

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

Injury No.: 02-105248

Employee: Judy Hartle  
Employer: Ozark Cable Contracting  
Insurer: Grinnell Mutual Reinsurance Company  
Date of Accident: September 17, 2002  
Place and County of Accident: Tiptonville, Tennessee

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 8, 2008. The award and decision of Administrative Law Judge Lawrence C. Kasten, issued February 8, 2008, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 29th day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**AWARD**

Employee: Judy Hartle

Injury No. 02-105248

Employer: Ozark Cable Contracting

Additional Party: None.

Insurer: Grinnell Mutual Reinsurance Company

Hearing Date: November 7, 2007

Checked by: LK/kh

**SUMMARY OF FINDINGS**

- Are any benefits awarded herein? Yes.
- Was the injury or occupational disease compensable under Chapter 287? Yes.
- Was there an accident or incident of occupational disease under the Law? Yes.
- Date of accident or onset of occupational disease? September 17, 2002.
- State location where accident occurred or occupational disease contracted: Tiptonville, Tennessee.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- Did employer receive proper notice? Yes.
- Did accident or occupational disease arise out of and in the course of the employment? Yes.

- Was claim for compensation filed within time required by Law? Yes.
- Was employer insured by above insurer? Yes.
- Describe work employee was doing and how accident happened or occupational disease contracted:  
The employee fell off a ladder and injured her right knee.
- Did accident or occupational disease cause death? No.
- Parts of body injured by accident or occupational disease: Right knee.
- Nature and extent of any permanent disability: 45% permanent partial disability of the right knee.
- Compensation paid to date for temporary total disability: None.
- Value necessary medical aid paid to date by employer-insurer? None.
- Value necessary medical aid not furnished by employer-insurer? \$7,566.68.
- Employee's average weekly wage: \$577.37
- Weekly compensation rate: \$384.91/\$340.12
- Method wages computation: By agreement.
- Amount of compensation payable:

\$7,566.68 in previously incurred medical benefits.  
\$18,970.56 in temporary total disability benefits.  
\$24,488.64 in permanent partial disability benefits.

TOTAL: \$51,025.88

- Second Injury Fund liability: N/A
- Future requirements awarded: None.

Said payments to begin (see rulings of law) and 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: Robert Ramshur.

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

On November 7, 2007, Judy Hartle, appeared in person and by her attorney, Robert Ramshur for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, James Telthorst. Also present was the employer, Chris Harris. The parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS:**

- On September 17, 2002, Ozark Cable Contracting was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured by Grinnell Mutual Reinsurance Company.
- On September 17, 2002, Judy Hartle sustained an accident arising out of and in the course of her employment.
- The employer had notice of the alleged employee's accident.
- Judy Hartle's claim was filed within the time allowed by law.
- Judy Hartle's average weekly wage was \$577.37. The rate of compensation for temporary total and permanent total is \$384.91 per week. The rate of compensation for permanent partial disability is \$340.12 per week.
- The employer-insurer has not paid any medical aid.
- The employer-insurer has not paid any temporary disability.
- Judy Hartle stipulated to the lien of \$975.00 for former Attorney Daniel J. Brown.

### **ISSUES:**

- Covered employee
- Medical causation
- Claim for previously incurred medical
- Claim for additional or future medical aid.
- Nature and extent of disability

## **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

### Employee's Exhibits

- Summary of medical bills
- Deposition of Dr. David Volarich with exhibits
- Deposition of Gary Weimholt with exhibits
- Medical report of Dr. Rende
- Deposition of Christopher Harris

### Employer-insurer's Exhibits

- Deposition of Dr. Nogalski with exhibits
- Deposition of Karen Thaler-Kane with exhibits
- Medical records of Dr. Farley

**Witnesses:** Judy Hartle; Cassie Ingram, for the employee; and Chris Harris, the employer

**Briefs:** The claimant filed her hearing brief/case summary on the date of the hearing. On November 27, 2007, the employer-insurer filed two alternate proposed awards. On November 30, 2007, the employee filed a proposed final award.

## **FINDINGS OF FACT FOR ISSUE 1 COVERED EMPLOYEE:**

Chris Harris is the brother of Judy Hartle. He the sole proprietor and owner of Ozark Cable Contracting and has been in business for approximately 10 years. Since he started operating the company he has contracted with different cable television providers to perform a variety of services including the installation of cable television both underground cable and wiring of homes; tower work; conducting audits to find illegal customers; and sales. Mr. Harris has a written contract or agreement with the cable television companies that request his services. The contract includes what services that Ozark Cable Contracting is to perform and in what location. Cable contracting is the only business that Mr. Harris is in. In 2002, Mr. Harris had workers' compensation insurance on himself. In the past, Mr. Harris has hired another company to do work and they were required to provide their own workers' compensation insurance.

In September of 2002, Ozark Cable's service area was Missouri, Illinois, Arkansas and Tennessee. Mr. Harris testified that his company does not have any employees and that everyone that works for Ozark Cable including Judy Hartle was a subcontractor. In September of 2002, he had fifteen or twenty people who were performing the same type of work that Judy Hartle performed. There were no written agreements between Ozark Cable and Ms. Hartle or

any other person who performed work for Ozark. The employer's base of operation was in Piedmont, Missouri. Ms. Hartle lived in St. Louis and went to Piedmont to pick up her work orders.

Ozark Cable contracted with cable companies to perform work that could last for a day or six months. Mr. Harris had a list of people that he would call to see if they would work for him at the price he was paying. Judy Hartle was on the list. Ms. Hartle was free to decline the work, was not obligated to be on call, and could work for someone else. Ms. Hartle stated that her brother might not call her again if she turned him down. She did not work continuously for Ozark. Her brother would call her when she was needed. Each cable company provided a list of what services were to be performed at each location and address. Mr. Harris would then give the people that worked for him a list of the exact services at each location they were to complete.

The work that Judy Hartle performed for Ozark was anything from installations including wiring of cable television, to disconnecting customers, and quality control. With regard to quality control, she would receive a copy of what the installers were supposed to have done at each address. She would verify what had been done at each address. On September 17, 2002, she was working for Ozark Cable Contracting performing audits, disconnects and sales. Audits were to verify whether or not for each address they were getting illegal cable services. If that address was not a subscriber, she talked to them about either signing up or being disconnected. If they wanted to sign up, she would perform an installation. Otherwise, she performed a disconnection. Her work was all above ground. The tools that she used to perform her job included drills, screwdrivers, and a ladder.

For quality control services she would get paid a set amount for either a ½ day or full day of work. Ms. Hartle was paid a certain sum for each service she performed which included inspecting houses, disconnecting services, signing up services, and installing services. There were no other benefits such as health insurance or 401K. She was paid weekly with no payroll taxes withheld and no W-2 issued. She was responsible for her deductions and taxes.

Ms. Hartle supplied her own vehicle to go to and from the job sites. She paid for her own gasoline and was not paid for any expenses such as meals or travel. She provided her own tools including a ladder. All of the people that worked for Ozark were required to have a sign on the side of their truck which said Ozark Cable Contracting or Cable TV. Ozark Cable supplied the magnetic signs. Mr. Harris stated that most of the time the person would have a small 12x12 magnetic sign that said Cable TV which worked for whatever cable system they were doing work for. In 2002, some of the trucks had an Ozark Cable magnetic sign on them. The truck Ms. Hartle was using had an Ozark Cable Contracting sign on it that was supplied by Mr. Harris.

Mr. Harris decided what area each person was assigned to work and what specific work was to be performed. He gave Ms. Hartle a computer print out of every address with every type of service that was to be done in the specific area. The employer directed her where to go and what she was to do. She could set her own hours and decide which order of houses or streets she performed the services. Mr. Harris could let Ms. Hartle go at anytime. He was not obligated to keep her for any given period of time or at any particular location. After giving her a list of services to perform, he could have changed his mind and tell her he did not want her to do any more work and to turn her paperwork and sign in. He could let anyone go at any time, even if he had assigned them to an area. Mr. Harris had control over whether they would work or not.

In 2002, Ms. Hartle performed work for Ozark Cable for eleven weeks prior to September 17, 2002. She had worked for him at other times before 2002. On September 17, 2002, Ms. Hartle was working in Tiptonville, Tennessee. She was standing on a seven or eight foot ladder next to the roof of an apartment building working on the splitter of an overhead line. She was on private property which the workers were allowed to be on.

### **RULING OF LAW FOR ISSUE 1 COVERED EMPLOYEE:**

Judy Hartle is alleging that she was a covered employee of Ozark Cable Contracting. The employer-insurer is alleging that she was not a covered employee but was an independent contractor.

Under Section 287.020.1 RSMo, the word "employee" is defined to include "every person in the service of any employer, as defined in this Chapter, under any contract of hire, express or implied, oral or written or under any

appointment or election, including executive officers of corporations.” In White v. Dallas & Mavis Forwarding Company, Inc., 857 S.W.2d 278 (Mo. App. 1993), the Court held that an independent contractor is defined as “one who, exercises an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of his work.”

To determine whether an employment relationship exists, Missouri courts first apply the “controllable services test.” See Lynn v. Lloyd A. Lynn, Inc., 493 S.W.2d 363 (Mo. App. 1973). If the application of the controllable services test fails to clearly indicate that an employment relationship exists, Missouri courts then undertake a secondary consideration of the factors in what is commonly referred to as the “relative nature of the work test.” See Ceradsky v. Mid-America Dairymen, Inc., 583 S.W.2d 193 (Mo. App. 1979).

The pivotal question in determining the existence of an employer/employee relationship is whether the employer had the right to control the means and manner of the service, as distinguished from controlling the ultimate results of the service. The relevant factors to be considered under the “controllable services test” are: actual exercise of control; the extent of control; the duration of employment; the method of payment of services; the furnishing of equipment by employer; the relationship of the services to the regular business of the employer; the right to discharge; and the contract. See Seaton v. Cabool Lease, Inc., 7 S.W.2d 501 (Mo. App. 2000), quoting Dawson v. Home Interiors & Gifts, Inc., 890 S.W.2d 747, 748 (Mo.App.1995). The Courts have held that no particular factor is dispositive of the issue, but that each factor must be considered in making the determination of whether an employee-employer relationship exists. See Seaton at 505, citing Watkins v. By-State Development Agency, 924 S.W.2d 18, 21 (Mo.App.1996).

#### Application of the Controllable Services Test:

In Ms. Hartle’s case, the factors in favor of an employee-employer relationship are the duration of employment, the right to discharge, and the relationship of the services to the regular business of the employer. The factors against an employer-employee relationship is the actual exercise of control, the extent of the control, the method of payment of services, the lack of furnishing equipment to the worker by the employer, and the lack of a written contract. Overall, I find that with regard to the “controllable services test,” there was not enough evidence to clearly find that Judy Hartle was an employee.

Therefore the “relative nature of the work test,” must be used to determine the employment status. That inquiry focuses on the relationship between the nature of the work and the operation of the business served. If the work activity is of a kind necessary in the operation of the business, so that if not done by the worker it would be done by a direct employee of the business, then the cost of all workers’ compensation claims associated with that business should be allocated to that business by designating the worker as an employee of the business. See Cerdasky v. Mid Am. Dairymen, Inc., 583 S.W.2d 193 (Mo. App. 1979) and Watkins v. Bi-State Development Agency, 924 S.W.2d 18 (Mo. App. 1996)

The factors considered by the Missouri courts in applying the “relative nature test” include: the skill required of the worker in rendering the service in question; whether, in rendering the services in question, the worker is engaged in an occupation or enterprise that is distinct and separate from that of the alleged employer; to what extent the workers’ occupation or business may be expected to carry its own allocation of financial burden for an industrial injury; whether the worker’s services are the regular part of the business of employer; whether the worker’s services were rendered continuously or intermittent; and whether the duration of the worker’s services is sufficiently long to constitute the hiring by the alleged employer of continuous services, as opposed to contracting by the employer for completion of a particular job.

#### **Application of the Relative Nature of the Work Test:**

The Skill of the Worker: Ms. Hartle was one of 15-20 people that worked for Ozark performing the same type of work. She had no special skills or training to differentiate her from the other workers. The more skilled a position, the more likely it is to be considered to be done by an independent contractor.

Separate Enterprise: The cable television services rendered by Ms. Hartle and the other persons were

clearly not an occupation that was distinct and separate from Ozark Cable Contracting.

Financial Burden: The work of Judy Hartle and the other persons for Ozark Cable Contracting was a regular part of the cable television service business. It was not an independent business which would be feasible to channel the costs of a work-connected injury.

Regular Part of Business: The regular business of Ozark Cable Contracting was performing cable television services including installation, auditing, disconnecting, and sales which were the services that were provided by Judy Hartle and the other persons performing work for Ozark Cable Contracting. The nature of the work was such that if it had not been done by the “independent contractors”, direct employees of Ozark Cable Contracting would have had to do it in order for Ozark to continue to stay in the business of providing cable television services. I find that Judy Hartle’s services were a regular part of the business of the employer.

Continuous or Intermittent Services: The providing of cable television services by the 15-20 persons including Judy Hartle was a continuous service provided to Ozark Cable Contracting during the performance of the contracts between Ozark and the cable television companies that provide cable television services.

Duration of Workers Services: Ms. Hartle had worked for her brother prior to 2002. In 2002, Ms. Hartle had performed services for Ozark for 11 weeks before her accident. I find that the duration of Ms. Hartle’s services was long enough to constitute the hiring by Ozark Cable Contracting as distinguished from the contracting for the completion of a particular job.

All of the facts lead to a conclusion that there was an employer-employee relationship. I find that when applying the “Relative Nature of the Work Test”, the evidence overwhelmingly supports a finding that the work of the 15-20 people including Judy Hartle was a regular and continuous part of the business of Ozark Cable Contracting. I find that as a matter of law that on or about September 17, 2002, Judy Hartle was an employee of Ozark Cable Contracting and was working under the provisions of the Missouri Workers’ Compensation Act.

Even if Judy Hartle is not deemed to be a direct employee of Ozark Cable Contracting, the facts support a finding that she was a statutory employee under 287.040.1 RSMo.

### **Statutory Employment under Section 287.040.1 RSMO.**

This section provides as follows:

Any person who has worked under contract on or about his premises which is an operation of the usual business, which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

The Supreme Court in Bass v. National Super Markets, Inc., 911 S.W.2d 617, held that “statutory employment exists when three elements co-exist: (1) the work is performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employment; and (3) the work is in the usual course of business of the alleged statutory employer.”

Contract: The Court of Appeals in State ex rel. J.E. Jones Construction Company, 875 S.W.2d 154 (Mo. App. 1994), held that the word “contract” should be interpreted broadly and includes those contacts which are written or oral, express or implied. The manifestation of acceptance of an offer need not be made by the spoken or written word but may come through the offeree’s conduct. I find that there was an oral contract between Mr. Harris and Ms. Hartle for Ms. Hartle to perform installation, auditing, disconnecting and sales of cable services. Ms. Hartle completed the work for a certain amount for each service. I find that the work was performed pursuant to a contract.

Premises: In Wilson v. C.C. Southern, Inc., 140 S.W. 3d 115 (Mo. App. 2004), the claimant was killed on a

public highway while driving a tractor-trailer. The Court of Appeals held that the vehicle was the means by which the company conducted its usual business of transporting goods and concluded that the public highway was included in the company's premises. The Court stated that premises should not be given a narrow or defined construction but should be liberally construed and applied. Premises contemplates any place under the exclusive control of the employer where the employer's usual business is conducted. Premises of the employer is any place where in the usual operation of his business it is necessary for those whom he has employed to do the work to be while doing it. An employer has exclusive control of a place if the general public does not have the right to use it. Premises can be temporary and mobile. In James v. Union Electric, 978 S.W. 2d 372 (Mo. App. 1998), Southwestern Bell owned a telephone poll located on private property where the general public did not have access. The Court held it was the premises of Schatz Underground Cable when repairing the cable telephone line. In Boatman v. Superior Outdoor Advertising Company, 482 S.W. 2d 743 (Mo. App. 1994), Superior erected, painted, repaired and maintained signs. A sign owned by Superior that was being repainted that was on the private property of another and which was not accessible by the general public was held to be the premises of Superior.

When she was injured, Ms. Hartle was on a ladder next to the roof of an apartment building working on a cable splitter that was on an overhead cable television line. That work was necessary in the usual business of Ozark Cable Contracting. The location was on private property that the general public did not have the right to use. It was where Ozark Cable Contracting's usual business was conducted and that location was necessary for Judy Hartle to be while performing the work for Ozark Cable Contracting. Ozark Cable Contracting had the exclusive control since the general public did not have the right to use it. I therefore find that Ms. Hartle was injured on or about the premises of Ozark Cable Contracting.

Usual Course of Business: The Court in Bass defined a putative employer's 'usual business' as used in Section 287.040 as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. The work that Judy Hartle was performing was routinely done on a regular and frequent schedule contemplated to be repeated over a short span of time and which the performance of which would require Ozark Cable Contracting to hire permanent employees absent the agreement.

I find that Judy Hartle was a statutory employee of Ozark Cable Contracting under Section 287.140.1 RSMo at the time of her September 17, 2002 accident.

#### **FINDINGS OF FACT FOR ISSUES 2 THROUGH 5:**

The employee went through 9th grade and stopped school a couple weeks into her 10th grade year. The majority of the time that she has been working has been in the cable television industry. She has had other jobs including bartending, which she has some cash handling skills. She also worked at a shrimp packing plant in Florida. She has had no other formal education and has no computer skills or other skills. The employee can read and write and use the internet on a computer to look up information.

On September 17, 2002, the employee was working in Tiptonville, Tennessee. The employee fell off a ladder and injured her right knee. The right knee was only body part she injured in the accident. Within minutes after the fall, her knee swelled up. She contacted Chris Harris who told her to go to a doctor.

Dr. Nogalski stated that the medical records from Dr. Harris in Memphis, Tennessee indicated a history of a right knee injury at work the day before when the employee slipped and fell from a ladder. He stated that the medical records from the September 19 emergency room visit indicated that the employee stepped off a ladder and twisted her knee. The employee walked with a limp and her range of motion was limited secondary to pain. The knee exam showed mild edema, no effusion, and medial knee pain.

Dr. Farley an orthopedic surgeon, saw the employee on October 17, 2002. The history noted that the employee injured her right knee a month ago when she fell off a ladder in Tennessee. On exam, the employee was tender along the medial joint line and had restricted range of motion. The employee had mild plus 1 laxity on valgus stress and plus

laxity with the anterior cruciate ligament. Dr. Farley thought the employee might have internal derangement including meniscal or anterior cruciate pathology. He ordered physical therapy and an MRI.

The findings by the radiologist for the October 18 MRI was that the medial meniscus was markedly attenuated. There was a strong suspicion of a grade three tear involving the posterior horn and adjacent body of the medial meniscus. The anterior cruciate ligament was thinned out and a partial tear of the anterior cruciate ligament could not be excluded. The posterior cruciate ligament was intact but bowed posteriorly.

Dr. Farley stated that the MRI suggested a possible tear of the medial meniscus and recommended surgery due to her significant problems. Dr. Farley performed an arthroscopic surgery on November 7, 2002. The procedure was a partial synovectomy, medial meniscal repair and an insertion of a pain pump. Dr. Nogalski stated that the operative report showed that there was a large displaceable bucket handle tear of the medial meniscus that was repaired. Dr. Farley did not specifically comment about the status of the anterior cruciate ligament. In November and December, the employee received physical therapy.

On January 6, 2003, Dr. Farley continued therapy and the employee was to return in three weeks to see if she had improved enough to return to work. On March 10, Dr. Farley noted that the employee was beginning to develop some locking, and thought she had non-healing of the meniscal repair. On March 20, Dr. Farley performed an arthroscopy of the right knee with a partial synovectomy, a removal of foreign body from the right knee and insertion of a pain pump.

Dr. Nogalski noted in his operative report Dr. Farley stated that the anterior cruciate ligament appeared to be lax. With palpation with a probe there was significant laxity of the anterior cruciate ligament and it was essentially not functional. On March 27, Dr. Farley believed the employee had problems with the anterior cruciate ligament. At the time of arthroscopy, the anterior cruciate ligament appeared to be not only thinned out as indicated on the MRI, but appeared to have scarring down to the posterior cruciate. Dr. Farley believed the employee had a non-functioning anterior cruciate ligament. If attempted rehabilitation failed, a reconstruction of the anterior cruciate ligament would be needed.

On April 21, Dr. Farley thought her anterior cruciate ligament may be non-functioning and causing the laxity which produced the locking. The radiologist's impression of an MRI that was performed that day was post operative changes of the medial meniscus with a tear in the posterior third at the base, a tear of the anterior cruciate ligament, and degenerative changes of the lateral meniscus. On April 24, Dr. Farley noted the MRI showed an anterior cruciate ligament tear and recommended that it be reconstructed. Dr. Farley noted the MRI indicated a posterior horn tear of the medial meniscus but the last arthroscopy probing did not reveal a tear.

On May 6, 2003, Dr. Farley performed an arthroscopy of the right knee with a partial medial meniscectomy and arthroscopy assisted anterior cruciate ligament reconstruction, with an insertion of a pain pump. Dr. Nogalski stated that Dr. Farley indicated in his operative note that the meniscal repair had not taken posteriorly and a partial medial meniscectomy was performed. Dr. Farley indicated that the anterior cruciate ligament was adhered to the posterior cruciate and essentially was non functional.

On May 22, the employee had a brace on and was prescribed physical therapy. On June 12, the employee still did not have complete motion of her knee. Dr. Farley continued physical therapy. On July 3, Dr. Farley released her to light duty work that next week. On July 31, Dr. Farley noted that if the employee was continuing to make anticipated progress, he would release her in August. On August 28, 2003, the employee was continuing to make improvement but still had some weakness. The employee was scheduled for a functional capacity evaluation to determine her disability. Although Dr. Farley indicated that he would see her back in a couple weeks, the August 28 note was the last record.

The employee saw Dr. Volarich on October 13, 2004. Prior to the accident, the employee had no difficulties with her right knee. She might have had some soreness or stiffness periodically from a heavy day at work, but nothing that required treatment and hindered her ability to work prior to September 17, 2002. The employee's extension was negative twenty degrees and the flexion was 120 degrees with normal being 140 degrees. There was considerable pain, two plus crepitus, and one plus swelling in the knee.

With regard to diagnosis regarding the injury of September 17, 2002, Dr. Volarich stated that the employee had an internal derangement of the right knee in the form of a medial meniscus and was status post meniscal repair with meniscal arrows and synovectomy; persistent right knee pain syndrome and was status post arthroscopy for removal of the meniscal arrow and redo synovectomy; persistent right knee pain with instability status post partial medial meniscectomy with anterior cruciate ligament reconstruction; and right knee arthrofibrosis. It was Dr. Volarich's opinion that the work accident that occurred on September 17, 2002, was the substantial contributing factor causing the internal derangement in the right knee that required the three separate surgical procedures.

Dr. Volarich recommended avoiding all stooping, squatting, crawling, kneeling, pivoting, climbing and impact maneuvers. The employee should be cautious navigating uneven terrain, slopes, steps and ladders. She can handle weight to tolerance. He advised her to continue using her cane at all times when ambulating. The employee should also limit prolonged weight bearing including standing or walking for twenty to thirty minutes or to tolerance. Dr. Volarich recommended daily glucosamine since it appears to be a useful compound to maintain articular surface cartilage. The employee was advised to pursue an appropriate strengthening, stretching and range of motion exercise program in addition to non-impact aerobic conditioning. She was advised to follow up with her personal physician for any required additional future medical care. Dr. Volarich stated that based upon his examination the employee was not at maximum medical improvement and would require an additional surgical repair of the right knee, most likely in the form of manipulation under anesthesia with resection of plica, scar tissue, and synovitis. Dr. Volarich suggested a consultation with Dr. Rende.

The employee saw Dr. Richard Rende, an orthopedic surgeon on November 2, 2004 for chronic pain and stiffness in her right knee. Dr. Rende noted that the right knee had a five degree flexion contracture and her flexion was limited to 110 degrees. There was no swelling but there was medial tenderness. X-rays showed moderately advanced narrowing in the medial joint space due to degenerative osteoarthritis. It was Dr. Rende's opinion that the employee has had multiple knee surgeries, which resulted in arthrofibrosis, loss of motion, and now progressive degenerative changes in the medial space line. Dr. Rende did not believe that taking out the scar tissue and removing the graft would improve her symptoms because some of the symptoms are due to the arthritis. Due to the progressive nature of the arthritis, she was eventually going to require knee replacement. Dr. Rende stated that the employee had a very bad outcome. She does not have additional options until her arthritis is severe enough for knee replacement surgery.

On November 19, 2004, it was Dr. Volarich's opinion that the employee had reached maximum medical improvement referable to treatment for the September 17, 2002 injury and that as a direct result of that injury the employee has a 65 % permanent partial disability of the right lower extremity rated at the knee due to the internal derangement including the torn medial meniscus and anterior cruciate ligament insufficiency that required three separate surgical repairs. The rating accounts for the development of arthrofibrosis causing significant losses in motion, ongoing pain, weakness and crepitus in the right lower extremity.

In his deposition, it was Dr. Volarich's opinion that as a result of the fall off the ladder on September 17, 2002 the employee had a significant injury to her right knee and tore her medial meniscus and anterior cruciate ligament. She had three surgeries by Dr. Farley. The first surgery was a repair of the medial meniscus by tacking it down with meniscal arrows. The second surgery was a meniscectomy and removal of one of the meniscal arrows that was causing inflammation. The third surgery was a partial meniscectomy and an anterior cruciate ligament reconstruction. The loss of motion was secondary to the arthrofibrosis (excessive scar tissue) from the three surgical repairs. From the time that she was injured on September 17, 2002, until she was released from treatment, which Dr. Volarich thought was in December of 2003, the employee was either recovering from a surgery or getting ready for another.

Dr. Volarich saw no problems with the employee managing her right knee pain using over the counter medications like Tylenol. He saw her shortly after her left knee surgery and she was using Darvocet. Dr. Volarich stated that Darvocet may have been more associated with the left knee symptoms. Dr. Volarich stated that the employee had pain in her right knee which was probably two out of ten and maybe five on a bad day. Dr. Volarich stated that on a routine everyday basis she would take over the counter Tylenol or Excedrin PM. On a bad day she would need something like Darvocet.

Dr. Volarich reviewed Dr. Farley's November of 2002 operative report and did not see where he evaluated the anterior cruciate ligament or made any comment about it in his report. When asked if he was still saying that the tear to the anterior cruciate ligament was causally related to the September 17, 2002 accident, Dr. Volarich's stated that based on the October 18, 2002, MRI scan the ACL was reported as being thinned out and at least a partial tear cannot be excluded. Dr. Volarich stated there was clearly some damage to that ligament and he thought it was injured in the accident.

Dr. Volarich stated it was reasonable that the employee would be gainfully employed provided she could stay within his restrictions. She was going to do best if she was able to change positions frequently. Anything that required her to be up for prolonged times or heavy lifting is going to be a problem. Whether she can be employed on a long term basis without aggravating the knees and requiring more pain management is another issue. Dr. Volarich stated that the employee cannot go back to cable television installation. Dr. Volarich stated that if the rehab specialist is able to identify a job for which she is suited, he does not have a problem with the employee trying to work. If a rehab specialist cannot find a job for which she is suited, he did not know if the employee would be able to return to work. In conclusion his opinion remained the same that she had a 65 % permanent partial disability of the right lower extremity referable to her right knee injury on September 17, 2002.

The employee saw Dr. Nogalski, an orthopedic surgeon on February 6, 2006. The employee was currently taking Darvocet that was prescribed by Dr. Honeywell, her primary care physician. She also takes Tylenol and Excedrin PM to help her sleep at night.

Dr. Nogalski stated that the employee's left knee did not bother her significantly and on exam there was tenderness over the anteromedial joint line. Dr. Nogalski reviewed medical records for the left knee. The employee started treating for the left knee in July of 2004 at an emergency room. The employee stated she was walking the night before and felt like something slipped. Another report was that when the employee was walking in a restaurant, her left knee became weak, and she fell. The employee saw Dr. Marti in August of 2004 who thought she might have an abnormality of the anterior cruciate ligament. He referred her to Dr. Weissfeld. On October 1, 2004, the employee had surgery by Dr. Weissfeld which showed chronic absence of the anterior cruciate ligament with no anterior cruciate ligament instability. There was impinging plica synovialis and an elongated nonfunctional anterior cruciate ligament with many of the fibers balled up in the scar tissue distally and very thin, almost absent fibers proximally which Dr. Weissfeld stated had obviously happened quite some time ago. It was Dr. Nogalski's opinion that that there was no causal connection between her left knee condition and the September 17, 2002 accident.

Dr. Nogalski stated that with regard to her right knee the employee had a trace effusion and there was tenderness along the medial joint line. The knee range of motion was around minus 7 degrees of extension and 120 degrees of flexion. The patellar mobility was slightly decreased. Dr. Nogalski's impression was the employee was status post right knee arthroscopy times three with anterior cruciate ligament reconstruction and post-operative tightness, probable anterior tunnel; and status post left knee arthroscopy and resection of synovial plica. The employee had probable mild chronic anterior cruciate ligament laxity.

Based upon the differing medical histories it was very difficult to clearly identify a hard fall on the right leg. It appeared that she had a twist or some type of fall over a very short distance. Dr. Nogalski stated he cannot identify a clear causal link between her alleged incident of September 17, 2002 and her right knee condition. His opinion was based on the chronic nature of her ACL injury; the bucket handle tear of the knee which can occur at some point in time, become locked and unlocked, and not always causing symptoms; and in consideration of really no swelling around the time of her evaluation by the emergency room doctor. Dr. Nogalski stated that her ACL insufficiency was pre-existing and it is probable that her meniscal tear was too. The meniscal condition could have been made symptomatic by an activity at work such as a twist or turn or even a fall. The October of 2002 MRI did not demonstrate any findings suggesting an acute injury such as a bone bruise.

It was Dr. Nogalski's opinion that the employee would not benefit from further medical treatment for her bilateral knee conditions. Dr. Nogalski was not optimistic that further surgical intervention would dramatically improve her knee condition. For her right knee, Dr. Nogalski recommended avoiding any prolonged standing on

uneven ground and kneeling and squatting. He thought she could climb up to a level of three to four feet safely and with good control. The employee appeared to be objectively capable of returning to gainful employment, but expressed multiple subjective complaints which may be self limiting with regard to return to her activities. There are no clear objective findings that she would be incapable of returning to gainful employment with those restrictions.

In a June 14, 2006 addendum, it was Dr. Nogalski's opinion that the employee sustained a 0% permanent partial disability of the right lower extremity as a result of her claimed injury on September 17, 2002. With regard to overall permanency, the employee has a 12 % permanent partial disability of the right lower extremity at the level of the knee which was not related to the claimed September 17, 2002, injury.

In Dr. Nogalski's deposition, it was his opinion that the employee did not require further medical treatment. Dr. Nogalski stated that based on the MRI, the employee appeared to have a chronic anterior cruciate ligament tear and medial meniscus tear. Dr. Nogalski stated that the MRI findings showed what appeared to be chronic changes and no signs of any acute bone bruises. There were some issues within the records that suggested that the fall was not as forceful or perhaps might not have occurred as described. Dr. Nogalski did not see anything in the records that she was injured other than from a fall from a ladder on September 17, 2002, and there were no record of the employee having treatment prior to September 17, 2002.

The employee was seen by Gary Weimholt for a vocational rehabilitation assessment/evaluation on April 25, 2005. His report and November 18, 2005 deposition were part of the evidence. Several vocational tests were administered. The employee scored in the high school level for reading and the seventh grade level for spelling and arithmetic. In the Purdue peg board test which assesses bilateral arm/hand coordination and fine finger dexterity the employee's scores were below the tenth percentile for fine finger dexterity, which indicated that she was slower than 90 percent of tested persons. Mr. Weimholt stated he did not see any reason to question her on authenticity as far as reporting her background and condition. He believed that she was giving her best efforts on the tests that she took. Mr. Weimholt did not detect any kind of learning disability that would prevent her from learning. The results of the peg board test would not keep her from taking keyboarding or typewriting classes. She does not have any pain or anything associated with use of her hands.

Mr. Weimholt interviewed the employee for an hour and forty minutes. He observed that she needed to change positions and stand between several of the testing periods. She needed to walk to reduce stiffness in the right knee. She reported increasing pain in the right knee at the end of the interview. She stated her pain was eight out of ten and she needed pain medication.

The employee stated that she needed to keep her legs propped with pillows when she slept. She sleeps poorly and needs to use a heating pad on her knees at night. She can be seated and be busy for about thirty minutes to an hour maximum, but then needs to lie down and prop up her legs. She wears a hinged brace on the right knee most of the time and had it on during the interview. She also presented with a cane. At home, she does not always use the brace but does keep an elastic wrap on her knees. She takes Darvocet and Xanax. The employee stated she has developed left knee problems and believed it was the result of compensation and poor gait from the right knee. She has had one surgery on the left knee and has a brace for it. She stated she has developed back discomfort as a result of her knee problems.

Mr. Weimholt stated that the factors and conditions affecting her capability for employability, placeability, retraining or vocational services include less than high school education, seventh grade spelling and arithmetic achievement, low average to average learning ability, absence of computer knowledge and skills, no typing skills, and absence of money handling experience or retail sales type of experience. It was his opinion that she was not a candidate for retail sales because of the requirement to stand and walk for prolonged periods of time. Her right knee condition alone precludes her from prolonged standing, walking or seated work. The physical restrictions of Dr. Volarich place the employee in the sedentary or light duty work capacity. Mr. Weimholt did not think she would fall in the medium category because that would require a lot of standing and walking and much more activities like stooping, climbing stairs and physical kinds of jobs than sedentary or light.

Mr. Weimholt performed a transferable skills assessment to assess potential job goals. When considering transferable jobs skills to a sedentary, light or medium physical demand level, the employee has lost the ability to

perform all highly transferable jobs in 94 % of possible related jobs. It was his opinion that the other remaining jobs would not be able to be performed with her need to alternate sitting and standing for twenty to thirty minute intervals, or allow continual use of a cane. It was his opinion that the employee has no transferable job skills and no advantage over other workers in the open labor market. Based upon her lack of transferable job skills and ongoing work disabilities, it was his opinion that she would not be successful in meeting the workplace competencies required of most employers. The employee's educational level, physical limitations, pain, discomfort, and depression type symptoms constituted a serious hindrance in her ability to meet the expectations of employers in the areas defined in the study and listed above. The ability to perform other light assembly or production was considered but those types of production assembly jobs would exceed her standing and walking abilities, and he also considered her aptitude for the required finger dexterity.

In was Mr. Weimholt's opinion that Ms. Hartle was totally disabled from employment in the open competitive labor market. It was his opinion that there was no reasonable expectation that an employer, in the normal course of business, would hire the employee for a position or that she would be able to perform the usual duties of any job that she is qualified to perform. With respect to her ability to just maintain regular employment that would be required in the competitive open labor market, it was his opinion that the employee is disabled vocationally from working in the open competitive labor market and is totally disabled. Ms. Hartle's total vocational disabilities are due to the September 17, 2002 injury of her right knee.

When asked if he gave consideration to her left knee and low back complaints, Mr. Weimholt stated that he looked primarily to the right knee but also saw complaints of low back pain and left knee pain. The employee indicated that due to her right knee, she was developing further problems with the left knee and the low back. He thought he could take both into consideration but just the right knee was quite severe in terms of functionality. When asked if the employee had no left knee or low back problems, whether that would change his opinion on employability, Mr. Weimholt stated he did not know how her actual presentation would be if she had no problems her left knee or low back . He stated it was possible that it would change his opinion but he doubted it would.

On October 5, 2006, Karen Thaler-Kane, a vocational consultant, performed an employability/labor market survey on the employee. Her report and January 31, 2007 deposition were in evidence. In an employability assessment, Ms. Kane is generally provided records regarding work history, education, medical and other pertinent information including other vocational counselor's report and testing. She obtained pertinent information including medical, work history, education, driver's license, and past and present residence.

In her transferable skills analysis, Ms. Kane stated that the employee's work history and educational background would place her in the semi-skilled work category. Her transferable skills along with her job requirements would allow her to access positions with the following sample job titles: cashier, parking attendant, inspector, desk clerk, customer service, and file clerk. These positions fall within the classification of light physical demands, which possibly means that more than one third of the time they are standing and walking. With regard to a hotel clerk it is her experience that the positions allow for someone to alternately sit, stand and walk. Ms. Hartle's work experience and education provides her with an ability to maintain records; to interact with customers, subordinates and co-workers; to problem solve; and to complete activities with minimal supervision.

In preparing a labor market survey, the person's physical condition, work history, skills and education and the geographic region they reside in or resided in at the time they were injured are reviewed. Ms. Kane looked at job titles where someone could access employment. At the time of the injury, the employee lived in St. Peters Missouri. She had relocated to the Licking/ Piedmont Missouri area. Ms. Kane contacted employers in the greater St. Peters, Licking and Piedmont, Missouri areas to determine if the employee's current physical capabilities and specific vocational preparation would allow her to access positions in the available open labor market. The employers were contacted to verify physical requirements; job duties; skills required; current and anticipated opportunities for employment; and to clarify if on the job training would be provided skills enhancement was required. Ms. Kane contacted thirteen employers in the St. Peters, St. Louis, St. Charles, Poplar Bluff and Rolla areas including several hotels and motels, Terminex, Cingular, and several hospitals. All of the employers stated they would consider reasonable accommodations and that they hired employees within the last two years. Ms. Kane did not tell the employers that the employee has to lie down and prop her leg up after sitting for twenty minutes to an hour, must stand after sitting, and

shift positions every ten to fifteen minutes.

It was Ms. Kane's opinion that the employee would be able to seek, accept, be hired, and maintain full time gainful employment in the greater St. Peters, O'Fallon, Piedmont and Licking Missouri open labor markets.

The employee testified that she has not worked for Ozark Cable Contracting since the accident. She cannot return to her job at Ozark Cable due to her inability to bend to the ground, crawl on her knees or climb a ladder. There is no other job that she is aware of that she can do. Since her accident, the employee has not looked for work. She cannot work because she has to lie and sit down as needed. The employee stated that most of the quality control work that she performed in the past can be done by a visual inspection while in a vehicle. The employee currently has a drivers' license and a pick up truck.

In 2005, Mr. Harris had work in Florida as a result of a hurricane. The employee went to Florida for a couple of months and stayed in Mr. Harris' trailer. Mr. Harris went to Florida about once a week to check on things. When he was not there, the employee kept an eye on the trailer and the people working for him. If someone did something wrong, she would contact her brother. The workers would bring in their paperwork and she would lay it on his desk. Otherwise, she laid around in the trailer. Her brother gave her some money to help her out but it was not from working at Ozark. He has not issued Ms. Hartle a 1099 since the accident.

The employee testified that on May 1, 2007, she had a right knee replacement by Dr. Duncan in Springfield. She is not requesting the employer-insurer pay the medical bills from the knee replacement surgery. The employee's right knee is worse since the knee replacement. Prior to the knee replacement, her pain was six out of ten and would sometimes go up to eight or nine. She now has constant pain in her right knee of nine out of ten. She takes Darvocet every four hours. Sometimes she takes a Percocet which will make her pain go down to a six. She is taking more Percocet. She takes a sleeping pill to help her sleep due to knee pain. The right knee does not bend or straighten out completely. She is having hip pain due to her gait. The employee needs to have her right knee redone but does not have an appointment scheduled. She has to rest or elevate her knee approximately three to four times a day. If she elevates it too long, it locks up and causes pain. She has trouble sleeping. She puts her knee on a pillow which will cause it lock up and the pain wakes her up. Her knee is unstable. She mainly uses a cane but sometimes uses a walker. She used a knee brace prior to her knee replacement but has not since that surgery. If she goes up the stairs, she puts one foot up at a time. She is now having problems with her right knee, right hip and low back. The employee testified that she had surgery on her left knee for a torn meniscus which helped and her left knee is now fine.

Cassie Ingram, the employee's daughter, stated that the employee lives with her family in Houston, Missouri. The employee has lived with them since 2003 or 2004. Prior to September 17, 2002, the employee was able to do whatever she wanted to do. She kept her own house and they went on shopping trips to St. Louis. Since September 17, 2002, the employee has not worked or looked for work. Ms. Ingram drove her mother to the hearing which was a several hour trip. They had to stop three times for the employee to stretch her knee due to stiffness. Ms. Ingram has to help her mother take a bath because she cannot get in and out of the bathtub due to her strength. She has trouble walking up steps and puts one foot up and then the other. She uses a cane quite a bit. The employee takes Darvocet and Percocet on a daily basis for pain. The employee cannot sit very long and can stand for only five minutes or so. She has to move around a lot. She lays down quite a bit with her knee propped up. She does not help with their housework including vacuuming or doing laundry due to her knee. She helps with her children's homework and lays out clothes for them. During the night, Ms. Ingram can hear the employee toss and turn and get up quite a bit. During the day the employee lies down and rests but does not sleep. The employee is able to drive places by herself.

## **RULINGS OF LAW FOR ISSUES 2 THROUGH 5:**

### ***Issue 2. Medical causation***

The employer-insurer is disputing that the employee's injury was medical causally related to the accident.

#### **Right Knee conditions and treatment through August 28, 2003:**

The employee was diagnosed with a torn medial meniscus and a torn anterior cruciate ligament and underwent three surgeries by Dr. Farley.

Dr. Nogalski stated that he could not identify a clear causal link between her alleged incident of September 17, 2002 and the conditions in her right knee. Dr. Nogalski stated that based on the October 2002 MRI the employee appeared to have a chronic anterior cruciate ligament tear and a chronic medial meniscus tear. He stated that there was really no swelling when she saw the emergency room doctor. Dr. Nogalski stated that her ACL insufficiency was pre-existing and that her meniscal tear probably was too. Dr. Nogalski stated that the meniscal condition could have been made symptomatic by a twist, turn or fall at work. It was Dr. Nogalski's opinion that the conditions in the right knee were not related to the claimed injury.

Dr. Nogalski's opinion on medical causation is substantially affected by the following facts: There was no evidence that prior to September 17, 2002 the employee had problems or treatment for her right knee. The emergency room physician two days after the accident found that the employee was limping, her range of motion was limited secondary to pain, and there was edema with medial knee pain. In October, Dr. Farley noted the employee had laxity on valgus stress, had laxity with the anterior cruciate ligament, and thought the employee had internal derangement including meniscal and/or anterior cruciate pathology. The October 18 MRI showed that there was a strong suspicion of a grade three tear involving the posterior horn of the medial meniscus. The anterior cruciate ligament was thinned out and a partial tear could not be excluded. The arthroscopic surgery on November 7, 2002 showed a large displaceable bucket handle tear of the medial meniscus. In the March 20, 2003, surgery, Dr. Farley stated that there was significant laxity of the anterior cruciate ligament and it was essentially not functional. The anterior cruciate ligament appeared to be not only thinned out but appeared to have scarring down to the posterior cruciate.

It was Dr. Volarich's opinion that as a result of the September 17, 2002, accident the employee sustained a significant injury and internal derangement to her right knee including tearing of the medial meniscus and anterior cruciate ligament that required three separate surgical procedures. It was Dr. Volarich's opinion that the work accident was the substantial contributing factor causing the internal derangement including the torn medial meniscus and torn anterior cruciate ligament that required the three separate surgical procedures by Dr. Farley.

Based upon a review of all the evidence, I find that the opinion of Dr. Volarich on the issue of medical causation on the right knee is persuasive and more credible than the opinion of Dr. Nogalski. I find that the employee's September 17, 2002, work accident was a substantial factor in causing the employee's right knee injury and resulting medical condition including the torn medial meniscus and torn anterior cruciate ligament, and the need for the three surgeries by Dr. Farley. I further find that the injury to the employee's right knee and resulting medical condition including the torn medial meniscus and anterior cruciate ligament, and the need for the treatment through August 28, 2003 including the three surgeries by Dr. Farley are medically causally related to the September 17, 2002 work accident.

#### Right knee after August 28, 2003 including knee replacement:

The employee had a right knee replacement by Dr. Duncan on May 1, 2007. The employee has the burden of proving that the need for the knee replacement is clearly work related and that the September 17, 2002 work accident and injury was a substantial factor in the cause of the need for the right knee replacement.

In order to prove a medical causal relationship between the accident and the medical conditions, the employee in cases such as this one involving any significant medical complexity must offer competent medical testimony to satisfy her burden of proof. See Brundrige v. Boehringer Ingelheim, 812 S.W.2d 200 (Mo. App. 1991) and Downs v. A.C.F. Industries, Inc., 460 S.W.2d 293 (Mo. App. 1973). Given these established principals, I find that the employee has failed to meet her burden of proof of the issue of medical causation for the right knee replacement surgery by Dr. Duncan.

Dr. Rende was the only doctor who specifically addressed a knee replacement. Dr. Rende stated that due to the progressive nature of the arthritis in her knee, the employee would eventually require a knee replacement but not

until her arthritis and her symptoms were severe enough for that procedure. Dr. Rende stated that the employee has had multiple knee surgeries, which resulted in arthrofibrosis, loss of motion, and now progressive degenerative changes in the medial space line. It is not clear what Dr. Rende's findings were with regard to the cause of the knee replacement. Dr. Rende did not give an opinion as to whether the future right knee replacement would be medically causally related to the employee's September 17, 2002 accident, whether the need for that procedure was clearly work related, and whether the work accident was a substantial factor in the cause of the need for the knee replacement.

It is important to note that Dr. Rende saw the employee approximately a year after being released by Dr. Farley and four and a half years prior to the knee replacement surgery by Dr. Duncan. The employee's burden of proof is substantially affected by the fact that there were no medical records from Dr. Duncan or any other treating doctor regarding the condition of the right knee since Dr. Rende saw the employee in November of 2004.

I find that there is insufficient evidence to support a finding that the problems and need for the right knee replacement is medically causally related to the employee's September 17, 2002 accident. I specifically find that the employee has failed to meet her burden of proof that the need for the right knee replacement is clearly work related and that the September 17, 2002 work accident was a substantial factor in the cause of the need for knee replacement surgery and any resulting disability. I find that the employee has failed to meet her burden of proof on the issue of medical causation for the treatment and surgery performed by Dr. Duncan for the right knee replacement. The employee's request for future medical treatment and permanent disability with regard to the right knee replacement is denied.

#### Left Knee, Right Hip & Low Back:

The employee had left knee surgery on October 1, 2004 by Dr. Weissfeld. She also has complaints to her right hip and low back. The employee has the burden of proving that those conditions are clearly work related and the work accident and injury was a substantial factor in the cause of the problems with her left knee, right hip and low back.

When the employee fell off the ladder, she only injured her right knee. The employee is alleging that she developed the problems with her left knee, right hip and low back due to her poor gait from her right knee problems.

The employee started treating for the left knee in July of 2004 but there was no history in the records regarding a relationship with her right knee injury. She had surgery on October 1, 2004, which showed a chronic absence of the anterior cruciate ligament. There was an elongated nonfunctional anterior cruciate ligament with many of the fibers balled up in the scar tissue distally and very thin almost absent fibers proximally which the surgeon stated had obviously happened quite some time ago. It was Dr. Nogalski's opinion that that there was no causal connection between the September 17, 2002 accident and her left knee condition. Dr. Volarich did not address medical causation of the left knee. Based on a review of the evidence, I find that Dr. Nogalski's causation opinion on the left knee is credible.

There are no medical records concerning her right hip or low back and no diagnosis of any type of conditions or treatment the employee has received. There is no medical causation opinion that connects any alleged problems of the right hip or low back to the right knee injury.

I find that there is insufficient evidence to support a finding that the conditions and problems in the left knee, right hip or low back are medically causally related to the employee's September 17, 2002 injury to her right knee. I find that the employee has failed to meet her burden of proof that those conditions are clearly work related and her work related injury to the right knee was a substantial factor in the cause of those medical conditions, disability and need for treatment. The employee's request for future medical treatment and permanent disability with regard to her left knee, right hip and low back is denied.

#### *Issue 3. Claim for previously incurred medical*

The employee is claiming \$7,566.68 in medical bills which is the remaining amount of medical bills that have not been paid for the treatment including the three surgeries by Dr. Farley. The listing of the medical bills that total \$7,566.68 bills is contained in Employee Exhibit A. The \$46.85 medical bill to Dr. Shisko in Exhibit A is not being claimed in the total of \$7,566.68. The employer-insurer is disputing the causal relationship of those bills. The employer-insurer is not disputing the authorization, reasonable, or necessity of those medical bills. Based on my ruling on medical causation in Issue 2, I find that those medical bills were medically causally related to the September 17, 2002 work accident. I find that the employer-insurer is responsible for and is directed to pay to the employee the sum of \$7,566.68 for the previously incurred medical bills contained in Exhibit A.

#### *Issue 4. Claim for additional or future medical aid*

The employee is requesting future medical aid. Under Section 287.140 RSMo, the employee is entitled to medical treatment to cure and relieve her from the effects of the injury. In Sifferman v. Sears, Roebuck and Company, 906 S.W.2d 823 (Mo. App. 1995), the Court held that future medical care must flow from the accident before the employer is responsible.

The employee has the burden of proof to show that the future medical care flows from the compensable accident. In my ruling in Issue 2, I held that the right knee replacement, left knee, right hip and low back conditions were not medically causally related to the September 17, 2002 work accident. In order for the employee to meet her burden of proof for additional medical aid there must be sufficient medical evidence showing that the employee needs additional treatment for her right knee that resulted from the accident and the subsequent three surgeries by Dr. Farley. Although there is evidence that the employee is in need of future medical care for her overall condition, there is not sufficient medical evidence proving that the treatment that the employee is seeking is a result of the compensable conditions, and flows from the compensable accident.

In November of 2004, Dr. Rende's only recommendation for additional treatment was a right knee replacement in the future. The employee had the knee replacement on May 1, 2007. In November of 2004, the employee saw Dr. Volarich. He recommended that the employee use glucosamine as it appeared that it was a useful compound to maintain articular surface cartilage. Dr. Volarich did not state that the use of glucosamine was a result of the September 17, 2002 accident or that it would cure or relieve the employee from the effects of the injury. Dr. Volarich had no problems with the employee managing her right knee pain using over the counter medications. When he saw her, it was shortly after her left knee surgery and the employee was using Darvocet. Dr. Volarich stated that the employee might need to take an occasional Darvocet for the right knee but the Darvocet may have been more associated with the left knee symptoms.

When the employee saw Mr. Weimholt in 2005, she told him that she had right knee pain, left knee pain and low back discomfort. It is important to highlight the fact that employee stated she needed to keep her **legs** propped up and to use a heating pad on her **knees** at night. When she does not wear her brace at home, she uses an elastic wrap on her **knees**. The fact that she was having problems with both her lower extremities makes her burden of proof more complicated in assessing the need for future medical.

The fact that the employee's right knee including the pain has gotten worse since the knee replacement makes the employee's burden of proof that any additional treatment flows from the initial accident more difficult. The employee stated she now has constant pain of 9 out of 10 in her right knee. She is currently taking Darvocet every four hours and takes Percocet. She also takes a sleeping pill to help her sleep at night due to knee pain. She is now mainly taking prescription medicine and not over the counter medicine as recommended by Dr. Volarich. The medical records of the doctors who are prescribing the Darvocet, Percocet, and sleeping pill were not in evidence. Without these records it is difficult to know why the medicine is being prescribed and whether it is being prescribed for the right knee, left knee, right hip, or low back pain or for some other body part.

It was Dr. Nogalski's opinion that the employee did not require and would not benefit from further medical treatment for her bilateral knee conditions.

I find that there is not sufficient medical evidence indicating that the treatment that the employee is receiving is the result of the compensable injuries or conditions, and/or flows from the compensable accident. I find that the

employee has failed to meet her burden of proof that future medical treatment is medically causally related to conditions caused by the work-related accident. The employee's claim for additional or future medical aid is therefore denied.

### *Issue 5. Nature and extent of disability*

The employee has alleged that she is permanently and totally disabled.

#### Permanent Total Disability:

Section 287.020.7 RSMo provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. Kowalski v M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, she is competent to compete in the open labor market. Reiner v Treasurer of the State of Missouri, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". Brown v Treasurer of the State of Missouri, 795 S.W.2d 479, 483 (Mo.App.1990). The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which she is hired. Reiner at 365. See also Thornton v Haas Bakery, 858 S.W.2d 831, 834(Mo.App.1993).

Based on my ruling on medical causation, the employee has the burden of proof to show that she is permanently totally disabled as the result of the right knee injury only prior to her knee replacement. The right knee replacement, left knee, right hip and low back cannot be considered in deciding whether the employee is permanently and totally disabled.

It was Mr. Weimholt's opinion that the employee was totally disabled from employment in the open labor market, and that there was not a reasonable expectation that an employer in the normal course of business would hire the employee for a position or that the employee would be able to maintain regular employment in the open labor market. The employee indicated to Mr. Weimholt that she had developed left knee problems and low back pain and told him what impact those conditions had on her. Mr. Weimholt stated that the employee's total vocational disabilities are due to the September 17, 2002 injury to her right knee. Mr. Weimholt stated that he looked primarily to the right knee but saw complaints of low back pain and left knee pain. Mr. Weimholt thought he could take both into consideration. He stated that the right knee condition alone was quite severe in functionality and precluded the employee from prolonged standing, walking or seated work. Mr. Weimholt stated he did not know how her actual presentation would be if the employee had no problems with her left knee or low back. He stated it was possible, but doubtful, that his opinion on employability would change. I find that Mr. Weimholt's opinion on permanent and total disability is affected by the fact that the employee's left knee and low back were part of the employee's overall condition when Mr. Weimholt determined her employability.

It was Dr. Volarich's opinion that the employee cannot go back to being a cable television installer, but it was reasonable that she could be gainfully employed provided she could stay within his restrictions. If a rehabilitation specialist cannot find a job for which the employee is suited, Dr. Volarich did not know if she would be able to return to work. It was his conclusion that the employee has permanent partial disability of the right upper extremity referable to her right knee injury on September 17, 2002. He did not render an opinion stating that the employee was permanently and totally disabled.

Ms. Kane stated that the employee's work history and educational background place her in the semi-skilled work category. Her work experience and education provides her with an ability to maintain records; to interact with

customers, subordinates and co-workers; to problem solve; and to complete activities with minimal supervision. It was Ms. Kane's opinion that the employee would be able to seek, accept, be hired, and maintain full time gainful employment in the greater St. Peters, O'Fallon, Piedmont and Licking Missouri open labor markets.

It was Dr. Nogalski's recommendation that due to her right knee, the employee should avoid any prolonged standing on uneven ground, and to avoid kneeling and squatting. Dr. Nogalski stated that the employee could climb to a level of three to four feet safely and with good control. It was his opinion that the employee was capable of returning to gainful employment.

The employee's claim for permanent and total disability is substantially affected by my rulings on medical causation that the employee's treatment to her right knee after August 28, 2003 including the knee replacement and condition of the employee's left knee, right hip and low back are not medically causally related to the September 17, 2002 work accident. The employee's right knee pain increased after the total knee replacement. It was at that time the employee started taking a substantial amount of prescription pain medications including Darvocet and Percocet.

I find that the opinions of Dr. Nogalski and Ms. Kane are more credible than the opinions of Mr. Weimholt and Dr. Volarich on the issue of employability. I find that the employee has failed to satisfy her burden of proof on the issue of permanent total disability. The evidence does not support a finding that the employee is unemployable in the open labor market. I find that the employee is not permanently and totally disabled. The evidence supports a finding that the employee has sustained permanent partial disability to her right knee.

#### Permanent Partial Disability:

It was Dr. Volarich's opinion that as a direct result of the accident, the employee has sustained a 65% permanent partial disability of the right knee. It was Dr. Nogalski's opinion that the employee has sustained a 12% permanent partial disability of the right knee.

Based on a review of the evidence including the ratings, I find that as a direct result of the accident, the employee has sustained a 45% permanent partial disability of the right knee at the 160 week level. The employer-insurer is therefore ordered to pay to the employee 72 weeks of compensation at the rate of \$340.12 per week for a total award of permanent partial disability of \$24,488.64.

#### Temporary Total Disability:

The employee is claiming temporary disability benefits starting on September 17, 2002. Temporary total disability benefits are intended to cover healing periods and are payable until the employee is able to return to work or until the employee has reached the point where further progress is not expected. Brookman v Henry Transportation, 924 S.W.2d 286 (Mo.App.1996).

The employee was under active medical care including three different surgeries from the date of the injury until August 28, 2003, which was the last record from Dr. Farley. I find that from September 17, 2002 through August 28, 2003, the employee was not able to return to work, was under active medical treatment, and had not reached the point where further progress was not expected. I find that the employee is entitled to temporary total disability from September 17, 2002 through August 28, 2003. The employer-insurer is therefore ordered to pay the employee 49 2/7 weeks of compensation at the rate of \$384.91 per week for a total of 18,970.56.

**ATTORNEY'S FEE:** Robert Ramshur, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

Lien of the employee's former attorney, Daniel J. Brown: The employee agreed to the lien of Daniel J. Brown

in the amount of \$975.00. Mr. Brown's attorney lien shall be paid out of Mr. Ramshur's 25% Attorney's Fee.

**INTEREST:** Interest on all sums awarded hereunder shall be paid as provided by law.

Date: \_\_\_\_\_

Made by:

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Lawrence C. Kasten  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Mr. Jeff Buker  
*Division Director*  
*Division of Workers' Compensation*