological/psychiatric effects of the work injury.

With regard to the issue of the psychological effects of the work injury, employee advances the expert opinion of Dr. Allan Schmidt, a PhD psychologist, who believes the work injury is the prevailing factor causing employee to suffer depression and a pain disorder, which he rates at 20% permanent partial disability of the body as a whole.

Employer and the Second Injury Fund do not advance any contrary expert psychological/psychiatric opinion evidence. Although we share the administrative law judge's concern that Dr. Schmidt's opinions may be entitled to less weight given his choice to rely upon Dr. Koprivica's report for employee's medical treatment history rather than to personally review employee's medical records, we are not convinced that his opinions are, in the absence of any contrary expert opinion evidence, entirely "weightless." After careful consideration, we credit the causation opinions from both Dr. Koprivica and Dr. Schmidt. We find that the accident of July 3, 2008, was the prevailing factor causing employee to suffer: (1) internal derangement of the right knee with associated permanent partial disability of the right knee referable to her physical impairment; and (2) depression and a pain disorder with associated permanent partial disability of the body as a whole referable to the psychological effects of the work injury.

Employee: Deirdre Francis

- 3 -

Nature and extent of disability

In her brief, employee makes clear that she does not argue that the Second Injury Fund is liable for permanent total disability benefits; rather, she asks us to find that her work injury of July 3, 2008, considered alone and in isolation, caused her to suffer permanent total disability.

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011).

We are not persuaded by employee's claim for permanent total disability benefits from the employer. Dr. Koprivica did not opine that employee is permanently and totally disabled as a result of the work injury, and additional factors, such as employee's return to work as a substitute teacher for approximately two years following her release from treatment for the work injury,¹ the unclear contribution of the effects of the motor vehicle accident of May 2012 upon her overall condition,² and her receipt of unemployment compensation benefits after quitting work as of May 2012, all cast doubt upon the proposition that the last injury caused any total disability that employee may now suffer.

On the other hand, we do find somewhat inadequate the administrative law judge's finding of 20% permanent partial disability of the right knee. We note that although the authorized treating physician, Dr. Key, recommended surgical intervention for employee's right knee as early as November 24, 2008, employee did not receive this treatment for over eight months, owing in part to employer's reluctance to authorize the procedure. Dr. Snyder finally performed surgery on August 12, 2009, over a year after the injury to employee's knee occurred, but employee did not experience any significant improvement in her symptoms.

We note also that the treating rehabilitation/pain management physician, Dr. Joseph Galate, imposed severe restrictions upon employee's functioning as a result of the work injury. Specifically, Dr. Galate determined as of January 26, 2010, that employee should perform only sedentary duties; refrain from any repetitive bending or twisting; and not lift over 10 pounds. When Dr. Galate released employee from his care as of March 3, 2010, he indicated that there had not been any change or progress in employee's condition. In his final note of April 16, 2010, Dr. Galate stated he would not impose any permanent restrictions, but he did not provide any explanation for removing the prior restrictions, other than to suggest that employee had "returned to work at Full Duty" as of March 3, 2010. *Transcript*, page 229. But this suggestion is belied by Dr. Galate's own note of

¹ Employee testified that working as a substitute teacher required her to be very active and on her feet 90% of the time.

² Dr. Koprivica did not address the effects of the May 2012 accident, as he evaluated employee in February 2012.

Employee: Deirdre Francis

- 4 -

that date, wherein he stated employee was then out of work and looking for another job. *Id.*, page 148.

Ultimately, where it is clear that employee's physical condition did not improve under Dr. Galate's care, we find no medical explanation on this record that would support a conclusion that the restrictions Dr. Galate imposed as of January 26, 2010, would have (or should have) been lifted as of March 3, 2010. Instead, we find that Dr. Galate's restrictions of January 26, 2010, remain the proper basis for rating permanent partial disability. In light of those restrictions and the weight of the credible evidence suggesting employee continues to suffer a great degree of limitation with regard to her right knee, we find that employee suffers a 50% permanent partial disability of the right knee owing to the physical effects of the work injury.

We turn now to the psychological effects of the work injury. As we have noted, Dr. Koprivica indicated he would add permanent partial disability referable to the psychiatric/psychological effects of the work injury for any such diagnoses validated by an appropriate mental health professional.³ We have credited the opinion of Dr. Schmidt, a PhD psychologist, with regard to those diagnoses, and found that the accident of July 3, 2008, caused employee to suffer depression and a pain disorder. We find that employee suffers an additional 15% permanent partial disability of the body as a whole referable to these conditions.

Future medical treatment

Section 287.140.1 RSMo provides for an award of future medical treatment where the employee can prove there is a reasonable probability of a need for future medical treatment that flows from the work injury. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51-4 (Mo. App. 2008). The administrative law judge stated that "[t]here is no evidence of the need for future medical treatment related to the July 3, 2008, accident[.]" *Award*, page 9. In fact, Dr. Koprivica opined that additional treatment geared toward employee's behavioral impairment would be an appropriate approach to dealing with the chronic pain issues employee suffers as a result of the work injury. Likewise, Dr. Schmidt believes employee has a need as a result of the work injury to be referred for psychiatric consultation and counseling.

After careful consideration, we are convinced (and we so find) that there is a reasonable probability that employee has a need for future medical treatment flowing from the work injury. We conclude that employer is obligated to provide that future medical treatment that may reasonably be required to cure and relieve the effects of employee's work injury.

³ Given Dr. Koprivica's specific endorsement of permanent partial disability referable to the psychiatric effects of the work injury, and because the parties have not disputed whether Dr. Schmidt, as a non-physician mental health expert, is qualified to assign disability under § 287.190.6(2) RSMo, we need not consider or address that question herein.

Employee: Deirdre Francis

- 5 -

Rate of compensation

Employee worked for employer on a sporadic basis as a substitute teacher. Employer called her with assignments, which employee could either accept or reject. The administrative law judge applied § 287.250.4 RSMo and determined that employee's average weekly wage was most fairly and justly determined by dividing by 11 the total wages earned during the 11 weeks employee worked preceding the work injury as shown on employer's Exhibit 4. Employee argues that the administrative law judge should have instead determined that she is a part-time employee and used a 30-hour minimum work-week to arrive at a more favorable compensation rate under § 287.250.3 RSMo:

If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

In light of the evidence presented by employee, we are not persuaded by her argument. Employee testified on direct examination that she worked all day, every day, and that to the extent Exhibit 4 does not so reflect, it must be incorrect. On cross-examination, though, employee admitted that she could not remember how much she was working in the weeks leading up to the work injury, and thus could not actually contradict any of the information set forth in Exhibit 4. As a result, we cannot rely on employee's testimony with regard to her average weekly wage. Employee did not present any other evidence relevant to this issue.

Employee argues, however, that if the evidence shows that she worked part-time, the 30-week minimum under § 287.250.3 must be applied. But that is not what the statute provides. Instead, the 30-week minimum is established for purposes of the "computation" referenced in that section, i.e., the average weekly wage of full-time or regular employees engaged in similar work. Employee did not present any evidence that would permit us to calculate the average weekly wage of a full-time or regular employee engaged by employer to perform work of the same or similar nature as that performed by employee. As a result, the 30-week minimum is not applicable to any such computation.

In our view, the administrative law judge's choice to resort to § 287.250.4 was reasonable and appropriate, given that § 287.250.1(4) does not fairly and justly produce an average weekly wage for employee where there is no evidence to demonstrate whether the days she did not work were true absences from scheduled work, or instead the product of employee's own choice to decline assignments. For these reasons, we affirm and adopt as our own the administrative law judge's findings and conclusions with

Employee: Deirdre Francis

- 6 -

respect to this issue, to the extent it is not inconsistent with the supplemental analysis provided herein.

Conclusion

We modify the award of the administrative law judge as to the issues of: (1) medical causation; (2) nature and extent of disability; and (3) future medical benefits.

Employer is liable to employee for \$25,505.20 in permanent partial disability benefits.

