

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

Injury No.: 13-002442

Employee: Barbara Fuller
Employer: Elementis Specialties, Inc.
Insurer: Zurich American 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, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The ALJ heard this matter on March 9, 2016. The parties stipulated that on January 6, 2013, employee sustained an accident arising out of and in the course of employment. The parties stipulated that the following issues were in dispute, to be decided by the administrative law judge:

- medical causation
- liability for past medical expenses
- future medical care
- temporary disability
- permanent disability
- Second Injury Fund liability

The ALJ determined as follows:

- (1) Employer/insurer is liable to employee for past medical expenses totaling \$53,372.07;
- (2) Employer/insurer is liable to employee for temporary total disability benefits in the amount of \$30,303.37;
- (3) Employee is liable to employee for permanent partial disability benefits totaling \$34,686.40, and disfigurement benefits totaling \$1,734.32;
- (4) The Second Injury Fund is liable to employee for permanent partial disability benefits totaling \$33,464.25; and
- (5) Employee is not entitled to an award of future medical treatment.

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Employee filed an application for review alleging the ALJ erred in:

- (1) finding that employee's left knee condition was not entirely medically causally related to the January 6, 2013, work injury;
- (2) failing to find that employee is permanently and totally disabled, either as a result of the work injury alone, or as a result of the work injury in combination with pre-existing conditions; and,
- (3) failing to award future medical care.

Employer/insurer filed an application for review alleging the ALJ erred in:

- (1) awarding past medical benefits for employee's left total knee replacement, as the surgery was not reasonable or necessary and the need for the surgery did not flow from the accident;
- (2) awarding past temporary total disability benefits beyond May 14, 2013; and
- (3) awarding permanent partial disability and disfigurement benefits.

For the reasons stated below, we modify the award of the ALJ referable to the issues of: (1) future medical care; (2) medical causation of employee's permanent and total disability and liability of the Second Injury Fund. In all other respects, we affirm and adopt the award and decision of the ALJ.

Discussion

On January 6, 2013, claimant, a then sixty-one year old machine operator, slipped and fell on Bentone, a chemical substance that had spilled on the employer's concrete floor. Claimant struck her mouth and right wrist on the floor and also injured her left knee by twisting and/or striking it on the floor.

Past medical care and temporary total disability

After her injury at work on January 6, 2013, employee worked for the rest of the day. When she arrived home after work, she lay down and treated her wrist with ice. Later than night, at her husband's insistence, employee sought emergency room treatment for injury to her right wrist, right cheek and left knee. On January 8, 2013, employer referred employee to Dr. Christopher Kostman for treatment. On January 11, 2013, Dr. Kostman performed surgery to address employee's right wrist injuries sustained in the accident.

On January 29, 2013, during a follow-up visit with Dr. Kostman, employee reported trouble descending stairs, pain and an occasional catching sensation in her left knee since the accident. Dr. Kostman examined employee's left knee, ordered x-rays and administered a steroid injection.

Employee next visited Dr. Kostman on February 6, 2013, and complained of difficulty kneeling, squatting and descending stairs. Dr. Kostman ordered an MRI scan to evaluate employee's knee joint. On February 13, 2013, based on his review of employee's MRI, Dr. Kostman diagnosed a meniscus tear attributable to employee's

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work injury. Dr. Kostman also noted patello femoral chondrosis, which he opined was not related to employee's injury on January 6, 2013. Dr. Kostman performed surgery for employee's torn medial meniscus on February 25, 2013.

Employee returned to Dr. Kostman on May 1, 2013, with swelling in her knee. That day, Dr. Kostman drained fluid to reduce the swelling. Employee returned to work. Dr. Kostman next evaluated employee on May 14, 2013. Employee reported additional swelling and pain in her left knee. Employee testified that although she told Dr. Kostman she was not even able to walk up stairs, he advised her he had repaired her meniscus tear and was sending her back to regular duty work. Dr. Kostman's report of May 14, 2013, opined that employee's left knee pain and swelling were attributable to degenerative joint disease or calcium pyrophosphate deposition disease (pseudogout), unrelated to the January 6, 2013, injury. He recommended that employee follow up with her primary care physician for pseudogout treatment, and at the same time declared her to be at "maximum medical improvement."

Employer refused to authorize further treatment by Dr. Kostman. As chronicled in the ALJ's award, after Dr. Kostman released employee from his care she sought treatment from several other medical providers for continued chronic pain in her left knee. Employee's knee pain remained unresolved. On October 25, 2013, she consulted orthopedic surgeon Dr. Nam. Pursuant to Dr. Nam's examination on that date, he considered employee a candidate for a left total knee arthroplasty. Dr. Nam performed that procedure on December 16, 2013.

Pursuant to §287.140, RSMo, employee need not prove that her left knee condition was *entirely* attributable to her January 6, 2013, accident to establish that replacement of her left knee was reasonably required to cure and relieve her compensable injury. As noted in *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. App. 2011):

[I]t is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo. App. S.D. 2006). **Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury.** *Id.* The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. *Id.* (emphasis added).

In awarding compensation for employee's left knee replacement surgery, the ALJ relied on Dr. David Volarich's opinion that employee's knee replacement "flows directly from the work-related injury of 1/6/13 as Ms. Fuller had no pre-existing limitations or hindrances or disabilities in either low extremity prior to 1/6/13." Dr. Volarich's opinion was at odds with Dr. Kostman's opinion that employee's persistent pain after his surgery of February 25, 2013, was unrelated to her fall at work on January 6, 2013, and was instead caused by pre-existing degenerative joint disease or pseudogout.

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Dr. Kostman's deposition testimony that employee's left knee replacement was unrelated to her January 6, 2013, injury is inconsistent with his original assessment that employee's left knee meniscus tear was attributable to her work injury. For that reason, we are persuaded by Dr. Volarich's opinion that employee's work-related injury caused her to become a candidate for a full knee replacement.

We therefore adopt the ALJ's finding that employee reached maximum medical improvement when she was released by Dr. Nam on January 28, 2014, and his award of compensation for the cost of employee's total left knee replacement surgery and for past temporary total disability from May 15, 2013, the date of her release to return to work by Dr. Kostman, until her January 28, 2014, release by Dr. Nam.

Future medical care

The ALJ declined to award future medical care for employee's left knee, relying heavily on Dr. Kostman's opinion that "severe arthritis and crystalline deposition disease was the cause of the claimant's deterioration of her knee condition and her need for treatment." From this, the ALJ inferred "that the claimant's condition will continue to deteriorate and that claimant's future medical requirements for pain medication and a knee replacement flow from her degenerative condition."

We are unable to reconcile the ALJ's finding that employee's total left knee replacement surgery flowed from her work-related injury on January 6, 2013, with his denial of future medical to address employee's ongoing need for medication to address pain in her left knee and potential replacement of her left knee joint prosthesis.

We find that because employee's left knee joint has been removed and replaced with a prosthetic device, any problems she experiences in the future relating to her left knee joint cannot be considered causally related to pre-existing degenerative arthritis.

Therefore, we reverse the ALJ's finding on the issue of future medical care and award future medical reasonable and necessary to cure and relieve employee of the effects of the injury to her left knee to include ongoing pain medication. By this award, we anticipate at some time in the future employee may need to have her knee prosthesis replaced. Replacement of the prosthesis is specifically encompassed within this award of future medical care, to the extent medical evidence proves replacement reasonable and necessary to cure and relieve employee of the effects of her injury.

Second Injury Fund Liability

The ALJ found that employee is now permanently and totally disabled. We agree. The ALJ concluded employee's permanent total disability is not the result of the effects of her work injury in combination with her preexisting disabilities. We disagree.

We affirm and adopt the ALJ's findings and conclusions that employee sustained a 20% permanent partial disability of the right forearm and a 25% permanent partial disability of the left knee as a result of the work accident and injury.

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Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.*

Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

Section 287.220 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). We have found employee sustained only a permanent partial disability as a result of the work injury. Having determined the liability resultant from the work injury, we must next determine the nature and extent of the employee's disability as a result of the effects of her work injury in combination with her preexisting disabilities.

As noted in the ALJ's award, at the time of the primary injury, employee had the following pre-existing disabilities:

1. 17½% pre-existing permanent partial disability to each wrist (61.25 weeks)
2. 17½% pre-existing permanent partial disability to the right elbow (36.75 weeks)
3. 15% pre-existing permanent partial disability to the left elbow (31.5 weeks)
4. 17½% pre-existing permanent partial disability to the left shoulder (40.6 weeks)
5. 17½% pre-existing permanent partial disability to the right middle finger (6.125 weeks)
6. 15% permanent partial disability to each hand (52.5 weeks)

We agree with the ALJ's conclusion that employee's preexisting disabilities were serious enough to constitute a hindrance or obstacle to employment and that each of employee's preexisting disabling conditions combined with her work injury to result in worse disability than would have resulted in the absence of the preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he

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must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Mr. J. Stephen Dolan, a vocational rehabilitation counselor, evaluated employee on May 20, 2016. Employee left high school after eleventh grade due to bullying. She later passed a GED and a real estate license test. Employee's math and reading ability tested below average. Mr. Dolan found employee's account of her subjective complaints and physical limitations in daily activities "entirely credible" and consistent with restrictions included in Dr. Volarich's report. He noted that employee worked for the same company through several mergers for thirty-one years at a level of maximum exertion. He stated, "She has proven her work ethic. She not only did for decades a physical job usually done by men but returned to work after many injuries and surgeries." Mr. Dolan noted that the only job employee has ever had that is not unskilled was operating chemical equipment and that because of her age of sixty-four years "those skills would transfer only very narrowly to a very similar type of job." Mr. Dolan considered employee unemployable in the open labor market because problems with her left knee keep her from jobs that are above the sedentary level and problems with employee's hands preclude her from doing sedentary jobs.

Employee testified she has a crooked spine and believes she "probably always had some sort of back pain." Medical records reflect employee was treated for chronic back pain and depression in 2008 and 2009. Mr. Dolan testified that if employee's ongoing back complaints were taken out of the picture he would still consider her permanently and totally disabled.

The ALJ quoted extensively from the brief submitted on behalf of the Second Injury Fund, arguing that employee's permanent and total disability "results in a combination of the primary injury, the pre-existing conditions and unrelated post primary injury progression of her pre-existing back condition."

The ALJ then noted that the sole vocational expert, Mr. Dolan, considered employee to be permanently and totally disabled due to permanent disability of her left knee from the 2013 accident in synergistic combination with her pre-existing permanent partial disabilities of the upper extremities **exclusive of her low back condition**.

The ALJ then went on to conclude:

The weight of the credible evidence infers that the claimant's pre-existing permanent partial disabilities combined with her permanent partial disability from the 2013 accident and the subsequent deterioration of her degenerative osteoarthritis to result in permanent total disability. Therefore, the claimant is not eligible for permanent total disability benefits from the Second Injury Fund.

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As noted above, we agree with the ALJ's conclusion that employee is permanently and totally disabled. We disagree with the ALJ's conclusion that the Second Injury Fund is not liable for permanent and total disability.

Contrary to the ALJ, we find the "subsequent deterioration of [employee's] degenerative osteoarthritis" was medically caused by the work injury. In reaching this finding, we rely on the expert medical opinion of Dr. Volarich that, as a result of her work injury, employee sustained trauma to her left knee. That trauma, in turn, caused internal derangement and *accelerated* degenerative changes in the knee. Dr. Volarich opined that it was the internal derangement and accelerating degenerative changes ("post-traumatic arthropathy") that ultimately resulted in employee's need for a total left knee replacement. Dr. Volarich noted that employee had no symptoms in her left knee prior to the accident. He testified that employee's post-traumatic arthropathy progressed after, and as a result of, Dr. Kostman removing cartilage from employee's knee during the chondroplasty he performed to cure and relieve employee of the effects of the work injury. Dr. Volarich testified that calcium pyrophosphate deposition disease, a/k/a pseudogout, is a disease that affects multiple joints and that the absence of pseudogout findings in employee's right knee or other big joints rules out pseudogout as a cause of her disability. We find Dr. Volarich's reasoning and conclusion more persuasive than the opinion of Dr. Kostman. As previously noted, inasmuch as employee has had a total knee replacement, she no longer has any degenerative arthritic changes involving her left knee. Employee no longer has any permanent disability attributable to arthritic changes in her left knee. Because we find that employee's need for a total knee replacement is casually related to her work injury, all disability referable to her left knee must be deemed injury-related and therefore relevant to the evaluation of Second Injury Fund liability. In other words, a proper analysis of Second Injury Fund liability must always include an evaluation of all residual effects of medical treatment found to be reasonable and necessary to cure and relieve the effects of a compensable injury.

Based upon the medical opinion of Dr. Volarich and the vocational opinion of Mr. Dolan (the only vocational expert who offered an opinion), and considering only the ill effects of employee's work injury in combination with her preexisting disabilities, we find no employer in the open labor market would reasonably be expected to hire employee (or any worker) laboring under such ill effects to perform the regular duties of employment. For that reason, we conclude employee is permanently and totally disabled as a result of the effect of her work injury in combination with her pre-existing disabilities.

Based upon the foregoing, we conclude the Second Injury Fund is liable to employee for permanent total disability benefits beginning January 29, 2014, the day after she reached maximum medical improvement.

Conclusion

We modify the award of the administrative law judge as to the issues of (1) future medical care; (2) the nature and extent of permanent disability; and (2) the liability of the Second Injury Fund.

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Employer/insurer shall pay to employee \$53,372.07 for her past medical expenses, \$30,303.37 in temporary total disability benefits, \$34,686.40 in permanent partial disability benefits, and \$1,734.32 for disfigurement. In addition, employer/insurer shall provide to employee all future medical care reasonable and necessary to cure and relieve employee of the effects of her injury, including pain medication to relieve employee's left knee pain as recommended by Dr. Volarich.

The Second Injury Fund is liable to employee for weekly permanent total disability benefits beginning January 29, 2014, the day after employee reached maximum medical improvement, through August 13, 2015, in the amount of \$328.28. Thereafter, the Second Injury Fund shall pay to employee weekly permanent total disability benefits of \$815.86 for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued May 5, 2016, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

We approve and affirm 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 12th day of January 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Barbara Fuller	Injury No.:	13-002442
Dependents:	N/A		Before the
Employer:	Elementis Specialties, Inc.		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Zurich American Insurance Company		
Hearing Date:	March 9, 2016	Checked by:	EJK/mk

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 6, 2013
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, 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:
The employee, a machine operator, slipped on a chemical on the employer's concrete floor and fell injuring her right forearm and left knee.
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: Right forearm and left knee
14. Nature and extent of any permanent disability: 20% permanent partial disability of the right forearm and 25% permanent partial disability of the left knee
15. Compensation paid to-date for temporary disability: \$8,156.60
15. Value⁸⁹ necessary medical aid paid to date by employer/insurer: \$72,252.96

- 17. Value necessary medical aid not furnished by employer/insurer? \$53,372.07
- 18. Employee's average weekly wages: \$1,223.73
- 19. Weekly compensation rate: \$815.86/\$433.58
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$ 53,372.07
37 1/7 weeks of temporary total disability	\$ 30,303.37
80 weeks of permanent partial disability from Employer	\$ 34,686.40
4 weeks of disfigurement from Employer	\$ 1,734.32

- 22. Second Injury Fund liability: Yes

77.18125 weeks of permanent partial disability from Second Injury Fund	\$ 33,464.25
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TOTAL: \$153,560.41

- 23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Barbara Fuller	Injury No.: 13-002442
Dependents:	N/A	Before the
Employer:	Elementis Specialties, Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Zurich American Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/mk

This workers' compensation case raises several issues arising out of a work-related injury in which the claimant, a machine operator, slipped on a chemical on the employer's concrete floor and fell injuring her right forearm and left knee. The issues for determination are (1) Medical causation, (2) Liability for past medical expenses, (3) Future medical care, (4) Temporary disability, (5) Permanent disability and disfigurement, and (6) Second Injury Fund Liability. The evidence compels an award for the claimant for medical expenses and temporary and permanent disability benefits.

At the hearing, the claimant testified in person and offered depositions of David T. Volarich, D.O., and J. Stephen Dolan, M.A., C.R.C., records from the Division of Workers' Compensation, medical bills, correspondence between legal counsel regarding additional medical care, and voluminous medical records. The defense offered depositions of the claimant and W. Christopher Kostman, M.D., records from the Missouri Division of Workers' Compensation, records of a prior workers' compensation settlement in Illinois, records of the defense payments in the case, a medical report from Andrew M. Wayne, M.D., and personnel records from the employer.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On January 6, 2013, this then 61-year-old claimant, a Bentone operator, slipped and fell on a chemical substance on the employer's concrete floor, striking her mouth and right wrist on the floor suffering a comminuted fracture in the right forearm. She also injured her left knee, by twisting it, striking it on the floor, or both, suffering a torn left medial meniscus and extension lateral femoral trochlear chondrosis.

A Bentone operator runs a machine which processes Bentone, a chemical. The machine is large and covers several stories and it has pipes which run the length of a city block. On January 6, 2013, the machine went down and she tried to start it without success. She took a

steam line and hung a hose from the steam line on the Bentone line to warm it up so that it would flow. She went to a different room to check the computer screen, to determine whether it was pumping. As she looked at the screen, she noticed fluctuations on the screen and returned to the area where she felt there was a clog. As she entered the room, she saw that a valve had come open and Bentone was being discharged onto the floor. She began moving toward the valve to turn it off but slipped and fell to the concrete floor. She struck her mouth and right wrist on the floor. She testified that she also injured her left knee, though she was not certain if she twisted her knee or struck it on the floor, or both.

After her fall, the claimant got up and turned off the valve. She had a loose tooth and a bloody lip, which was most concerning to her. She testified that her tooth and lip have subsequently healed without problem. She spoke to her supervisor about the spill before finishing her shift. Her right wrist was feeling bad during the remainder of her shift. She went home, lay down, and put ice on her wrist. She testified that her husband noticed that her wrist was swollen and he took her to St. Joseph's Hospital Emergency Room.

On January 7, 2013, the claimant went to the St. Joseph's Hospital Emergency Room complaining right wrist, right cheek, and left knee pain. She was diagnosed with a comminuted distal radius fracture. A CT scan of her facial bones revealed no fractures. X-rays of the left knee revealed mild three compartment osteophyte with mild decrease in medial joint space. See Exhibit 20. She received a temporary cast and instructions to follow up with a physician. On the next day, she called her employer to report that she would not be able to work because of the wrist injury.

On January 8, 2013, the claimant went to Dr. Kostman, who diagnosed a right distal radius fracture and performed a closed reduction and placement of external fixator placing pins into her arm which stuck out of her arm. See Exhibit 26. There was a bar running across these pins on the outside of her arm. On March 7, 2013, Dr. Kostman removed the bar and the pins. See Exhibit 26.

On January 29, 2013, Dr. Kostman examined the claimant's left knee and noted:

In addition, she describes that she had injured her left knee when she fell. She believes when she slipped she may have twisted her left knee or fallen onto the anterior aspect of the left knee. Since that time, she has had trouble with stair descending activity, has had some degree of anterior medial knee pain and also occasional catching sensation. She has not had any prior injury to her left knee, no prior evaluation or injury in the past. See Exhibit 26.

She complained of worsening pain in the left knee, feeling the pain under the kneecap area. Dr. Kostman provided her with an injection into the left knee, although the pain returned. A left knee MRI revealed a torn medial meniscus with extensive lateral femoral trochlear chondrosis. See Exhibits 25, 26. On February 25, 2013, Dr. Kostman performed a left knee arthroscopy, partial meniscectomy, chondroplasty of the patellofemoral joint and medial femoral condyle. See Exhibit 26. She returned to work with increasing knee pain as she worked on it. On May 1, 2013, the claimant returned to Dr. Kostman and showed him the swelling in her knee. He drained fluid to reduce the swelling. See Exhibit 25. She returned to work with her knee

feeling better. However, it became swollen, and she returned to Dr. Kostman on May 14, 2013. She assumed the knee would be drained again. However, Dr. Kostman told her he had fixed her meniscus tear and discharged her to regular duty. He opined:

I do not believe the condition of degenerative joint disease or calcium pyrophosphate deposition disease is related to her injury of January 6, 2013. It was recommended that she follow with her primary care physician. He or she may further recommend metabolic testing to evaluate for possible causes and subsequent treatment for her pseudogout which may further improve her left knee swelling and pain. ... I believe she is at maximum medical improvement. See Exhibit 25.

She returned to Dr. Fulton, her family physician, and received a pain injection and physical therapy, resulting in additional pain. On July 17, 2013, Dr. Shuman, a rheumatologist, examined the claimant's left knee and observed that the knee was warm and swollen. See Exhibit 17. The claimant complained that her left knee had continued to swell, and that it had not done this prior to her work accident. Dr. Shuman reported had "chronic swelling of the left knee. It is too long for it to be related to pseudogout. It may be related to the internal derangement but I am very concerned that this is regional complex pain syndrome." See Exhibit 17. On July 22, 2013, a left knee MRI scan revealed a degenerative change in the lateral meniscus without a tear, moderate sized joint effusion, chondromalacia, an abnormal signal in the posterior horn of the medial meniscus compatible with a tear, and possibly a bucket handle tear. See Exhibit 17. A comparison of the MRI with the February 6, 2013 MRI revealed that the claimant had a recurrent or residual tear of the posterior horn of the medial meniscus. See Exhibits 16, 17.

On August 16, 2013, Dr. Smith, an orthopedic surgeon, examined the claimant for left knee pain since January 2013. See Exhibit 8. The claimant reported that she had not received any relief from her surgery. She complained that her pain was worse with walking, as well as with descending stairways. He diagnosed left knee osteoarthritis, performed an injection, and recommended that she continue with physical therapy. See Exhibit 8.

On October 1, 2013, claimant's counsel advised defense counsel that "Dr. Kostman's office called my client cancelling the [claimant's October 1, 2013,] appointment, because work comp would not approve the appointment. Please let me know what's going on." See Exhibit 30. On October 7, 2013, claimant's counsel advised defense counsel, "You have not responded to my e-mail of October 1, 2013. Under the circumstances, I will instruct my client to receive medical treatment from physicians of her own choosing, for which we will seek payment from your client. If I am mistaken and you responded in some fashion to my e-mail of October 1, please let me know. After receiving your letter dated September 25th, my client made an appointment with Dr. Kostman, only to be informed at the last minute that the appointment had been cancelled because it was not authorized by your client." See Exhibit 30.

On October 25, 2013, Dr. Nam, another orthopedic surgeon, examined the claimant for chronic left knee pain. He opined that she was a candidate for a left total knee arthroplasty and performed that procedure on December 16, 2013. See Exhibit 8. In December 2013, Illinois Home Health visited the claimant's home following her left knee replacement. The claimant

received instructions on pain management, medications, and dressing changes, and the nurse assisted the claimant with her exercise program. See Exhibit 24. On January 28, 2014, Dr. Nam discharged the claimant to return in six months and opined that the surgery had been successful. See Exhibit 8.

The claimant incurred \$53,372.07 for her total knee replacement after having been discharged by the office of Dr. Kostman. See Exhibit 29. The claimant identified an exhibit and testified that it constituted a copy of the medical bills she received for her knee replacement surgery.

Pre-existing Medical Conditions

The claimant suffered from several pre-existing permanent partial disabilities to her upper extremities: Bilateral carpal tunnel syndrome, lateral epicondylitis of the right elbow, ulnar neuropathy in the left elbow, and a left shoulder cyst and supraspinatus tendonitis.

In 1994, the claimant complained of carpal tunnel syndrome to Dr. Lopatin, her primary physician. See Exhibit 12. On January 31, 1995, Dr. Beatty performed a left carpal tunnel release and a right carpal tunnel release on February 28, 1995. Finally, Dr. Beatty performed a left elbow ulnar nerve decompression with medial epicondylectomy on June 23, 1995. See Exhibit 13.

On January 11, 2000, Dr. Lopatin examined the claimant for left knee soreness. The claimant reported that a truck bumped her left leg and she felt as if there was catching in her knee. However, a left knee MRI revealed no abnormalities. See Exhibit 12.

On February 7, 2001, Dr. Brown examined the claimant and diagnosed right lateral epicondylitis and pain at the base of her thumbs. Initially, she received medication, light duty, and bracing. She then received an injection into her elbow. When she did not receive relief, Dr. Brown performed a surgical excision of a degenerated right common extensor origin with a limited lateral epicondylectomy. She underwent therapy before being released. See Exhibit 15. The claimant settled a January 7, 2001, workers' compensation claim with her employer on the basis of a 17.5% permanent partial disability of her right elbow. See Exhibit 3.

In 2007, the claimant went to BarnesCare and was diagnosed with a crush injury to the right hand and a laceration to the right middle finger. She also complained of pain in her left shoulder, and was diagnosed with a persistent strain of the anterior left shoulder. She was referred to Dr. Brown for further treatment. See Exhibit 4. On August 3, 2007, Dr. Brown performed an exploration and laceration of her right middle finger with extensor tendon repair and arthrotomy of the PIP joint. See Exhibit 6.

On December 11, 2007, a left shoulder MRI revealed a cyst, supraspinatus tendonitis, and an abnormality involving the superior labrum. See Exhibit 5. On March 26, 2008, Dr. Rotman performed a left shoulder arthroscopy, biceps tenotomy, and subacromial decompression. See Exhibit 6. She also underwent injection of keloid scars to the right long, middle and ring fingers. See Exhibit 6. Dr. Rotman also injected her thumbs on June 12, 2008. The claimant settled an August 3, 2007, workers' compensation claim with her employer on the basis of a 17.5%

permanent partial disability of her left shoulder and a 17.5% permanent partial disability of the right middle finger. See Exhibit 3.

In 2008 and 2009, the claimant received medical care for chronic back pain and depression from the Highland Physicians. See Exhibit 16.

Dr. Ungacta, an orthopedic surgeon, examined the claimant in 2010 regarding bilateral thumb pain that had been present for years. She received injections into each thumb. When her complaints continued, she went to Dr. Goldfarb for surgery. After undergoing surgery from Dr. Goldfarb, the claimant returned to Dr. Ungacta and received physical therapy. See Exhibit 18.

The claimant testified that her carpal tunnel syndrome surgery was a success, although she still had occasional numbness in her hands. She testified that she had numbness in her fingertips at the time of the hearing. She also complained of lost grip strength in her hands. With regard to her elbows, she also had occasional problems which would wake her up late at night. The problems were mainly in her left elbow area. She complained that the left elbow was painful if she would rest it on the table or other hard surfaces. She also stated that she had to shake her left arm when she was driving due to increased complaints. The claimant also had a prior left knee injury that was not disabling prior to the 2013 work-related accident.

Current Conditions

The claimant testified that if she sits still, her right wrist does not give her much in the way of problems. However, she has trouble if she is active. She cannot hold a book in front of her due to right wrist and forearm pain. Driving a car bothers her due to holding onto the steering wheel. When she is outside in her yard, which is only for short periods, she has pain and aching in her arm. Her complaints are worse with movement and lifting. She testified that she could lift up to a gallon of milk but nothing heavier.

She testified that her left knee is doing fairly well but gets worse in rainy weather. She has trouble getting down onto the floor and getting back up due to knee pain. She cannot sit with her left leg crossed over her right leg, due to pain and lost motion. She cannot kneel on the left knee due to pain. She also has increased pain if she is inactive. She tries to stay active and uses a stationary bike at home to try to strengthen her leg. She exhibited a 2-inch scar over her right wrist where the first pin was inserted and a very noticeable 2-inch scar over the right forearm.

The claimant testified that she now has limitations on her daily activities. She tries to do things outside of her home such as trimming branches, but limits the duration of activity due to pain. She uses a riding lawn mower, but drives it for short durations before she takes a rest break. She has difficulty driving a car due to fatigue and left knee pain. She has difficulty getting into the car due to her left knee and difficulty grasping a steering wheel due to upper extremity pain.

The claimant testified that she only sleeps three hours at a time and wakes up to due to pain in her arms and legs. She testified that if she turns over during the night she can sometimes go back to sleep after one half hour. She testified that she always sleeps with her television on.

The claimant testified that she can sit for forty-five minutes and is limited by pain in her back and left leg. She testified that she has had back pain before her two work injuries and has taken medication for her back pain since before her work injuries. She testified that she can sit and stand, but after short periods she develops more back and left knee pain. She can walk one block back and forth, and is limited by back pain. She uses a cane when she goes outside of her home due to uneven surfaces in her yard. She testified that she walks deliberately and tries to step in a steady and deliberate manner so that she does not twist her knee or back. She testified that her left knee pops. She testified that she climbs stairs slowly. Her left knee has increased pain while descending stairs. During the day she lies down from time to time when she gets tired and achy. She testified her pain increased with increased activity. She is able to bathe herself using a long handled brush. She has pain in her left knee when putting clothes on. She has trouble cooking, because she cannot use her hands for things such as peeling potatoes or cutting meat with a knife. She can do laundry but does very small loads due to pain in her hands.

Employment and Educational Background

This now 64-year-old claimant is 5-feet and 5-inches tall and weighs 155 pounds. Her medications include Norco for pain, Xanax for anxiety, Ambien for sleep, Crestor for cholesterol, and Celexa for depression. She receives all of her medications from her primary care physician.

The claimant went to school until the 11th grade at East St. Louis High School with average grades, did not receive a diploma, but later received a GED. She has never been in the military. The claimant owns a computer, knows how to operate it, and uses it for shopping and sending e-mail, but she does not use it often.

The claimant began working for this employer in 1982 and worked there until her last date of work on May 14, 2013. She testified that this employer forced her to retire after her knee replacement. She has not worked since her 2013 work-related accident. She testified that her plan was not to retire, but to continue working and that her finances have been significantly diminished due to early retirement. She testified that she did not believe that she could work at this time. By way of prior employment, she performed housekeeping duties at Scott Air Force Base and at a motel, and did waitress duties at a fast food restaurant as a teenager.

David T. Volarich, D.O.

On March 5, 2015, Dr. Volarich examined the claimant, took a medical history, and reviewed her medical records. Dr. Volarich testified that pseudogout is a crystal disease which can be found in joints and is also called calcium pyrophosphate deposition disease. He testified that it is a different type of crystal than regular gout. See Dr. Volarich deposition, page 13. He testified that gouty crystals cause destruction of the joint because of the acids and enzymes they secrete. See Dr. Volarich deposition, page 13. Therefore, gout will cause a deformity in the joint and break down the articular cartilage. See Dr. Volarich deposition, pages 13-14. However, he opined that pseudogout is not such a destructive process. See Dr. Volarich deposition, page 14. Dr. Volarich acknowledged that the claimant had pseudogout at one point, but that he, and the claimant's rheumatologist - Dr. Shuman – do not believe that the claimant currently has pseudogout, because pseudogout does not cause swelling. See Dr. Volarich deposition, page 14. He, therefore, ruled out pseudogout as the cause of the swelling in the claimant's knee. See Dr.

Volarich deposition, page 14. He opined that the swelling in claimant's knee is caused by the injury at work. See Dr. Volarich deposition, page 14.

Dr. Volarich testified that the claimant had no problems with her left knee leading up to the January 6, 2013, accident. See Dr. Volarich deposition, page 16. She now has continued problems with that knee including popping with motion, limited motion, difficulty getting up from the floor, stiffness with sitting, difficulty kneeling, limited ability to squat, difficulty with stairs and the need to use a cane. See Dr. Volarich deposition, pages 15-16.

Dr. Volarich performed a physical examination and found weakness in the claimant's left quadriceps and attributed it to the knee replacement. See Dr. Volarich deposition, page 17. He also found weakness in both of the claimant's forearms, and in her left shoulder. See Dr. Volarich deposition, pages 16-17. The claimant had loss of range of motion in the left shoulder, along with crepitus with movement. See Dr. Volarich deposition, page 17. She also had a Popeye deformity of the left biceps from a failed biceps tenotomy in 2008. See Dr. Volarich deposition, page 18. In the claimant's right elbow she had loss of range of motion which he attributed to the January 6, 2013, injury at work. See Dr. Volarich deposition, page 18. He found that she still has tenderness in the arm as well. She also had tenderness in the left elbow, the medial side, which he attributed to a cubital tunnel syndrome surgery. The claimant had a positive tinel sign in the left elbow. See Dr. Volarich deposition, pages 19-20. He opined that the ulnar nerve in the left elbow was still irritated as it had never been transposed, it had simply been decompressed. See Dr. Volarich deposition, page 20. He found that the claimant had decreased motion in her right wrist, with some loss in the left wrist as well. See Dr. Volarich deposition, page 20. He also found that the claimant had positive findings on testing for carpal tunnel syndrome in her wrist. See Dr. Volarich deposition, pages 20-21. He described her as having chronic denervation in the hands. See Dr. Volarich deposition, page 21. He also found that the claimant has atrophy and decreased grip strength in her hands from chronic carpal tunnel syndrome. See Dr. Volarich deposition, page 21. Dr. Volarich found that the claimant's left thigh was atrophied from her joint replacement surgery in the left knee. See Dr. Volarich deposition, page 22. He opined that the claimant had good motion in the left knee, though less than what a normal knee would have. See Dr. Volarich deposition, page 23. He found she had patellofemoral crepitis in the left knee because the kneecap was still sliding from side to side and making grinding noises. See Dr. Volarich deposition, page 23.

Based on reviewing the MRI's and surgical reports, Dr. Volarich opined that the degenerative changes in the claimant's left knee had come about after the surgical repair, because during the chondroplasty the surgeon removed the cartilage which caused the claimant to lose joint space. See Dr. Volarich deposition, page 27. He opined that the removal of the cartilage accelerated post-traumatic arthropathy, which is a degenerative change after trauma, and that the narrowing was not seen on the earlier MRI scan. See Dr. Volarich deposition, pages 27-28. He opined that the lack of findings in the right knee shows that the reason for changes in the claimant's left knee was the trauma of January 6, 2013. See Dr. Volarich deposition, page 29. He opined that the condition in the claimant's left knee could not be caused by the calcium pyrophosphate deposition disease, because that disease is not going to affect only one joint in the body, but rather, it would affect multiple joints in the body. See Dr. Volarich deposition, page 29. He opined that all of the damage to the left knee was done at the time of the January 6, 2013, injury. See Dr. Volarich deposition, page 29. Dr. Volarich opined:

As a direct result of this knee injury, she developed accelerated post-traumatic arthropathy in the left knee that required left total knee joint replacement. It's my opinion that the need for the left total knee joint replacement flows directly from the work-related injury of 1/6/13 as Ms. Fuller had no pre-existing limitations or hindrances or disabilities in either lower extremity prior to 1/6/13. The 1/6/13 work injury was the prevailing factor necessitating the need for the knee joint replacement." See Dr. Volarich deposition, page 37.

With regard to the occupational disease of August 29, 2011, Dr. Volarich diagnosed overuse syndrome of the hands, causing irreversible aggravation of thumb CMC arthritis, status post trapezial excision with suspensionplasty and tendon interposition arthroplasty. See Dr. Volarich deposition, page 31. He opined that the claimant's work, leading up to August 29, 2011, was the prevailing factor in causing these conditions. See Dr. Volarich deposition, pages 31-32. With regard to the occupational disease of August 29, 2011, he opined that the claimant suffered a 30% permanent partial disability of each hand.

With regard to the accident of January 6, 2013, Dr. Volarich diagnosed (1) a left knee contusion causing a torn medial meniscus and chondral injuries, status post-arthroscopic partial medial meniscectomy and chondroplasty of the patellofemoral joint and medial femoral condyle, (2) accelerated left knee post-traumatic arthropathy, status post left total knee joint replacement, and (3) a comminuted right distal radius fracture, status post closed reduction and placement of an external fixator and subsequent removal of the fixator. See Dr. Volarich deposition, page 32. Dr. Volarich testified that the post-traumatic arthropathy is also referred to as post-traumatic arthritis, and that it developed in the claimant's left knee after her accident. See Dr. Volarich deposition, page 32. He testified that the arthropathy is not the same thing as the calcium pyrophosphate deposition disease, which is a completely different, metabolic process. See Dr. Volarich deposition, page 33. He opined that the January 6, 2013, accident caused damage to the structure of the knee in the form of loose cartilage on the surface of the bone, as well as a meniscal tear, thereby narrowing the joint space. See Dr. Volarich deposition, page 33. He opined that this narrowing caused a breakdown of the knee, which developed into a bone-on-bone process, thereby requiring a total knee replacement. See Dr. Volarich deposition, pages 33-34. Dr. Volarich testified that the pseudogout was not causing any ongoing problems, and noted that the claimant is not currently under treatment for it. See Dr. Volarich deposition, page 35. Dr. Volarich testified that the January 6, 2013, accident was the prevailing factor causing these conditions. See Dr. Volarich deposition, page 36. With regard to the accident of January 6, 2013, he opined that the claimant suffered a 30% permanent partial disability of the right forearm at the 200 week level, and a 60% permanent partial disability of the left knee. See Dr. Volarich deposition, pages 39-40.

With regard to pre-existing medical conditions, Dr. Volarich diagnosed: (1) bilateral carpal tunnel syndrome, status post open carpal tunnel releases in 1995; (2) left elbow ulnar nerve decompression and partial medial epicondylectomy in 1995; (3) right elbow lateral epicondylitis, status post excision of degenerated common extensor tendon with limited lateral epicondylectomy and muscle flap coverage in 2001; (4) right long finger laceration and extensor tendon injury, status post arthrotomy at the proximal interphalangeal joint with tendon repair and exploration in 2007; (5) left shoulder internal derangement, status post arthroscopic biceps

tenotomy and subacromial decompression in 2008; and (6) left knee contusion, resolved in 1999. See Dr. Volarich deposition, pages 38-39.

With regard to pre-existing conditions, he opined that the claimant suffered the following pre-existing permanent partial disabilities: (1) 25% of the right wrist due to the carpal tunnel surgery and long finger laceration and exploration; (2) 20% of the left wrist due to the carpal tunnel syndrome; (3) 25% of the right elbow due to the lateral epicondylitis; (4) 25% of the left elbow due to the ulnar neuropathy and decompression; and (5) 20% disability of the left shoulder due to the internal derangement and arthroscopic repair. See Dr. Volarich deposition, pages 40-42. He opined that all of the disabilities would combine with each other to create a substantially greater disability than the simple sum. See Dr. Volarich deposition, pages 42-44.

With regard to ongoing medical care, Dr. Volarich opined that the claimant requires “ongoing pain medication to help control her pain syndrome using narcotics, non-narcotics, muscle relaxants, and physical therapy ... I didn’t think she needed anything beyond that when I saw her.” See Dr. Volarich deposition, pages 44-45. He also recommended that the claimant’s medical care be left open with regard to the left knee, because the knee joint will need to be removed and replaced in fifteen to twenty years. See Dr. Volarich deposition, page 45.

Based upon his assessment, and that of Mr. Dolan, he opined that the claimant is unemployable in the labor market and that she was permanently and totally disabled as a result of the combination of all of her injuries. See Dr. Volarich deposition, page 47.

W. Christopher Kostman, M.D.

Dr. Kostman treated the claimant for both her right forearm and her left wrist injuries. See Dr. Kostman deposition, page 9. On January 29, 2013, x-rays on the claimant’s left knee revealed mild to moderate degenerative change in the left knee. See Dr. Kostman deposition, page 9. He testified that he questioned the claimant about the mechanism of her injury, and that she reported that she may have struck her left knee when she fell on January 6, 2013. See Dr. Kostman deposition, page 10. He testified that he was concerned that she might have had a direct impact on the knee and recommended an MRI scan. See Dr. Kostman deposition, page 10. The MRI demonstrated a tear of the medial meniscus and extension lateral femoral trochlear chondrosis. See Dr. Kostman deposition, pages 10-11. He opined that the meniscus tear resulted from the January 6, 2013, accident and that the degenerative changes were pre-existing. See Dr. Kostman deposition, pages 11-12. He opined that the degenerative changes would not have formed this quickly after the traumatic accident. See Dr. Kostman deposition, page 13.

Dr. Kostman performed surgery on the claimant’s left knee. In follow-up, he found that the range of motion in her left knee had worsened. See Dr. Kostman deposition, page 15. He opined that these findings were caused by a flare-up of her degenerative condition, creating extra fluid in the knee joint which “sometimes happens post-operatively in people who have significant degenerative change”. See Dr. Kostman deposition, page 15. He aspirated the fluid from the knee to decrease the pressure in the knee joint. See Dr. Kostman deposition, pages 15-16. He testified that the fluid was tested and showed positive for pseudogout, and opined that it can cause inflammation in the knee joint. See Dr. Kostman deposition, page 16. He testified that the cause of pseudogout is not fully understood, but he opined that it could be from the aging process

or caused by genetics, but that he was not an expert in the area. See Dr. Kostman deposition, pages 16-17. He found no relationship between the work accident and the pseudogout. See Dr. Kostman deposition, page 17. He opined that the claimant had pseudogout prior to the accident of January 6, 2013. See Dr. Kostman deposition, page 18.

Dr. Kostman testified that the claimant has ongoing disability as a result of the January 6, 2013, accident. He opined that the claimant suffered a 12% permanent partial disability of the right wrist and a 1% permanent partial disability of the left knee from the accident. See Dr. Kostman deposition, page 22. He also found that the claimant had an additional 20% permanent partial disability in the left knee due to her degenerative joint disease. See Dr. Kostman deposition, page 22. He testified that the claimant's pre-existing arthritis was not related to the work injury and that she had pre-existing significant degenerative arthritis in the left knee. See Dr. Kostman deposition, page 24. He opined that the knee replacement was not related to the January 6, 2013, accident. See Dr. Kostman deposition, page 25.

Dr. Kostman testified that he provided all of his opinions within a reasonable degree of medical certainty. See Dr. Kostman deposition, page 28. Dr. Kostman testified that he had not evaluated the claimant since January 2014. See Dr. Kostman deposition, page 30. He testified that when the January 6, 2013, accident occurred, the claimant had a comminuted fracture in the right forearm, showing that she had fallen hard during her accident. See Dr. Kostman deposition, pages 30-31. Dr. Kostman was asked about the swelling which the claimant had in her left knee following the surgical procedure which he performed. See Dr. Kostman deposition, page 34. He testified that patients sometimes have flare-ups in their degenerative conditions after a surgical procedure. See Dr. Kostman deposition, page 34. He testified that the claimant also had pseudogout, which can also cause a flare-up. See Dr. Kostman deposition, page 35. He testified that the surgical procedure does not cause a flare-up, but that the flare-up occurs because of the pseudogout. See Dr. Kostman deposition, page 35. He testified that the claimant had no symptoms in her left knee prior to her work accident. See Dr. Kostman deposition, page 35. He testified that some persons with degenerative changes may not have any symptoms at all. See Dr. Kostman deposition, page 36. He was asked about what would cause a knee with no subjective symptoms to suddenly become symptomatic. See Dr. Kostman deposition, page 36. He testified that this is not always known. See Dr. Kostman deposition, page 36. He testified that trauma can cause an asymptomatic degenerative condition to become symptomatic if the trauma results in disruption of the joint surface. See Dr. Kostman deposition, page 37.

Dr. Kostman was asked about the relationship between the trauma and the claimant's knee symptoms thereafter. He was asked why he believed the January 6, 2013, accident did not cause the ongoing problems in her knee when the claimant had no symptoms prior to the fall and has had consistent symptoms since the accident. See Dr. Kostman deposition, page 38. He testified that patients can very easily develop increasing symptoms when they have pseudogout. See Dr. Kostman deposition, pages 38-39. He opined that there was no evidence that the January 6, 2013, accident specifically made the claimant's arthritis any worse. See Dr. Kostman deposition, page 40. He was asked as to why the claimant's knee had begun hurting on January 6, 2013, and why it had not stopped hurting since that date, if the work accident had nothing to do with it. See Dr. Kostman deposition, pages 40-41. Dr. Kostman testified that he did not have an answer for why the claimant's knee did not hurt prior to January 6, 2013. Dr. Kostman testified that the claimant's ongoing pain has nothing to do with her fall on January 6, 2013, even

though it began on that date and has not ceased. See Dr. Kostman deposition, pages 43-44. Dr. Kostman testified that the January 6, 2013, accident did not cause the arthritis to become symptomatic. See Dr. Kostman deposition, pages 46-47.

J. Stephen Dolan, M.A., C.R.C.

On May 20, 2015, Mr. Dolan, a board certified rehabilitation counselor, evaluated the claimant and reviewed her medical records and reports. See Dolan deposition, page 7. He performed vocational testing and found that the claimant had to stop frequently during the testing to rest and rub her hands and wrists. See Dolan deposition, page 12. He opined that the claimant basically has no skills which would transfer to any other jobs. See Dolan deposition, pages 13-14. He said that her age makes it less likely that she will be able to adjust to new types of job tasks in new types of job settings. See Dolan deposition, page 14. He opined that potential employers would view the claimant as having liabilities because older workers are considered as being harder to train than a younger person. See Dolan deposition, page 15. He testified that while it is illegal to discriminate against a person based upon age, it is nevertheless done by employers. See Dolan deposition, page 15. He testified that he has placed people in jobs for more than 40 years, and that it is harder to place an older person in a job than a younger person. See Dolan deposition, pages 15-16. Mr. Dolan testified that the claimant is not employable in the open labor market. See Dolan deposition, page 16. He testified that her left knee continues to be symptomatic and she cannot be on her feet for prolonged periods of time, which means she will need a job where she sits down most of the time. See Dolan deposition, page 16. On the other hand, he testified that those types of jobs are typically jobs that require frequent use of the hands, and the claimant is not able to do that. See Dolan deposition, page 17. He opined that the knee problems keep her from working above a sedentary level, and the hand problems keep her from performing sedentary work. See Dolan deposition, page 17.

MEDICAL CAUSATION

“The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job.” Royal v. Advantica Restaurant Group, Inc., 194 S.W.3d 371, 376 (Mo.App. W.D. 2006) (citations and quotations omitted). “Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission.” Id. (citing Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, “[a]n 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. § 287.020.2. On the other hand, “[a]n injury is not compensable because work was a triggering or precipitating factor.” Id. Awards for injuries ‘triggered’ or ‘precipitated’ by work are nonetheless proper *if* the employee shows the work is the prevailing factor in the cause of the injury. Thus, in determining whether a given injury is compensable, a work-related accident can be both a triggering event and the prevailing factor.” Id.

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliott v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly,

where expert medical testimony is presented, “logic and common sense,” or an ALJ's personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 258 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995). The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability that claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

In this case, this then 61-year-old claimant, a Bentone operator, testified that on January 6, 2013, she slipped and fell on a chemical substance on the employer's concrete floor, striking her mouth and right wrist on the floor suffering a comminuted fracture in the right forearm. She also injured her left knee, either by twisting it or striking it on the floor, or both suffering a torn left medial meniscus and extension lateral femoral trochlear chondrosis.

Dr. Volarich examined the claimant and diagnosed: (1) a left knee contusion causing a torn medial meniscus and chondral injuries, status post arthroscopic partial medial meniscectomy and chondroplasty of the patellofemoral joint and medial femoral condyle, (2) accelerated left knee post traumatic arthropathy, status post left total knee joint replacement, and (3) a comminuted right distal radius fracture, status post closed reduction and placement of an external fixator and subsequent removal of the fixator. See Dr. Volarich deposition, page 32. Dr. Volarich testified that the January 6, 2013, accident was the prevailing factor causing these conditions. See Dr. Volarich deposition, page 36. He also opined that the claimant suffered a 30% permanent partial disability of the right forearm at the 200 week level, and a 60% permanent partial disability of the left knee. See Dr. Volarich deposition, pages 39-40.

Dr. Kostman treated the claimant for both her right forearm and her left wrist injuries. See Dr. Kostman deposition, page 9. He testified that when the January 6, 2013, accident occurred, the claimant suffered a comminuted fracture in the right forearm, showing that she had

fallen hard during her accident. See Dr. Kostman deposition, pages 30-31. He opined that the meniscus tear resulted from the January 6, 2013, accident and that the degenerative changes were pre-existing. See Dr. Kostman deposition, pages 11-12. He opined that the degenerative changes would not have formed this quickly after the traumatic accident. See Dr. Kostman deposition, page 13. Dr. Kostman testified that the claimant has ongoing disability as a result of the January 6, 2013, accident. He opined that the claimant suffered a 12% permanent partial disability of the right wrist and a 1% permanent partial disability of the left knee from the accident. See Dr. Kostman deposition, page 22. He also found that the claimant had an additional 20% permanent partial disability in the left knee due to her degenerative joint disease. See Dr. Kostman deposition, page 22. He testified that the claimant's pre-existing arthritis was not related to the work injury, as she had pre-existing significant degenerative arthritis in the left knee. See Dr. Kostman deposition, page 24. He opined that the knee replacement was not related to the accident of January 6, 2013. See Dr. Kostman deposition, page 25.

Based on the evidence, the work-related accident was the prevailing cause of the claimant's wrist and knee injuries and permanent partial disability resulting from those injuries and the claimant therefore prevails on this issue.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury or disability, to cure and relieve from the effects of the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

As stated in Sickmiller v. Timberland Forest Products, Inc., 407 S.W.3d 109, 121 (Mo. App. S.D. 2013), “[S]ection 287.140.1 ‘does not require a finding that the workplace accident was the prevailing factor in causing the need for particular medical treatment.’” (quoting Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 517 (Mo. App. W.D. 2011)). “Where a claimant produces documentation detailing his past medical expenses and testifies to the relationship of such expenses to the compensable workplace injury, such evidence provides a sufficient factual basis for the Commission to award compensation.” Id. (quoting Treasurer of Missouri v. Hudgins, 308 S.W.3d 789, 791 (Mo. App. W.D. 2010)).

In Maness v. City of Desoto, 421 S.W.3d 532 (Mo.App.E.D.2014), the Court clarified the claimant’s burden of proof to recover an award of past medical expenses, and the circumstances under which an employer can take credit for deductions and offsets taken against an employee’s total medical charges. Section 287.140.1 required an employer to provide such care as may reasonably be required after the injury to cure and relieve from the effects of the injury. An employee seeking past medical expenses had to prove the need for treatment and medication flowed from the work injury. A sufficient factual basis existed for an ALJ to award past medical expenses where employee’s medical bills were introduced into evidence, employee testified those bills were related to and the product of the work injury, and the bills related to the professional services rendered, as shown by the medical records in evidence. An employer could challenge the reasonableness or fairness of the bills, or show the medical expenses incurred were not related to the injury in question. Maness, 421 S.W.3d at 544. The evidence showed, and the defense did not dispute, the claimant’s health insurer paid a portion of his medical bills. Since the employer did not assert those payments came from it or its workers’ compensation insurer, it could not take a credit for amounts paid by the claimant’s health insurer. Thus, the Commission did not err in awarding these amounts to the claimant. Maness, 421 S.W.3d at 545.

However, when a claimant carried his burden under Martin by producing documentation detailing past medical expenses, and testifying to the relationship of the expenses to the compensable injury, the employer can raise a defense. Specifically, the employer can establish the employee was not required to pay the billed amounts, the employee’s liability for the disputed amounts was extinguished, and the reason employee’s liability was extinguished did not otherwise fall within the provisions of Section 287.270. If the employee remained personally liable for any write-offs or fee reductions taken against the total medical expenses, he was entitled to recover them as “fees and charges” within the meaning of Section 287.140. But if the employee was not subject to further liability for those amounts, he was not entitled to a windfall recovery. Maness, 421 S.W.3d at 545-546. The employer could not take advantage of fee reductions or discounts against the total medical charges. In so holding, the Court relied on the fact the injured employee had signed documents, wherein he agreed to be responsible for the total charges for medical services rendered to him by certain care providers. Id.

In this case, the claimant offered extensive medical bills and records relating to her medical and surgical treatment.

Date	Provider	Services Rendered	Exhibits	Amount
2013				
01/07	St. Jos. Hosp.	Emergency Room evaluation and x-rays	20, 29	\$ 3,182.75
01/10	St. Jos. Hosp.	Medical testing and EKG	20, 29	\$ 571.00
01/24-05/14				
	Highland Phys Office	visits and Rx for Percocet	16, 29	\$ 180.00
04/02	Defense files Answer generally denying allegations in Claim for Compensation			
05/15	Highland Phys Office	visit regarding left knee	16, 29	\$ 92.00
05/20	Highland Phys Office	visit regarding left knee	16, 29	\$ 92.00
06/13	Highland Phys Office	visit regarding left knee, Rx PT, meds	16, 29	\$ 178.00
06/17-06/26				
	Anderson Hospital,	Physical therapy	14, 29	\$ 2,521.20
06/26	Highland Phys Office	visit regarding left knee	16, 29	\$ 92.00
07/01	Anderson Hospital,	Physical therapy	14, 29	\$ 121.30
07/10	Highland Phys Office	visit regarding left knee	16, 29	\$ 92.00
07/17	Dr. Shuman,	Medical evaluation of left knee	17, 27, 29	\$ 212.00
07/24	Highland Phys Office	visit regarding left knee	16, 29	\$ 92.00
08/07	Highland Phys Office	visit regarding left knee	16, 29	\$ 92.00
08/16	Barnes Jewish Hospital,	radiology left knee	11, 29	\$ 172.00
08/16	Barnes Jewish Hospital,	radiology left knee	11, 29	\$ 452.00
09/04	Highland Phys Office	visit regarding left knee	16, 29	\$ 92.00
10/07	Claimant warns that she will obtain own medical care due to defense default			
10/25	Dr. Denis Nam,	Office visit	29	\$ 800.00
11/20	Barnes Jewish Hospital,	Laboratory tests	29	\$ 172.00
11/26	Highland Phys Office	visit regarding left knee, flu shot	16, 29	\$ 131.00
12/16-12/17				
	Barnes Jewish Hospital,	Left knee replacement procedure	10, 29	\$12,188.00
12/16-12/17				
	Barnes Jewish Hospital,	Hospital services for knee surgery	10, 29	\$30,158.55
12/18-12/31				
	Illinois Home Health,	Nursing services	24, 29	\$ 1,280.27
2014				
01/01-01/18				
	Illinois Home Health,	Nursing services	24, 29	\$ 375.00
01/28	Barnes Jewish Hospital,	Radiology left knee	11, 29	\$ 33.00
Total				\$53,372.07

The medical bills also include billings from EMPI, Inc. from June 19, 2013 to March 19, 2014, for “Ass’y Kit Continuum NMES”, which is probably a TENS Unit. The amount billed to this claimant is \$1,900.00. See Exhibit 29. The medical bills also include billings for Diane Thomasjoy of Newport, Kentucky, ordered by John Schwegmann on June 19, 2013, in the amount of \$910.51. See Exhibit 29. While the undersigned cannot find a nexus between these billing statements and the medical records submitted, it is possible that the parties will direct the Commission to the nexus on a thorough review of the evidence.

In addition, the medical bills include a billing statement from Advanced Ambulatory Surgical Care in the amount of \$28,227.24, for surgical facilities for the claimant's arthroscopy from January 11, 2013, to March 7, 2013. See Exhibit 29. However, the billing states that the obligation was fully paid by "workers comp" which raises a presumption that the defense has already satisfied the bill, that the claimant has not paid any of it and has no liability for the billing statement. See Exhibit 29. Finally, the cover of the medical bill exhibit includes billings from Dr. Kostman, who performed the arthroscopy, and the Apex Physical Therapy, who performed physical therapy at Dr. Kostman's direction from January to May 2013. The entries are crossed out suggesting that the claimant has abandoned a claim for these services, and the undersigned assumes that the defense has fully satisfied all billings for these services that were ordered by the defense. See Exhibit 29.

Dr. Volarich opined "that the need for the left total knee joint replacement flows directly from the work-related injury of 1/6/13 as Ms. Fuller had no pre-existing limitations or hindrances or disabilities in either lower extremity prior to 1/6/13." See Dr. Volarich deposition, page 37. While the prevailing factor causing the condition and need for a surgical procedure was not the accident, no other expert rendered an opinion whether or not the need for the surgical procedure "flowed" from the accident. The record demonstrates that the claimant incurred emergency medical care for her arm and knee from St. Joseph Hospital in January 2013, and pain medication for her wrist. See Exhibits 16, 29. Further, the defense filed a general denial of the claim on April 2, 2013, and elected not to respond to the claimant's October 13, 2013, request for medical care.

Based on the above, the claimant is awarded \$53,372.07 for past medical expenses.

FUTURE MEDICAL CARE

Pursuant to Section 287.140.1, an employer is required to provide care "as may be reasonably required to cure and relieve from the effects of the injury." This includes allowance for the cost of future medical treatment. Pennewell v. Hannibal Regional Hospital, 390 S.W.3d 919, 926 (Mo. App. E.D. 2013) citing Poole v. City of St. Louis, 328 S.W.3d 277, 290-91 (Mo. App. E.D. 2010). An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related injury. Id. Future care to relieve [an employee's] pain should not be denied simply because he may have achieved [maximum medical improvement]. Id. Therefore, a finding that an employee has reached maximum medical improvement is not necessarily inconsistent with the employee's need for future medical treatment. Id.

To receive an award of future medical benefits, a claimant need not show "conclusive evidence" of a need for future medical treatment. ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo.App. W.D. 2007). Instead, a claimant need only show a "reasonable probability" that, because of her work-related injury, future medical treatment will be necessary. Id. A claimant need not show evidence of the specific nature of the treatment required. Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876, 883 (Mo.App. S.D. 2004); Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 237 (Mo.App. S.D. 2008).

In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id.* The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. *Id.* Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. *Id.* at 521.

In this case, Dr. Volarich opined that the claimant required additional medical and surgical requirements due to her work-related accident:

Q. What is your opinion within a reasonable degree of medical certainty as to whether she needs any further medical care that you would relate to the two work injuries?

A. I thought she needed some ongoing pain medication to help control her pain syndrome using narcotics, non-narcotics, muscle relaxants, and physical therapy. When I saw her, her medication for pain included over-the-counter ibuprofen, 400 milligrams daily for extremities and back. She wasn't on any prescription pain medication. I didn't think she'd need anything beyond that when I saw her.

Q. What about that left knee replacement she's had?

A. That knee prosthesis, joint prosthesis has live expectancy of about 15 years after which it will need to be removed and replaced. This woman was 63 when I saw her. In all likelihood, she'll live to be something in her mid 80's, early 80's. So she'll probably need one change-out in her lifetime. The decision to perform any additional surgeries on the knee should be made in conjunction with her wishes, symptoms, and expert surgical opinion. These treatments are necessary to cure and relieve the ill effects of her work-related injuries. See Dr. Volarich deposition, pages 44, 45.

Although Dr. Kostman testified extensively on the prevailing factor for the claimant's left knee osteoarthritis and her left knee replacement, neither he nor any of the other forensic medical experts directly opined whether the claimant required any further medical treatment that flowed from the accident. More to the point, Dr. Kostman opined that the claimant's severe arthritis and crystalline deposition disease was the cause of the claimant's deterioration of her knee condition and her need for treatment. The inference of his testimony is that the claimant's condition will continue to deteriorate and that the claimant's future medical requirements for pain medication and a knee replacement flow from her degenerative condition. In reviewing Dr. Nam's surgical notes and Dr. Smith's evaluation, it is clear that the claimant's diagnosis was left knee osteoarthritis, based on the findings of the three orthopedic surgeons, two of which performed surgery on the claimant's knee. See Exhibits 8. It is also clear that the work-related accident did not cause the claimant's left knee osteoarthritis. Dr. Kostman's testimony and expertise in orthopedic surgery is more credible than Dr. Volarich's conclusive statement on this point. Accordingly, no future medical care is awarded.

TEMPORARY DISABILITY

Compensation must be paid to the injured employee during the continuance of temporary disability but not more than 400 weeks. Section 287.170, RSMo 1994. Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. Id.

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

Temporary total disability awards are designed to cover the employee's healing period, and they are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. When further medical progress is not expected, a temporary award is not warranted. Any further benefits should be based on the employee's stabilized condition upon a finding of permanent partial or total disability. Shaw v. Scott, 49 S.W.3d 720, 728 (Mo.App. W.D. 2001). The Missouri Supreme Court ruled that if "additional treatment was part of the claimant's rehabilitative process, then he or she is entitled to TTD benefits pursuant to Section 287.149.1 until the rehabilitative process is complete. Once the rehabilitation process ends, the commission then must make a determination regarding the permanency of a claimant's injuries."

The plain language of section 287.149.1 does not mandate the commission arbitrarily rely on the maximum medical improvement date to deny TTD benefits, if the claimant is engaged in the rehabilitative process. Instead, whether a claimant is engaged in the rehabilitative process is the appropriate statutory guidepost to determine whether he or she is entitled to TTD benefits under the plain language of Section 287.149.1. It is plausible, and likely probable, that the maximum medical improvement date and the end of the rehabilitative process will coincide, thus, marking the end of the period when TTD benefits can be awarded. However, when the commission is presented with evidence, as here, that a claimant has reached maximum medical improvement yet seeks additional treatment beyond that date for the work-related injury in an attempt to restore

himself or herself to a condition of health or normal activity by a process of medical rehabilitation, the commission must make a factual determination as to whether the additional treatment was part of the rehabilitative process. If the commission determines the additional treatment was part of the claimant's rehabilitative process, then he or she is entitled to TTD benefits pursuant to section 287.149.1 until the rehabilitative process is complete. Once the rehabilitation process ends, the commission then must make a determination regarding the permanency of a claimant's injuries. Greer v. Sysco Food Servs., 475 S.W.3d 655, 668-69 (Mo. Banc 2015)

The court, thus, requires a detailed analysis of the claimant's medical treatment to determine whether the claimant is entitled to temporary total disability benefits. In this case, the parties stipulated that the defense paid the claimant temporary total disability benefits from January 7, 2013, to March 17, 2013. On March 13, 2013, Dr. Kostman opined that the claimant could return to work on a light-duty basis: "50% seated duty and in addition no use of her right upper extremity". See Exhibit 26. He repeated those restrictions on March 27, 2013, April 16, 2013 and May 1, 2013. On May 14, 2013, he released the claimant to return to work without restrictions. The claimant testified that her last day of work was May 14, 2013.

However, on May 15, 2013, the claimant's primary care physician examined her and opined that the claimant was to be "off work until next appointment". On May 27, 2013, he opined: "continue off work until I see in two weeks". On June 12, 2013 he opined: "off work next two weeks until I re-evaluate". On July 6, 2013 he opined: "continue off work two more weeks until I re-evaluate her". On July 10, 2013 he opined: "no work next two weeks". These restrictions continued until November 24, 2013 when he reported: "letter written for her disability".

On July 17, 2013, Dr. Shuman, a rheumatologist, examined the claimant and wrote a letter stating "she is currently unable to work". See Exhibit 17. On December 16, 2013, the claimant underwent a total knee replacement. See Exhibit 8. She was discharged to her home, and underwent home health care. See Exhibit 24. On January 28, 2014, Dr. Nam discharged her. See Exhibit 8.

The claimant's total knee replacement was not medically causally related to the January 6, 2013, accident but "flowed" from the accident, based on the forensic medical evidence. The claimant was taken off work on May 15, 2013, and those restrictions continued until the claimant reached maximum medical improvement on January 28, 2014, when she was discharged by Dr. Nam. The facts compel a finding that the claimant underwent a rehabilitative process until January 28, 2014, that flowed from the accident. Therefore, the claimant is awarded temporary total disability benefits from May 15, 2013, to January 28, 2014, a period of 37 1/7 weeks.

PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if

“shown to be of indefinite duration in recovery or substantial improvement is not expected.”
Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Workers' compensation awards for permanent partial disability are authorized pursuant to Section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in Section 287.190.1. "Permanent partial disability" is defined in Section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by a work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to the performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

The claimant testified that if she simply sits still, her right wrist does not give her much in the way of problems. However, she has trouble if she is active. She cannot hold a book in front of her due to the pain in her right wrist and forearm. Driving a car bothers her due to holding onto the steering wheel. When she is outside in her yard, which is only for short periods, she has pain and aching in the arm. Her complaints are worse with movement and lifting. She testified she could lift up to a gallon of milk, though nothing more than that.

She testified that her knee is doing fairly well, though it is worse with rainy weather. She has difficulty getting down onto the floor and then getting back up again due to knee pain. She

cannot sit with her left leg crossed over the right leg, due to pain and lost motion. She cannot kneel on the left knee due to pain. She also has worse pain if she is inactive. She tries to stay active and uses a stationary bike at home to try to strengthen her leg. She exhibited a 2-inch scar over her right wrist, where the first pin was inserted, and another 2-inch scar in the middle of the right forearm. The second scar was noticeable with two deep holes in the scar.

Dr. Volarich examined the claimant and opined that the claimant suffered a 30% permanent partial disability of the right forearm at the 200 week level and a 60% permanent partial disability of the left knee. See Dr. Volarich deposition, pages 39-40. On the other hand, Dr. Kostman opined that the claimant suffered a 12% permanent partial disability of the right wrist and 1% permanent partial disability of the left knee as a result of the January 6, 2013, accident. See Dr. Kostman deposition, page 22. He also found that the claimant had an additional 20% permanent partial disability in the left knee due to her degenerative joint disease. See Dr. Kostman deposition, page 22. He testified that the claimant's pre-existing arthritis was not related to the work injury, because she had significant pre-existing degenerative arthritis in the left knee. See Dr. Kostman deposition, page 24.

Based on the evidence as a whole, the claimant is awarded a 20% permanent partial disability of the right forearm and 25% permanent partial disability of the left knee with an additional four weeks of permanent partial disability benefits for disfigurement. None of the evidence creates an inference that the claimant is permanently and totally disabled solely as a result of the January 2013 accident alone.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in "[a]ll cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ... the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 236 S.W.3d 43, 50 (Mo.App. W.D. 2007). The test for permanent, total disability is the worker's ability 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. Id. at 48.

Based on the entire record, the claimant suffered a compensable work-related injury in 2013 resulting in a 20% permanent partial disability of the right forearm (40 weeks) and 25% permanent partial disability of the left knee (40 weeks).

With regard to pre-existing medical conditions, Dr. Volarich diagnosed: (1) bilateral carpal tunnel syndrome, status post open carpal tunnel releases in 1995; (2) left elbow ulnar nerve decompression and partial medial epicondylectomy in 1995; (3) right elbow lateral epicondylitis, status post excision of degenerated common extensor tendon with limited lateral epicondylectomy and muscle flap coverage in 2001; (4) right long finger laceration and extensor tendon injury, status post arthrotomy at the proximal interphalangeal joint with tendon repair and exploration in 2007; (5) left shoulder internal derangement, status post arthroscopic biceps tenotomy and subacromial decompression in 2008; and (6) left knee contusion, resolved in 1999. See Dr. Volarich deposition, pages 38-39. He opined that the claimant suffered the following pre-existing permanent partial disabilities: (1) 25% of the right wrist due to the carpal tunnel surgery and long finger laceration and exploration; (2) 20% of the left wrist due to the carpal tunnel syndrome; (3) 25% of the right elbow due to the lateral epicondylitis; (4) 25% of the left elbow due to the ulnar neuropathy and decompression; and (5) 20% disability of the left shoulder due to the internal derangement and arthroscopic repair. See Dr. Volarich deposition, pages 40-42. He opined that all of the disabilities would combine with each other to create a substantially greater disability than the simple sum and testified extensively how they combine to create synergism. See Dr. Volarich deposition, pages 42-44.

Based on the entire record, the claimant suffered a compensable work-related injury in 2013 resulting in a 20% permanent partial disability of the right forearm (40 weeks) and 25% permanent partial disability of the left knee (40 weeks). Based on the evidentiary record, at the time the last injury was sustained, the claimant had: (1) a 17 ½% pre-existing permanent partial disability to each wrist (61.25 weeks), (2) a 17 ½% pre-existing permanent partial disability to her right elbow due to lateral epicondylitis (36.75 weeks), (3) a 15% pre-existing permanent partial disability to her left elbow due to the ulnar neuropathy and decompression (31.5 weeks), (4) a 17 ½% pre-existing permanent partial disability to the left shoulder due to internal derangement and arthroscopic repair (40.6 weeks), (5) a 17 ½% pre-existing permanent partial disability to right middle finger (6.125 weeks), and (6) a 15% permanent partial disability each hand (52.5 weeks) from her 2011 CMC arthritis. The simple sum of all permanent partial disabilities is equivalent to 308.725 weeks. The permanent partial disability from the last injury synergistically combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 25%, given the severe impact of the combination of the claimant's upper extremities with her knee.

Mr. Dolan, a vocational counselor, testified that the claimant is not employable in the open labor market. See Dolan deposition, page 16. Dr. Volarich opined that the claimant is unemployable in the labor market and that she was permanently and totally disabled as a result of the combination of the disabilities from her work-related injuries with her pre-existing medical conditions. See Dr. Volarich deposition, page 47.

On the other hand, counsel for the Second Injury Fund submitted a well-written brief arguing that the claimant's total disability resulted from the combination of the disabilities from

her work-related accident, her pre-existing permanent partial disabilities, and subsequent unrelated post primary injury progression of her pre-existing back condition after her last injury:

In Claimant's case, the entirety of the evidence supports a finding that Claimant's permanent total disability results from a combination of the primary injury, the pre-existing conditions and unrelated post primary injury progression of her pre-existing back condition.

Claimant's testimony at hearing was consistent with a finding that her permanent total disability results from a combination of her primary injury, pre-existing conditions, and post primary progression of her back condition. Claimant testified that she was not working under any permanent, physician-imposed restrictions for any injury or condition, leading up to January 6, 2013. She agreed that leading up to her injury in 2013, she was lifting salt bags that weighed 55 pounds. She also agreed that she was walking up and down 3 flights of steps up to 20 times a day. She testified that she currently takes Norco for pain in her back, and that she was not taking Norco before her injury in 2013. Finally, Claimant testified that between the time she started seeing Dr. Fulton for back pain in 2010, and the date of the hearing in 2016, her back got worse.

Claimant's subjective reporting of her complaints to her experts supports a finding that her permanent total disability is a result of a combination of her primary injury, preexisting injuries, and post primary progression of her back condition. Dr. Volarich examined Claimant on her behalf on March 5, 2015. At that time, Claimant reported to Dr. Volarich that she was taking ibuprofen 400 mg twice daily for back pain. Volarich Report, 8. As of the date of the hearing, March 9, 2016, Claimant testified that she was taking prescription pain medication (Norco) for pain in her back. Mr. Dolan evaluated Claimant on her behalf on May 20, 2015. Mr. Dolan confirmed that leading up to her injury in 2013, she was lifting 50 pound bags of salt, and going up and down 14 metal steps. Dolan Dep. 46. He acknowledged that there was no indication in the medical records or his conversation with Claimant that low back pain prevented her from doing any of her job duties leading up to 2013. Dolan Dep. 47. He testified that as of the date of his evaluation on May 20, 2015, Claimant reported to him that she could not stand or walk for long periods of time because of pain in her back. Dolan Dep. 41. He acknowledged that there was no indication in the medical records or his conversation with Claimant that back pain caused her any problems walking, sitting or standing before 2013. Dolan Dep. 47. Finally, Mr. Dolan acknowledged that his opinion of Claimant's employability was based, at least in part, on the subjective complaints she gave him as of the date he saw her. Dolan Dep. 52. Mr. Dolan's opinions, by his own admission, consider the condition of Claimant's back on May 20, 2015, and not at the time of her 2013 injury.

In Claimant's case, the entirety of the evidence supports a finding that Claimant's permanent total disability results from the combination of the primary injury, the pre-existing conditions and unrelated post primary injury progression of her pre-existing back condition. There are no objective findings within the medical

records which establish that the low back worsened due to or in connection with the primary injury. As a result, if Claimant's back condition did worsen following the primary injury, it was for reasons unrelated to the primary injury. For these reasons, and all the reasons stated above, a judgment should be entered finding no liability on behalf of the Second Injury Fund. See Second Injury Fund brief.

However, the sole vocational expert, Mr. Dolan, opined that the claimant was unemployable in the open labor market based on the combination of the condition of her knees and hands and did not consider the condition of her back relative to her employment status:

There are two basic reasons. She now has an artificial knee that has not worked out real well for her. She can't be on her feet for prolonged periods of time. That's going to mean vocationally that she needs a job where she's able to sit much of the time. Those types of jobs, sedentary types of jobs, are jobs that always require at least frequent use of the hands, and she's not able to do that. The problems with her knee keeps her from jobs above the sedentary levels, the problems with her hands keep her from doing sedentary types of jobs. See Dolan deposition, pages 16, 17.

Mr. Dolan based his findings on Dr. Volarich's restrictions. See Dolan deposition, page 52. While the claimant's low back condition did not improve her employability, Mr. Dolan soundly concluded that the permanent disability of the claimant's knee from the 2013 accident and the pre-existing permanent partial disabilities in her upper extremities combined to create an overall greater disability, namely total disability, than the simple sum of the individual disabilities.

The more difficult question is whether one can consider the disability from the deterioration of the claimant's knee due to a degenerative condition as compensable disability contributing to her total disability. That is, if the claimant were able to work on her feet, given just the disability from her left knee contusion causing a torn medial meniscus and chondral injuries, status post arthroscopic partial medial meniscectomy and chondroplasty of the patellofemoral joint and medial femoral condyle, would she be employable in the open labor market? More specifically, none of the forensic experts were asked to opine on that issue. The claimant has the burden to prove that her pre-existing permanent partial disabilities combined with her permanent partial disability from the 2013 accident to result in permanent total disability. The weight of the credible evidence infers that the claimant's pre-existing permanent partial disabilities combined with her permanent partial disability from the 2013 accident and the subsequent deterioration of her degenerative osteoarthritis to result in permanent total disability. Therefore, the claimant is not eligible for permanent total disability benefits from the Second Injury Fund.

Notwithstanding, the claimant is entitled to additional permanent partial disability benefits from the Second Injury Fund, because the credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how she

performs many activities both at home and at work due to the combination of the problems. Based on the record, the claimant's overall disability exceeds the sum of her individual permanent partial disabilities by 25%.

Therefore, the Second Injury Fund bears liability for 77.18125 weeks of permanent partial disability benefits.

Made by: _____

EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation