

**FINAL AWARD ALLOWING COMPENSATION**

(Modifying Amended Award and Decision of Administrative Law Judge)

Injury No.: 11-031117

Employee: Olga Harris  
Employer: Columbia Staffing/All About Staffing  
Insurer: Ace 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 read the briefs, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the amended award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and amended award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Discussion**

Temporary total disability

There appears to be some confusion surrounding the issue of temporary total disability in this matter. The administrative law judge's amended award states on page 2 that the compensation previously paid for temporary total disability is "disputed," but on page 4 recites that the parties stipulated that temporary total disability benefits were paid by employer in the amount of \$601.76, representing 7 weeks and 1 day of temporary total disability. Also on page 4, the administrative law judge states that the parties stipulated that employee was temporarily and totally disabled from April 25 through June 15, 2011, but on page 5, the administrative law judge states that "[t]he parties have agreed to the period of temporary total disability in dispute to be 7 1/7ths weeks" (emphasis added).

Turning to the record created at the hearing, we discover that the parties did stipulate that employer paid \$601.76 for 7 weeks and 1 day of "weekly benefits," but did not stipulate to any time period of temporary total disability. *Transcript*, pages 1, 2. Instead, the parties asked the administrative law judge to resolve the issue of the "nature and extent of temporary total disability." *Id.* The administrative law judge thus appears to have been working under the mistaken impression that the parties stipulated that employee was temporarily and totally disabled from April 25 through June 15, 2011.

Naturally, we would be inclined to correct these errors and revisit the issue of the nature and extent of temporary disability, but employer did not appeal the administrative law judge's award of 7 and 1/7 weeks of temporary total disability benefits, and instead challenges only the rate of compensation at which the administrative law judge calculated the award. We note that, in its brief, the employer appears to concede that employee's temporary total disability lasted 7 weeks and 1 day, when it requests that we use this time period in calculating an award of temporary total disability benefits at the rate of compensation it suggests.

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Where no party has requested relief, we are reluctant to engage in the sua sponte action of enlarging the scope of issues on appeal. This is especially true in this case, where employer appears to agree that the administrative law judge determined the appropriate time period of temporary total disability. Accordingly, despite the administrative law judge's apparent errors with regard to the issue of nature and extent of temporary disability, we find that employer has conceded the issue by failing to appeal.

Medical causation – low back injury

At the hearing before the administrative law judge, the parties placed in dispute the issue of medical causation of employee's claimed low back injury, but on page 4 of his amended award, the administrative law judge omits this issue from the list of disputed issues. Although the administrative law judge ultimately awarded benefits consistent with a finding of 5% permanent partial disability of the body as a whole for this injury, he did not make any credibility findings or resolve the controlling issue under § 287.020.3(1) RSMo whether employee's accident of April 24, 2011, was the prevailing factor causing the claimed low back injury and disability. Accordingly, we hereby supplement the amended award, as follows.

Employee provided credible testimony (and we so find) that she experienced a significant and permanent change in her preexisting low back complaints during the course of her treatment for the left leg work injury. Employee also provided testimony from Dr. Fernando Egea, who opined that employee's treatment with crutches and a leg immobilizer resulted in nerve root irritation and a permanent worsening of her low back pain. At his deposition, Dr. Egea did appear to possess a poor memory of the facts regarding employee's preexisting and post-injury low back complaints, and offered a number of concessions on cross-examination which call into question his attention to detail in this case. But employer's expert, Dr. Gerald McNamara, agreed that employee's use of an immobilizer resulted in an altered gait pattern, which he opined "certainly" injured or irritated the nerves in her back. *Transcript*, pages 813-14. Although Dr. McNamara ultimately opined that this condition resolved and thus resulted in 0% permanent partial disability, this latter finding is contradicted by employee's very credible testimony regarding her new and increased low back symptoms. Especially in light of this credible testimony from the employee, we find persuasive the ultimate opinion from Dr. Egea that employee suffered a permanent low back injury as a result of her treatment for the work injury.

Accordingly, we conclude that employee's use of crutches and an immobilizer in the course of her treatment for the April 24, 2011, left leg injury is the prevailing factor causing employee to suffer a low back injury and permanent partial disability. We affirm and adopt the administrative law judge's finding that employee suffered a 5% permanent partial disability of the body as a whole referable to the low back.

Second job wage loss benefits

The administrative law judge concluded that employee "has not presented any evidence of any claim against the Second Injury Fund for second wage loss." *Award*, page 7. But the records of the Division of Workers' Compensation, of which we hereby take administrative notice, reveal that employee's Claim for Compensation, filed with the Division on May 23, 2011, includes a claim against the Second Injury Fund for second job wage loss. Accordingly, we find that employee has a claim against the Second Injury Fund for second job wage loss benefits.

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The relevant statutory provision is § 287.220.9 RSMo, which provides, as follows:

Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury. The employee shall be entitled to a total benefit based on the total average weekly wage of such employee computed according to subsection 8 of section 287.250. The employee shall not be entitled to a greater rate of compensation than allowed by law on the date of the injury. The employer for whom the employee was working where the injury was sustained shall be responsible for all medical costs incurred in regard to that injury.

Section 287.250.8 RSMo additionally provides, as follows:

For an employee with multiple employments, as to the employee's entitlement to any temporary total or temporary partial disability benefits only pursuant to subsection 9 of section 287.220, and for no other purposes, the employee's total average weekly wage shall be equal to the sum of the total of the average weekly wage computed separately for each employment pursuant to the provisions of this section to which the employee is unable to return because of this injury.

Under the foregoing statutory sections, employee was required to show (1) she was employed by another employer at the time the compensable work-related injury was sustained; and (2) she suffered a loss of earnings from that second employment. The remaining provisions speak to the method of calculating the benefit. Accordingly, we turn to the evidence regarding employee's physical condition following the work injury to determine whether it supports a finding that she suffered a loss of earnings in the form of an inability to work for her second employer during any time period.

Employee testified that, at the time of the work injury, she was working for a second employer, namely, the Kansas City School District (District). Employee also testified that, owing to the effects of the work injury, she was not able to return to her work with the District for a period of two weeks, but was able to return thereafter to perform sit-down work. Employee's testimony is substantially corroborated by the notes from the treating physician, Dr. McNamara. In his first evaluation of employee's left knee injury, Dr. McNamara determined that employee was required to wear an immobilizer on her left leg and to keep the leg elevated. Although Dr. McNamara did not specifically restrict employee from working for the District, his nurse noted that employee would discuss with her employer whether she was able to return to work, and on May 9, 2011, Dr. McNamara indicated employee was able to "return to work" as of May 10, 2011. This "return to work" instruction is clearly referable to employee's work for the District,

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as Dr. McNamara's subsequent notes reveal that he continued to restrict employee from performing "hospital work" with employer through at least May 25, 2011.

Employee also presented testimony from Dr. Egea to support her claim for second job wage loss benefits. Although he failed to provide a temporally specific opinion on the issue, Dr. Egea did opine that employee was unable to work following the work injury as a result of her injuries and work restrictions.

We note that the Second Injury Fund, in its brief, does not cite any evidence that would rebut that described above, nor does it identify any reason why we should find employee's evidence lacking credibility on this issue. Instead, it argues that employee is not entitled to second job wage loss benefits because employee's Form W-2 with the District shows that she made more money in 2011 than reflected in the contract that she signed, and because employee was permitted to use sick leave and to work make-up days for the time that she missed. But the Second Injury Fund has failed to advance any authority that would support the proposition that these factors are relevant to our analysis under § 287.220.9, and our own research reveals none.

We are of the opinion that whether employee earned more money with the District in 2011 than she originally contracted is not particularly relevant to the question whether employee suffered a loss of earnings by reason of the work injury. There are many possible reasons why employee earned more money than she originally contracted with the District in 2011, and nothing about employee's Form W-2 or contract with the District suggests she would not have earned *more* in 2011 if she hadn't missed two weeks as a result of the work injury, so this evidence does nothing to show employee did not suffer a loss in earnings. Nor do we find relevant employee's use of sick leave to cover her absences for this time period; employee would not have been forced to expend sick leave if she had not been rendered temporarily unable to work as a result of the work injury, so it cannot be argued that employee did not suffer any loss simply because she had this benefit available to her.

In sum, we find the Second Injury Fund's arguments unconvincing, and we can find no evidence on this record that would rebut that put forward by employee on the issue. Accordingly, we find that employee was working for the Kansas City School District at the time she sustained the April 24, 2011, work injury, and that this was a second employer. We find that employee missed two weeks of work with this second employer owing to the effects of the work injury. Applying § 287.250.8 RSMo, we conclude that employee's total average weekly wage would entitle her to the maximum compensation rate for temporary total disability in 2011, or \$799.11. We conclude that this is the appropriate compensation rate for second job wage loss benefits in this matter.

Applying § 287.220.9, which requires us to deduct the amount paid by employer for temporary total disability for the relevant time period, we conclude that employee is entitled to \$504.76 in second job wage loss benefits ( $\$799.11 - \$546.73 = \$252.38 \times 2 = \$504.76$ ).

*Employer's entitlement to a credit against permanent partial disability benefits*

On page 7 of his amended award, the administrative law judge concludes that employer is entitled to a credit in an unspecified amount against the permanent partial disability benefits awarded in this matter for "any amounts paid in the state of Kansas for which the Employer is

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entitled to a credit.” Although the record includes a copy of an award dated August 23, 2012, issued by the State of Kansas Division of Workers’ Compensation, the parties did not stipulate whether any benefits have actually been paid as a result of the issuance of this award. Nor did the parties ask the administrative law judge to resolve any issue whether employer is entitled to a credit against permanent partial disability benefits awarded in this matter by reason of benefits paid pursuant to the law of another state.

Because employer did not raise the issue of a credit against permanent partial disability benefits at the hearing, we conclude that the administrative law judge exceeded his jurisdiction in reaching this issue and ordering such a credit. *Boyer v. Nat’l Express Co.*, 49 S.W.3d 700, 706 (Mo. App. 2001). For this reason, we modify the administrative law judge’s amended award by hereby vacating any reference to a credit against the award of permanent partial disability benefits.

### **Conclusion**

We modify the amended award of the administrative law judge as to the issues of Second Injury Fund liability for second job wage loss benefits and whether employer is entitled to a credit for benefits paid in another state.

Employee is entitled to, and the Second Injury Fund is hereby ordered to pay, \$504.76 in second job wage loss benefits.

The amended award and decision of Administrative Law Judge Mark S. Siedlik issued May 23, 2013, is attached and incorporated by this reference to the extent it is not inconsistent with our modifications and supplemental findings and conclusions herein.

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 19<sup>th</sup> day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Olga Harris

Injury No. 11-031117

## **AMENDED AWARD**

Employee: Olga Harris

Injury No. 11-031117

Dependents: N/A

Employer: Columbia Staffing

Insurer: Ace American Insurance Company

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: March 14, 2013

Checked by: MSS/lh

### **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: April 24, 2011.
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was Claim for Compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While in the course and scope of employee's work, employee fell injuring her left knee and low back.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left knee and back.
14. Nature and extent of any permanent disability: 10 percent left knee, 5 percent whole body.

15. Compensation paid to-date for temporary disability: Disputed
16. Value necessary medical aid paid to date by employer/insurer? \$5,542.97
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Disputed
19. Weekly compensation rate: \$546.73/\$418.58.
20. Method wages computation: Evidence at trial

**COMPENSATION PAYABLE**

21. Amount of compensation payable: temporary total disability benefits \$3,905.21; permanent partial disability benefits \$15,068.88, less any payments on Kansas case.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

Said payments to begin as of the date of the award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dan Doyle

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Olga Harris Injury No. 11-031117  
Dependents: N/A  
Employer: Columbia Staffing  
Insurer: Ace American Insurance Company  
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund  
Hearing Date: March 14, 2013 Checked by: MSS/lh

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

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri, on March 14, 2013. The Claimant was present with her counsel Mr. Dan Doyle. The Employer and Insurer were represented by their counsel Mr. John Fox. The Second Injury Fund was represented by Ms. Benita Seliga and was defending a second wage loss claim.

#### **STIPULATIONS**

The parties stipulated to the following:

- 1) That the Claimant and the Employer were operating under and subject to the provision of the Missouri Workers' Compensation Law at all relevant times;
- 2) That venue was proper in Jackson County, Kansas City, Missouri;
- 3) That the Employer's liability under the Workers' Compensation Law was fully insured by Ace American Insurance Company;
- 4) That the Claimant and the Employer were engaged in an Employer/Employee relationship on or about April 24, 2011;
- 5) That the Claimant suffered an accidental injury on April 24, 2011;
- 6) That the Claimant's injuries to her left knee arose out of and in the course and scope of employment with the Employer;
- 7) That the Claimant provided timely notice of her accident as required by Missouri law;
- 8) That a Claim for Compensation was timely filed;

- 9) That temporary total disability benefits have been paid by the Employer/Insurer as a result of the April 24, 2011 injury in the amount of \$601.76 representing 7 weeks and 1 day;
- 10) That the Employer/Insurer paid medical expenses in the amount of \$5,542.97;
- 11) That the Claimant was temporarily and totally disabled from April 25 through June 15, 2011.

### **ISSUES**

The issues to be resolved at this hearing are:

- 1) The average weekly wage;
- 2) The nature and extent of the Claimant's disability; and
- 3) Second Injury Fund liability for a second wage loss claim.

### **EVIDENCE**

The evidence at trial consisted of the testimony of the Claimant in person together with the testimony of Avis Eden together with Exhibits A through F on behalf of the Claimant and 1 through 9 for the Employer and Insurer. Claimant testified that on or about April 24, 2011, she was employed for All About Staffing and was placed at Research Psychiatric Center. The Claimant was assisting patients who were taking medications and being moved about within the facility. Within the scope of the Claimant's employment she tripped on a rope causing her to land on her left knee fracturing the patella. The Claimant was provided care under the treatment of Dr. Gerald McNamara, an orthopaedic surgeon, who placed the Claimant in a knee immobilizer which kept her leg from bending at the knee. The Claimant was in said immobilizer for a period of approximately six weeks and ambulated with the aid of a walker or crutches during that period of time.

The Claimant testified as a result of having her leg so immobilized that it altered her ability to walk and ambulate causing pain in her low back which radiated into her leg. Claimant admitted that prior to her work-related injury she was receiving treatment for spasms and pain in her back but after this work-related accident the pain became sharp and stabbing down the right side of her leg which the Claimant testifies continues up until the time of trial. The Claimant was cross-examined extensively on the nature and severity of her pain and her history of prior treatment with physicians as well as chiropractic treatment. The Claimant adamantly insisted that the pain caused by wearing the immobilizer was different in her back than the pain which she had prior to the work-related accident.

Consistent with the Claimant's assertion of the change in pain after the work-related accident, medical records of Dr. McNamara document the Claimant's straight-leg raising test was positive for quite a period of time after the accident while a review of medical records predating the accident show a negative straight-leg raised test consistently up until the time of the Claimant's accident and shortly thereafter when it became positive.

The Claimant testified her employment with All About Staffing was her second job for which she was paid \$42 per hour, although evidence submitted by the Employer and Insurer suggest that the

appropriate wage rate is \$43.50 per hour. The Claimant testified the day she was hurt, Easter Sunday, April 24, 2011, was the first day she had worked this second job in a great period of time. The Claimant testified that for personal reasons, as well as and including taking care of her husband who had physical ailments of his own, was the reason that the Claimant was not taking shifts on this second employment. The Claimant continued working her full-time job missing only a few weeks after the initial date of injury, thereafter returning to her regular 40-hour-per-week job with the Kansas City School District. The Claimant testified All About Staffing had certain work rules regarding how often one must work to retain in good status with All About Staffing. The Claimant testified, as well as Avis Eden for the Employer and Insurer, who was the director of staffing for Mid-America Staffing, as to some of the particular employment requirements. The Claimant testified, and it's confirmed by Ms. Eden's testimony, that the Claimant was required to work at least one shift every 30 days to stay in the data base with All About Staffing. In the event a person does not work a shift within the 30-day period an inactivity report is issued, and the person is sent a letter with regard to the inactivity and is requested to work a shift in order to remain an employee. The Claimant confirmed in her testimony, as well as that of Ms. Eden, that the Claimant was issued two written notices of inactivity prior to the work accident. The Claimant in her testimony, and that of Ms. Eden, covered a number of days predating the work accident which the Claimant reported unavailable for assignments beginning in November of 2010 and intermittently up until April 2011. The Claimant in her testimony indicated that one of the primary reasons she was working that Sunday shift was to retain her place on the employment roster with All About Staffing.

The significance of the above discussion regarding the employment status and the lack of shifts worked is relevant to this proceeding in determining the average weekly wage to be used to determine the Claimant's appropriate wage rate. As part of the evidence submitted in this proceeding were 26-week wage statements, as well as a 52-week wage statement both inclusive of the date of injury. In both of these exhibits there are no wages indicated as having been earned from the 13-week period predating the date of injury. There was evidence submitted and arguments made by both sides regarding the application of 287.250 to determine the appropriate wage rate. There is agreement between the parties that subsections 1 through 3 of 287.250 cannot fairly and justly determine the appropriate weekly wage. Subsection 4 of 287.250 provides that based on exceptional facts presented the Division may apply the evidence presented to fairly determine the employee's average weekly wage. While the statute does not specifically define "exceptional facts," Missouri courts have upheld the application of this provision when circumstances prevented the Division or Commission from using other statutory formulas to fairly and justly calculate a weekly wage. In the case of Ash v. Ahal Contracting, 916 S.W.2d 439 (Mo.App. 1996) the Court determined that due to the intermittent and part-time nature of the employee's work that such was deemed an exceptional fact and warranted the application of 287.250.4. In that case the Court was asked to determine the average weekly wage for an employee who worked for various concrete companies on an as-needed basis out of the union hall. The evidence presented showed that the claimant worked sporadically when employed by Ahal Contracting Company. The Commission in that case found that the claimant had worked for 10 separate weeks out of a 10-month period and added up the total amount of remuneration paid by the employer for the 10-week period and divided that amount by 10. The Court of Appeals in the Western District found that such method in calculating the average weekly wage was appropriate. When applying the application of that law to these facts by looking at Employer/Insurer's Exhibit No. 4, which is a 52-week wage statement, I find the Claimant had gross pay of \$18,404.23 working 23 weeks out of the 52-week period. And subtracting the date of injury because the Claimant got hurt midway through her shift, I find the gross wage to be taken into consideration is \$18,042.23 over 22 weeks period. This results in an average weekly wage of \$820.10 and the applicable compensation rates to be \$546.73/\$418.58. The parties have agreed to the period of temporary total disability in dispute to be 7 1/7ths weeks. And I find that for purposes of temporary total disability due the Claimant is entitled to the \$546.73 per week for a total of \$3,905.21.

### MEDICAL EVIDENCE

The Claimant was examined by Dr. Egea on behalf of the Employee. Dr. Egea reviewed the Claimant's history of the accident, treatment records available at the time of his examination, and solicited a history of injury, and examined the Claimant. Dr. Egea noted that Claimant had complaints of patella fracture to the left knee and during the period of the Claimant's left leg immobilization Dr. Egea noted an increase of pain to the low back. Dr. Egea testified that the change in the Claimant's gait was the likely cause of the Claimant's complaints of low back pain. Dr. Egea in his testimony was aware that the Claimant had a history of low back problems and had been treating with a chiropractor before and after the work accident. Dr. Egea noted that the Claimant did not have the benefit of an MRI but was aware of the Claimant's nerve root irritation after the accident which was not a symptom present predating the work accident. Dr. Egea ultimately was of the opinion that Claimant had from a work-related accident a 10 percent permanent partial disability of the whole body referable to the back and a 10 percent permanent partial disability to the left knee.

There was evidence submitted in the form of the deposition of John J. Schmidt, D.C., who had treated the Claimant for a period of time before the accident, as well as after the work-related accident of April 24, 2011. Dr. Schmidt noted the Claimant had complaints of pain both predating the accident as well as after the accident. Dr. Schmidt testified in his deposition that he was unaware at the time of his treatment the Claimant had suffered a work-related accident. Dr. Schmidt testified that from the date he first saw the Claimant up until the last visit before his deposition testimony the Claimant's symptoms of low back pain and radiating pain into the legs have waxed and waned, sometimes better, sometimes worse.

The Claimant was also examined by Dr. Gerald McNamara whose deposition testimony is in evidence. Dr. McNamara was the treating physician who treated the Claimant's patella fracture implementing work restrictions and placed the Claimant in a leg immobilizer to keep the leg straight. Dr. McNamara placed the Claimant on partial weight-bearing with the uses of crutches and a knee immobilizer and walker. Dr. McNamara noted that after Claimant was in the knee immobilizer for a period of time that the Claimant began to complain of pain in the low back area. Dr. McNamara ordered physical therapy that would be appropriate for the knee and the low back. Dr. McNamara opined that because of over compensation because of the immobilized leg there would be aggravation to the Claimant's low back by an altered gait. Dr. McNamara ultimately opined upon release of treatment of the Claimant that Claimant had a 7 percent permanent partial disability to the left knee and no permanent disability related to the low back complaint.

### FINDINGS

I find that Claimant has met her burden of proof to establish a work-related injury for which she was paid appropriately for time lost albeit at a disputed compensation rate. I find the Claimant who testified at great length over the pain complaints to her left knee from the patella fracture, as well as her complaints of pain and problems regarding her low back were extensive. The Claimant testified at length to the nature of her complaints to the low back predating the work injury, as well as the nature of her complaints to the low back post-injury. The Claimant, trained as a nurse, seemed to distinguish between many different types of what an ordinary person would call pain. The Claimant, for example, mentioned discomfort, pain, spasm, stabbing, pinching, radiating, all in reference to pain and in her mind all different. Counsel for the Employer and Insurer cross-examined the Claimant at length regarding documented records of medical visits where pain was the documented complaint where the Claimant chose to describe that as discomfort or an ache or a spasm or any nature of things other than pain. I find

while the Claimant and counsel at times seemed to enjoy the joust of semantical games the Claimant did, I believe, establish that even though she had low back treatment predating her injury there was a period of treatment post-injury for which additional treatment was ordered for complaints which seemed to be absent pre-injury. Notably, Dr. McNamara, the treating physician, ordered physical therapy for low back complaints post-injury but was ultimately of the opinion that the low back condition was transient in nature and would resolve after the Claimant's removal of the leg immobilizer. The Claimant's testimony would suggest otherwise.

I find the Claimant has not presented evidence of any claim against the Second Injury Fund for second wage loss, although the Claimant and her counsel insisted the Second Injury Fund participate and the Second Injury Fund was able to question the Claimant at some length. I find insufficient in the record any evidence to establish any entitlement to any second wage loss claim for which the Second Injury Fund is to be held liable.

Based on the above-mentioned discussion and the careful review of the evidence and testimony presented, I find the Claimant has met her burden of proof to establish a permanent partial disability of 10 percent to the left knee at the 160-week level and a 5 percent permanent partial disability to the whole body for a low back injury. I find, therefore, the Claimant is entitled to temporary total disability benefits of \$3,905.21 with a credit given for the \$601.76 paid in the state of Kansas. I find further the Claimant is entitled to 36 weeks of permanent partial disability benefits at a compensation rate of \$418.58 per week for a total of \$15,068.88 less any amounts paid in the state of Kansas for which the Employer is entitled to a credit. I find no liability of the Second Injury Fund for a wage loss claim.

I find Claimant's counsel, Mr. Dan Doyle, entitled to attorney's fees of 25 percent of sums recovered for his legal services rendered.

Made by: \_\_\_\_\_

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