Employer is ordered to provide that future medical treatment that may reasonably be required to cure and relieve the effects of employee's work injury.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued October 7, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 7th day of July 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Deirdre Francis Injury No. 08-064252
Dependents: N/A
Employer: School District of Kansas City, Missouri
Insurer: Wausau Insurance Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 2, 2015; Briefs submitted Aug. 2, 2015 Checked by: MSS/pd

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: July 3, 2008
5. State location where accident occurred or occupational disease was contracted: Jackson 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 was struck by a chair thrown by a student.
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: 20% permanent partial disability to the left knee
15. Compensation paid to-date for temporary disability: \$6,117.55
16. Value necessary medical aid paid to date by employer/insurer? \$36, 228.49
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$273.27
19. Weekly compensation rate: \$182.18
20. Method wages computation: Evidence at trial

COMPENSATION PAYABLE

21. Amount of compensation payable from Employer/Insurer: 20% of the left knee (32 weeks x \$182.18 per week)

TOTAL: \$5,829.76

22. Future requirements awarded: N/A

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mark Kolich

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Deirdre Francis Injury No. 08-064252
Dependents: N/A
Employer: School District of Kansas City, Missouri
Insurer: Wausau Insurance Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 2, 2015; briefs submitted Aug. 2, 2015 Checked by: MSS/pd

On July 2, 2015, the employee, employer/insurer and Second Injury Fund appeared for final hearing. The Division had jurisdiction to hear this case pursuant to Mo. Rev. Statute Section 287.110. The employee, Deirdre Francis, appeared in person and with counsel, Mark E. Kolich. The employer/insurer appeared through its counsel, Stephanie J. Warmund. The Second Injury Fund appeared through Assistant Attorney General, Kimberly Fournier.

STIPULATIONS

The parties stipulated as follows:

1. On or about July 3, 2008, the School District of Kansas City, Missouri was an employer operating subject to Missouri's Workers' Compensation law with its liability being fully insured;
2. Deirdre Francis (Claimant) was its employee working subject to the law in Kansas City, Jackson County, Missouri;
3. Claimant met with personal injury by accident on July 3, 2008 in Jackson County, Missouri;
4. Claimant's accidental injury arose out of and in the course of her employment with the School District;
5. Claimant provided employer with timely notice of her accidental injury;
6. Claim for compensation was timely made;
7. Employer has paid 33 weeks and 4 days of temporary total disability compensation. Such benefits were paid at the weekly rate of \$182.18 and a total sum has been paid of \$6,117.55. Benefits were paid for the periods of August 25 through October 22, 2008, August 12 through October 10, 2009, October 28, 2009 through February 17, 2010 and temporary partial benefits were paid for the period of October 13 through October 23, 2009;
8. Employer has paid medical expenses incurred as a result of Claimant's injury in the total amount of \$36,228.49.

ISSUES

The issues to be determined by this hearing are:

1. Medical causation;
2. Claimant's entitlement to future medical treatment;
3. Average weekly wage/compensation rate;
4. Nature and extent of disability;
5. Compensation payable;
6. Liability of the Second Injury Fund.

The trial record includes Claimant's testimony presented at the final hearing plus the following exhibits:

Claimant's Exhibit A: Concentra Medical Records

Claimant's Exhibit B: Records of Vincent H. Key, M.D.

Claimant's Exhibit C: Records of Dickson-Diveley Midwest Orthopaedic Clinic

Claimant's Exhibit D: Exhibit D: Records of Joseph G. Galate, M.D.

Claimant's Exhibit E: Report of Allan D. Schmidt, Ph.D.

Claimant's Exhibit F: Curriculum Vitae of Allan D. Schmidt, Ph.D.

Claimant's Exhibit G: Report of P. Brent Koprivica, M.D.

Claimant's Exhibit H: Curriculum Vitae of P. Brent Koprivica, M.D.

Claimant's Exhibit I: Report of Michael J. Dreiling

Claimant's Exhibit J: Curriculum Vitae of Michael J. Dreiling

Employer/Insurer's Exhibit 1: Report of Joseph G. Galate, M.D.

Employer/Insurer's Exhibit 2: November 19, 2013 deposition of Claimant

Employer/Insurer's Exhibit 3: July 9, 2014 deposition of Claimant

Employer/Insurer's Exhibit 4: Wage record

Employer/Insurer's Exhibit 5: 2010 teaching certificate

Employer/Insurer's Exhibit 6: Dismissal order

Employer/Insurer's Exhibit 7: 2004 stipulation

*Employer/Insurer's Exhibit 8: September 13, 1995 emergency room record of
Truman Medical Center (TMC)*

Employer/Insurer's Exhibit 9: June 23, 1996 ER record (TMC)

Employer/Insurer's Exhibit 10: May 2, 1997 orthopedic clinic note (TMC)

- Employer/Insurer's Exhibit 11: August 4, 1998 orthopedic clinic note (TMC)*
Employer/Insurer's Exhibit 12: May 21, 1997 physical therapy record (TMC)
Employer/Insurer's Exhibit 13: June 21, 1997 progress note (TMC)
Employer/Insurer's Exhibit 15: July 14, 1998 orthopedic clinic note (TMC)
Employer/Insurer's Exhibit 16: August 25, 2006 record (TMC)
Employer/Insurer's Exhibit 17: September 18, 2006 record (TMC)
Employer/Insurer's Exhibit 18: October 25, 2006 record (TMC)
Employer/Insurer's Exhibit 19: November 10, 2006 record (TMC)
Employer/Insurer's Exhibit 20: April 20, 2007 record (TMC)
Employer/Insurer's Exhibit 21: November 6, 2007 telephone message (TMC)
Employer/Insurer's Exhibit 22: January 2, 2008 record (TMC)
Employer/Insurer's Exhibit 23: February 19, 2008 record (TMC)
Employer/Insurer's Exhibit 24: March 22, 2012 record (TMC)
Employer/Insurer's Exhibit 25: March 9, 2011 record (TMC)
Employer/Insurer's Exhibit 26: May 30, 2012 record (TMC)
Employer/Insurer's Exhibit 27: May 18, 2012 record of Research Medical Ctr
Employer/Insurer's Exhibit 28: April 5, 2004 record of Research Medical Ctr
Employer/Insurer's Exhibit 29: Records of Center for Life Chiropractic

Deirdre Francis (Claimant) is a 52 year old single lady who lives alone in Kansas City, Missouri. Until recently, she cared for two foster children, ages 4 and 7. Claimant has not been employed since May 2012. It is her contention that she is unable to compete in the open labor market because of chronic pain resulting from her work injury.

Claimant graduated from high school in 1981 and completed her associate's degree in early childhood development from Penn Valley Community College in 1990. She does not have any significant typing experience or skills and her knowledge of personal computers is very limited.

Claimant's first work experience was as a crew member at a McDonald's restaurant. Between 1977 and 1986 she was not gainfully employed, but rather she was a stay at home mother taking care of her children. When she returned to the labor market Claimant had several short term jobs that involved answering telephones and taking messages. After she completed her associate degree she began working for the Kansas City Missouri School District as a parent-educator which involved the evaluation of young children in terms of their development. Claimant performed this job from 1991 through 1995. From 1995 to 1999 she worked at child care centers. In 1999 Claimant began working as a substitute school teacher for the Kansas City Missouri School District and she was performing this job when she was injured in 2008.

Claimant has an extensive medical history beginning earlier than 1993 when she claimed to have glaucoma in her eyes and surgery on her right hand. In 1995 she was involved in an accident and complained of neck and low back pain with radiation down the back of both legs. In December, 1996 she was driving and hit a tree, losing consciousness. Treatment for this injury extended well into 1997 with complaints to both knees as a result of her knees hitting the dashboard. She was diagnosed with an ACL deficient left knee and patellofemoral right knee. Physical therapy was ordered to both knees in 1997. By August 4, 1998, Claimant's knees still bothered her when she sat for prolonged periods. She also had trouble going up stairs.

In 2006, Claimant slipped and fell in a parking lot, injuring her tailbone/low back. She reported severe pain and sharp, burning and tingling sensations in her lower extremities, right more than left. Pain prevented her from sleeping, sitting, walking, standing and lifting for long periods. In November, 2007, Claimant was seen at Truman Medical Center feeling depressed due to many stressors over the past year, especially of late. She had 14 family members die within the past year, was upset because she could not pay her bills or find a job and wondered if she should be on an antidepressant. In 2008, before this work related injury, Ms. Francis had complaints to her right wrist, and low back with trouble walking, squatting and sitting up.

Ms. Francis was seen on March 11, 2011, in the primary care clinic at Truman Medical Center as a follow up to an emergency room visit in which she had complaints of numbness and tingling in her neck and left arm which was getting worse. In March 22, 2012 Claimant was seen with complaints of headache with stuttering. The rearend accident in May, 2012 caused a multitude of complaint to her neck, upper extremities, mid back, low back and lower extremities. (Er/Ins's Exhibits 24, 25, 26 & 27.)

On July 3, 2008 Claimant suffered an injury to her right knee as a result of being struck by a chair thrown by a student. Initial treatment was received at Concentra Medical Centers. On August 5, 2008 Dr. Barnes at Concentra referred Claimant to Dr. Vincent Key, an orthopedic surgeon at KU Medical Center. Three days later Dr. Key examined Claimant and prescribed physical therapy and anti-inflammatory medication. He also restricted Claimant to sedentary work. On December 5, 2008 Dr. Key noted, "Given the fact that she has failed conservative treatment, I would recommend a right knee diagnostic arthroscopy." (Exh. B) Instead of authorizing the treatment, the insurance carrier transferred Claimant's care to Dr. Lance Snyder at Dickson-Diveley Midwest Orthopaedic Clinic.

Dr. Snyder tried additional conservative measure, but ultimately agreed an arthroscopic procedure was necessary and on April 12, 2009 the procedure was performed. His post operative diagnosis was "medial meniscus tear of right knee, lateral meniscus tear of right knee." After the surgery Claimant experienced persistent swelling of the knee which caused Dr. Snyder to order an ultrasound for evaluation of leg veins. The test did not reveal evidence of deep venous thrombosis. On October 28, 2009 Dr. Snyder reported Claimant was "not doing well, the pain is severe and not improving." (Exh. C, p. 13) His physical examination noted "quad atrophy" and hypersensitivity to light touch. Dr. Snyder suspected, "patient may have RSD," so he referred her to Dr. Fotopoulos, a physiatrist in his office. He also prescribed some Ambien to help Claimant sleep.

Instead of seeing Dr. Fotopoulos, Claimant was evaluated by Dr. Alisha Hillman on February 4, 2009. Dr. Hillman felt a diagnosis of RSD was unlikely, but she did diagnose "chronic pain syndrome, right knee." (Exh. C, p. 9) Dr. Hill prescribed Neurontin for pain relief as well as an analgesic cream. She also allowed a return to sedentary work.

Claimant was examined again by Dr. Snyder on January 6, 2010. He noted, "she is not doing well on the Neurontin. She says her knee is worse than before surgery and it is severely limiting. It swells all of the time and it hurts to touch." (Exh. C, p. 6) Dr. Snyder maintained Claimant at "light duty" status and he instructed her to follow up with him in four weeks.

On January 15, 2010 Dr. Hillman re-evaluated Claimant and once again she documented severe pain that was neither aggravated nor improved by activity. Additionally, Dr. Hillman noted the pain "wakes her up on the hour every hour." Claimant told Dr. Hillman she felt it was unsafe for her to drive because of the difficulty moving her right leg. Dr. Hillman prescribed physical therapy and replaced the Neurontin with Lyrica. Dr. Hillman also offered a lumbar sympathetic block, but Claimant declined. Dr. Hillman planned to re-evaluate Claimant in four weeks, but this did not happen as Claimant's care was transferred to Dr. Joseph Galate.

Dr. Galate's initial evaluation of Claimant was on January 26, 2010. He recommended a course of treatment that included a bone scan, steroids, medication and physical therapy. Dr. Galate restricted Claimant to sedentary duties with no repetitive bending or twisting and no lifting over ten pounds. Claimant followed up with Dr. Galate on February 17, 2010 with no significant improvement in symptoms. The bone scan was obtained and it showed no sign of RSD. Dr. Galate prescribed lidoderm patches in an attempt to control Claimant's pain. On March 3, 2010 Dr. Galate admitted there had been no change in Claimant's symptoms, but he released her from his care as he had "no future recommendations for the patient at this time." (Exh. D, p. 3) Dr. Galate also released Claimant to return to work although he noted, "She is currently out of work and looking for another job." (Exh. D, p. 3) About six weeks later Dr. Galate issued his final report containing his disability rating of 10% of the right lower extremity.

Following the release by Dr. Galate, Claimant was able to return to work as a substitute teacher for a facility called ACE. She testified that she was only able to work because of the employer's willingness to accommodate her condition. In particular, she was allowed to elevate her leg and she was also given the opportunity to take additional breaks throughout the day. However, by May 2012 she was unable to satisfactorily perform her job duties even with the accommodations. Claimant has not worked since.

On February 27, 2012, Claimant was evaluated by P. Brent Koprivica, M.D. According to Dr. Koprivica, the July 3, 2008 work injury represents the direct, proximate and prevailing factor in the development of internal derangement of Claimant's right knee. He further notes Claimant continues to have disabling, chronic right knee pain, but he agrees with Dr. Galate that

he does not believe she has complex regional pain syndrome. Instead it is Dr. Koprivica's opinion that Claimant has developed chronic pain syndrome with underlying major depressive disorder. However, he deferred any opinions or conclusions regarding psychological impairment to an appropriate mental health care expert. Dr. Koprivica rated the disability of Claimant's knee at 30% with the understanding that additional disability may be present on a psychological basis.

A psychological evaluation was performed by Allan Schmidt, Ph.D., on February 12, 2013. After interviewing the Claimant and administering various psychological tests, Dr. Schmidt diagnosed major depressive disorder and pain disorder stemming from her injury. His report states:

Her injury, and the resulting physical limitations and pain she experienced was the prevailing factor in the development of her current depression and pain disorder.

Her experience of pain appears to be enhanced by her psychological condition. In particular, she is so focused on her pain and the anticipation of pain, that she enhances the negative impact of her significant levels of pain. This is further complicated by the disruption of sleep that she reports.

Dr. Schmidt provided a disability of 20% of the whole person based upon the psychological problems stemming from the injury. He estimated her global assessment of functioning at 52 which is only slightly above the threshold for serious impairments in psychological, social or occupational functioning.

On March 25, 2013 vocational expert Michael Dreiling evaluated Claimant's ability to access the open labor market. In his report Mr. Dreiling admits that Dr. Galate believes Claimant can return to work without restrictions. However, Mr. Dreiling points out that following Dr. Galate's evaluation Claimant attempted to perform substitute teaching, "But eventually left the classroom setting because of significant pain issues." Mr. Dreiling also concluded, "Based on her current level of functioning, she is not a realistic candidate to perform employment in the open labor market. When taking into account the totality of her vocational profile and factors previously cited, it is my opinion that no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in her current physical and emotional condition." (Exh. I, p. 12)

RULINGS

1. Average Weekly Wage:

The provision for the computation of average weekly wages are set forth in R.S.Mo § 287.250. In pertinent part, the statute provides:

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

R.S.Mo § 287.250.4 (2014)

Claimant was paid by the day, \$90.00. However, as a substitute, Claimant could choose when she worked. A review of Exhibit 4, the 11 week wage statement reflects that the Claimant rarely worked a full week. The entries, divisible by the \$90.00 daily rate reflect Claimant worked from 1 - 5 days, with some half days. Given that Claimant chose when to work, dividing the total by 11 weeks most fairly determines her average weekly wage (\$273.27).

Claimant argues part time status. However, Claimant did not testify regarding an hourly rate. Further, if those weeks that Claimant did not work a full week are taken out of the "equation," then the average weekly wage is distorted to an amount which Claimant rarely made. Clearly, exceptional facts exist—Claimant's choice as to when she would work. There is no underpayment of temporary total benefits.

2. Nature and Extent of Disability:

Claimant bears the burden of proving each element of her case. I find that the injury of July 3, 2008 resulted in a right knee partial lateral meniscus tear requiring arthroscopic surgery. I find that the Claimant does not have reflex sympathetic dystrophy and that she returned to work full duty. Further, that Claimant applied for and received unemployment benefits, further evidence of her ability to work. I find that Claimant has sustained permanent partial disability to her right knee of 20%. I find that Mr. Schmidt's opinion regarding alleged depression related to this accident is not credible, in that he relied only on Dr. Koprivica's report, did not review any of the treating physicians' reports and did not review any medical records of treatment before or after the July 3, 2008 accident.

I find that Claimant had a number of prior injuries which resulted in complaints identical to those which she testified resulted from this accident. I find that the Claimant is a poor historian and that none of the prior injuries and complaints were reported to her treating or examining physicians. Further, I do not find the opinion of Mr. Dreiling persuasive.

Ms. Francis did return to work, full duty for almost 4 years after this accident. She collected unemployment and has secretarial skills which would allow her to return to work.

There is no evidence of the need for future medical treatment related to the July 3, 2008 accident and no evidence of Second Injury Fund liability.

I find Claimant is entitled to disability benefits from the Employer/Insurer in the amount of \$182.18 per week times 32 weeks (20% of the left knee) for a total of \$5,829.76. I find Claimant's attorney, Mark Kolich, entitled to 25% of the sums recovered for his legal services.

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation