

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

Injury No.: 08-065630

Employee: Linda K. Lane  
Employer: Oxford Health Care d/b/a  
Healthcare Services of the Ozarks (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 22, 2013. The award and decision of Administrative Law Judge Victorine R. Mahon, issued February 22, 2013, 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 7<sup>th</sup> day of August 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

**AWARD**

Employee: Linda K. Lane

Injury No. 08-065630

Dependents: N/A

Employer: Oxford Health Care d/b/a  
Healthcare Services of the Ozarks (settled)

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

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

Insurer: Self-Insured c/o Cannon Cochran Management  
Services (TPA) (settled)

Hearing Date: January 3, 2013

Checked by: VRM/ps

**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: August 4, 2008.
5. State location where accident occurred or occupational disease was contracted: Greene 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: The employee was assisting a client in walking on a ramp when she fell, causing the employee to hit her knee on a railing.

12. Did accident or occupational disease cause death? No. Date of death? Not applicable.
13. Part(s) of body injured by accident or occupational disease: Left Knee.
14. Nature and extent of any permanent disability: Claimant settled with Employer; Permanent Total Disability as to the Second Injury Fund.
15. Compensation paid to date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer: \$3,331.18.
17. Value necessary medical aid not furnished by employer/insurer: None.
18. Employee's average weekly wages: Sufficient to yield the following rate.
19. Weekly compensation rate: \$316.56 Permanent Total Disability.
20. Method wages computation: By agreement.

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: Employer settled.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

Beginning June 29, 2009, and continuing each week for the remainder of her lifetime, the Second Injury Fund shall pay Claimant the weekly sum of \$316.56, subject to review and modification 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: Rick S. Vasquez.

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

Employee: Linda K. Lane

Injury No. 08-065630

Dependents: N/A

Employer: Oxford Health Care d/b/a  
Healthcare Services of the Ozarks (settled)

Before the  
**DIVISION OF WORKERS'  
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**INTRODUCTION**

The undersigned Administrative Law Judge conducted a final hearing on January 3, 2013, to determine the liability of the Second Injury Fund. This case was set for hearing in conjunction with the claim in Injury Number 07-019019. At the outset of the hearing, Claimant voluntarily dismissed the claim against the Second Injury Fund in Injury Number 07-019019. The cause proceeded with reference to Injury Number 08-065630. Linda K. Lane (Claimant) appeared in person and with her attorney of record, Rick Vasquez. Assistant Attorney Skyler Burks represented the Treasurer of Missouri as Custodian of the Second Injury Fund (Fund). The self-insured employer, Oxford Health Care d/b/a Healthcare Services of the Ozarks, previously settled with Claimant. The parties stipulated to the following facts and issues:

**STIPULATIONS**

1. On August 4, 2008, Claimant sustained an accident in the course and scope of her employment with Employer. Venue and jurisdiction are proper in Springfield, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo. Both Claimant and Employer were operating under and subject to the provisions of the Missouri Workers' Compensation Law at the time of the accidental injury. Employer was self-insured on the date of the injury.
3. Employer received proper notice of the injury. The claim was filed within the time allowed by law.
4. The average weekly wage on the date of injury was sufficient to yield a permanent total disability rate of \$316.56.
5. Employer paid \$3,331.18 in medical aid and no temporary total disability benefits.

6. The issues for hearing are as follows:
  - a. Is the alleged injury and resulting disability medically and causally related to the work accident of August 4, 2008?
  - b. Is the Second Injury Fund liable for permanent total disability?

### **EXHIBITS<sup>1</sup>**

Claimant offered the following exhibits, which were admitted into evidence without objection:

Exhibit A	Medical Report (IME) – Dr. Shane Bennoch, dated January 7, 2008
Exhibit B	Medical Report (IME) – Dr. Shane Bennoch, dated February 26, 2007
Exhibit C	Stipulation with Employer – Injury Number 08-165630
Exhibit D	Stipulation with Employer – Injury Number 07-019019
Exhibit E	Deposition – Dr. Shane Bennoch
Exhibit F	Deposition – Mike Kevin Lala – Vocational Expert

The Second Injury Fund offered the following exhibit, which was admitted without objection:

Exhibit I      Deposition – Linda K. Lane

### **FINDING OF FACT**

Claimant was 57 years old at the time of her accident on August 4, 2008. She lives in Billings, Missouri, with her disabled husband. Claimant did not finish high school because she chose to get married at a young age. She had no difficulty in learning and subsequently obtained a GED. She attained a Certified Nurse's Aide license when she was 21 years old. Although most of her life's work has been in the healthcare field, she once was a waitress. She also worked in a t-shirt factory for a short time. But for the last 14 years of her working career, Claimant was employed with Oxford Health Care, traveling to the homes of various clients. There, she cooked, cleaned, shopped, and ran errands. She also helped clients with personal hygiene. She worked full time, sometimes as much as 55 hours per week.

#### **2007 Accident**

In 2007, Claimant injured her right knee while working for Oxford Health Care. She eventually underwent an arthroscopic partial lateral meniscectomy to repair the torn right meniscus on April 26, 2007. Following the surgery, Claimant worked in the office at Oxford Health Care on light duty until July 2007.

In July 2007, Ms. Lane returned to work full duty, although it took a few months before she had a sufficient number of new clients to require 40 hours of weekly work. Dr. Miller, who

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<sup>1</sup> All objections not addressed at the time of the hearing now are overruled. Any marking contained in any exhibit was present at the time the document was received into evidence, and was not placed there by the Administrative Law Judge.

performed the surgery, gave Claimant no permanent work restrictions. Claimant testified that she was working full duty, full time, when she sustained a left knee injury on August 4, 2008.

Claimant's testimonies are not entirely consistent regarding her need for some accommodation after the right knee injury and surgery. In deposition, Claimant denied needing unscheduled breaks or doing any tasks differently than she had done in the past. She just had some pain. At the hearing on January 3, 2013, when she was asked about her job performance after her right knee surgery, Claimant responded, "It was probably different." She then recited a number of self-accommodations. These included sitting down to fold laundry, working more slowly, and not working overtime. She explained that in her personal life she has avoided tub baths, apparently due to the difficulty of getting in and out of the tub. She also explained that the clients she had after the 2007 injury were different from those she assisted before the 2007 accident. She explained that she also was having difficulty maneuvering stairs and getting in and out of vehicles. Due to the injury in the right knee, Claimant relied more heavily on her left knee and took Ibuprofen for continued pain.

Even though there are some inconsistencies between her testimonies, Claimant explained that she was scared the day of the deposition. Claimant did testify consistently that she was not without pain after returning to work from the right knee surgery. She continued to work anyway. Having reviewed the entire record, I find credible that Claimant worked through pain and did what she could to retain her job of 14 years. I specifically find Claimant is credible regarding her abilities and the self-accommodation she made subsequent to the 2007 knee injury.

### **2008 Accident**

On August 4, 2008, Ms. Lane was working with a client who could make transfers from a wheelchair by himself, but needed assistance in walking. Claimant had control of the client by a gait belt while they were walking on a ramp outside his home. The patient shifted his weight, fell onto Claimant, and she fell into the railing on the wood ramp. Claimant knew she had injured herself and immediately sought medical treatment. She was seen by Dr. Ted Lennard the same day.

For the next six weeks, Claimant continued to work full time, 10 to 12 hours per day, while also seeing Dr. Lennard for the knee pain. While Claimant missed no work due to her left knee, she said her clients understood her predicament. Claimant conceded that she was unsure whether Oxford Health Care had offered her light duty after the 2008 injury. In any event, she said she did not want to go back to work in the office.

On August 6, 2008, Dr. Lennard noted that an x-ray of Claimant's left knee revealed extensive degenerative changes. On August 27, 2008, Dr. Lennard's impression was left knee pain and degenerative joint disease of the left knee. He opined the degenerative joint disease is not related to Claimant's work accident. On September 4, 2008, Dr. Lennard reviewed an MRI of Claimant's left knee, which revealed a degenerative tear of the lateral meniscus, moderate degenerative changes and loose bodies present. On September 5, 2008, Dr. Lennard stated in a medical records entry that Claimant needed an "orthopedic consultation" for her degenerative meniscal tear, loose bodies, and degenerative joint disease. Dr. Lennard specifically stated in the

medical records entry that his findings were “based on a reasonable degree of medical certainty” and that Claimant’s work was not the prevailing factor with respect to these findings.

During the six weeks following the 2008 knee injury, Claimant was given a functional capacity evaluation (FCE). The result of the FCE revealed that Claimant could perform light duty work with limited standing tolerances. Thereafter, Claimant was discharged because she was physically incapable of performing the full range of her job duties. She was terminated from Oxford Health Care on September 12, 2008.

Claimant applied for unemployment insurance benefits after her discharge, but was disqualified because she was not able to work. Having no income, Claimant waited about five and one-half months before undergoing an arthroscopic surgery to repair her left meniscus. Dr. Christopher Miller performed the surgery. Her last treatment for her knees was a visit with Dr. Miller two weeks after her left knee surgery, but there is evidence she still was experiencing knee pain at that time. She has sought no additional treatment and takes only Advil or Ibuprofen for pain. Claimant testified in deposition on June 8, 2009, that she now self limits some activities.

### **Current Condition**

Claimant testified at hearing on January 3, 2013, that her *right knee* (2007 accident) has always hurt worse than her *left knee* (2008 accident). She believes her right knee has deteriorated since her deposition in 2009. She said the current pain in her right knee is greater than in the left one. She believes that had she not been fired by Oxford Health Care she could be working there today. Since she was fired, and then turned down for unemployment, she applied for, and receives social security disability. Other than the right knee injury, Claimant identified only one other preexisting condition – a trigger finger injury – but denied that it interfered with her work.

Claimant is able to take care of her personal hygiene. While she refrains from sweeping or vacuuming, she is able to go to the store, although she occasionally rides in the motorized shopping cart. In her spare time, she enjoys beadwork.

### **Medical Evidence**

The MRI of Claimant’s right knee on April 5, 2007, revealed the following:

Shows tricompartmental degenerative changes most pronounced at the patellofemoral joint and to a lesser degree in medial and lateral knee joint compartments. There is a torn anterior horn of the lateral meniscus, marginal tearing of a free edge medial meniscus and within the medial meniscal compartments, there are degenerative signals. There is patellofemoral disease and associated secondary reaction of anterior knee structures. The edema at the margins of the iliotibial band probably are related to the patellofemoral disease verses strain and a combination thereof and there is also noted to be a joint effusion.

(Exhibit A, Dr. Bennoch’s report, p. 6). Claimant’s right knee clearly has degenerative changes.

The MRI of Claimant’s left knee on August 27, 2008, revealed:

Impression:

- 1) Complex degenerative tear at the anterior horn of the lateral meniscus.
- 2) Severe degenerative changes of the lateral tibiofemoral joint with multiple cartilage defects. There is full-thickness cartilage loss at the anterior and lateral femoral condyle.
- 3) Multiple intraarticular loose bodies are seen, the largest is posterior to the posterior cruciate ligament that measure 3.1 x 1.1 cm in size and at least 1-2 other loose bodies are seen as well. If arthroscopy is performed, I recommend careful inspection, especially in the suprapatellar femoral pouch.
- 4) There is subcutaneous edema with a small Baker's cyst on the posterior medial knee measuring 2 x 0.5 cm.

(Exhibit B, Dr. Bennoch's report, pp. 13-14). Claimant's left knee clearly has degenerative changes.

The operative report of Dr. Miller dated January 7, 2009, reveals something different from the last MRI. While Dr. Miller notes degenerative conditions in the left knee, he also states:

Moving into the lateral compartment, **there was a very large traumatic-appearing tear of the anterior horn of the lateral meniscus. This was likely secondary to her work trauma.** A shaver and basket forceps were used to perform an arthroscopic partial lateral meniscectomy. The necessitated removing almost all of the anterior horn. Bleeding was controlled with electrocautery. She did show grade II and III changes on both sides of the joint [emphasis added].

(Exhibit F - appendices).

### **Dr. Lennard's Opinion**

On November 30, 2008, Dr. Lennard issued a final impairment rating report which is included in the appendices to Dr. Bennoch's IME. Dr. Lennard stated:

Permanent Partial Disability:

15% to the body as a whole. Of this specific amount 5% can be attributed to her work related strain and the remaining 10% to her nonwork related degenerative changes.

This is stated within a reasonable degree of medical certainty.

Discussion:

Ms. Lane is encouraged to see an orthopedic surgeon for the non work related degenerative changes noted on imaging studies. As a result of these degenerative changes she should be maintained on a 25 pound lifting limit and should avoid squatting and limit stair climbing. No other treatment necessary for her work related strain.

(Exhibit A - appendices).

Dr. Lennard's report is dated prior to the date of the left knee surgery performed by Dr. Miller. There is no supplemental report in the record from Dr. Lennard. There is no deposition of Dr. Lennard in the record. It appears that Dr. Lennard was not afforded the opportunity to address

the significance of the surgeon's finding of a "large" meniscal tear that was "traumatic-appearing" that likely was caused by the work trauma.

### **Dr. Bennoch's Opinion**

Based on his independent medical evaluation on February 9, 2009, Dr. Bennoch said that left knee problems were due to the work injury on August 4, 2008, noting that Claimant was completely asymptomatic in the left knee prior to the incident on the ramp.

Dr. Bennoch imposed a number of restrictions that pertained to both knees. These included only occasionally lifting and carrying up to ten pounds, standing or walking less than two hours in an eight-hour work day, periodic alteration in sitting and standing to relieve pain or discomfort, and no climbing of ramps, poles, ladders or scaffolds. She is to refrain from pushing or pulling with the legs, only. Asked why it was important for Claimant to periodically move around, Dr. Bennoch explained that the injured knees would cause increasing pain if they remained in one position. In deposition, Dr. Bennoch said Claimant could stoop or bend at the waist occasionally, and Claimant had no restrictions with respect to reaching, handling, fingering, feeling, seeing, hearing, and speaking.

Dr. Bennoch concluded that Claimant was at maximum medical improvement with respect to the last injury. He rated the last injury as 25 percent of the left lower extremity at the knee. He rated the preexisting right leg disability at 30 percent at the knee. He clearly opined that the combination of these two disabilities created permanent and total disability. I find it significant that Dr. Bennoch's opinion on disability followed very shortly after Claimant was released by her treating physician, Dr. Miller, following the 2009 left knee surgery. This is not a case where Claimant was examined years after the work accident. Therefore, I do not accept the defense argument that Claimant's permanent total disability is attributable to post injury deterioration.

While Dr. Miller's operative report, standing alone, might not support causation, it does lend weight to Dr. Bennoch's causation opinion. I accept Dr. Bennoch's causation opinion as more credible than that of Dr. Lennard in this instance.

### **Vocational Opinion**

Mike Lala is the only vocational expert to provide a report or deposition in this case. He met with Claimant on April 21, 2009. He stated that Claimant's responses to his questioning were very consistent with the restrictions imposed by Dr. Bennoch. Mr. Lala indicated that those restrictions, together with Claimant's age, low average I.Q., lack of transferable job skills, and Claimant's vocational testing results, supported his conclusion that Claimant is permanently and totally disabled. He said the permanent total disability results from a combination of Claimant's preexisting and last injuries.

Mr. Lala agreed in deposition that if one uses the restrictions imposed by Dr. Lennard, Claimant could perform light work and a very limited part of medium work. He noted that Dr. Lennard's limitations leave out any factors such as Claimant's ability to sit, stand, and walk. Mr. Lala also

noted, however, that Dr. Lennard's opinion was limited to Claimant's knee from one injury, whereas Dr. Bennoch rated both knees.

Mr. Lala conceded that Claimant was performing very heavy work prior to the last injury and had not been requesting accommodation because of pain. He further conceded that Claimant has no limitations in the upper extremities. Moreover, Claimant has a reading recognition at the high school level, spelling at the seventh grade level, and arithmetic at the eighth grade level, which would be sufficient for most entry level jobs. She has no cognitive impairments. Still, knowing all of the facts, Mr. Lala found Claimant unable to compete on the open labor market.

Claimant has two bad knees. This Administrative Law Judge normally would find it *very difficult* to accept that a person with only lower extremity disabilities, with no upper extremity impairment, no reliance on narcotic pain medication, no other preexisting chronic health condition, and no cognitive deficit, is permanently and totally disabled. As Mr. Lala explained, however, Claimant's pain significantly erodes her potential occupational base. She possesses no computer or typing skills. She has never worked in a sedentary or clerical type job. She scored extremely low on a clerical aptitude test. She is in the low average range for I.Q., placing in the bottom third of the population. Given her age, "it is realistic to expect that Ms. Lane would encounter some age discrimination during a job search." (Exhibit F, Report of Mr. Lala). Given that the Second Injury Fund has provided no contrary vocational opinion, and having personally observed Claimant and heard her testimony, I accept as credible Mr. Lala's vocational opinion.

### **Settlements**

On November 23, 2009, an Administrative Law Judge approved a settlement in Injury Number 07-019019, relating to Claimant's 2007 right knee injury. That case settled for \$5,602.32, indicating a 15 percent permanent partial disability at the 160-week level. I accept this stipulation as accurately reflecting the degree of disability from the 2007 accident.

Also on November 23, 2009, Claimant and Employer settled the primary case, Injury Number 08-065630, for \$2,532.48. The settlement document recites that the compensation rate and the percentage of disability has been compromised. I do not accept this stipulation as accurately depicting the degree of disability from the last accident in 2008. It is apparent that the settlement in the primary case involved multiple issues. Considering that Claimant underwent a surgery and continues to have significant pain, but has testified that the right knee is worse than the left, I find Claimant's disability from the last injury is 12.5 percent of the left knee.

### **Date of Maximum Medical Improvement**

Claimant's date of maximum medical improvement is February 9, 2009. Dr. Bennoch examined Claimant on that date and reported that Claimant was at maximum medical improvement at that time. This was about one month post surgery for the left knee.

## CONCLUSIONS OF LAW

### Medical Causation

Section 287.220 RSMo, 2000,<sup>2</sup> sets forth the criteria by which benefits may be paid from the Second Injury Fund. That statute requires that a claimant is entitled to benefits only if she first has sustained a *compensable* injury. As noted in *Bond v. Site Line Surveying*, 322 S.W.3d 165, (Mo. App. W.D. 2010), “[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” § 287.020.3(1). ‘Prevailing factor’ is defined as ‘the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.’” 332 S.W.3d at 170.

As detailed in the above findings, Dr. Lennard opined that Claimant suffered only a strain from the 2008 work accident, and the complained of disability and need for further treatment was related to a degenerative condition. Dr. Lennard’s opinion, issued prior to the surgery, while perhaps based on the best information available at the time, was made without the subsequent operative report. In the operative report, the surgeon specifically notes that Claimant suffered from a large trauma-induced tear of the meniscus. Dr. Bennoch, examining Claimant after surgery, disagreed with Dr. Lennard and found a medical-causal relationship. Based on the evidence recited above, I have found Dr. Bennoch credible in this instance. I conclude that Claimant’s work was the prevailing factor in the meniscus tear in the left knee, the need for surgery, and related disability.

### No Subsequent Deterioration

Citing *Lammert v. Vess Beverages, Inc.* 968 S.W.2d 720, 725 (Mo. App. E.D. 1998), the Fund argues that it is not responsible for progression of preexisting conditions or new conditions that develop after and are unrelated to the work injury. While it is true Claimant commented at the hearing that she believed her right knee had become worse, Dr. Bennoch gave his opinion of permanent total disability within six weeks of Claimant’s surgery to the left knee and less than seven months after the August 4, 2008 accident. Given the timeliness of his examination, the evidence does not support a finding that Dr. Bennoch’s opinion of permanent total disability is based on a subsequent deterioration of a preexisting condition, or of a condition unrelated to the August 4, 2008 work accident.

### Permanent Total Disability

Claimant has the burden of proving all elements of her claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). To recover against the Second Injury Fund, Claimant must prove that she sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. § 287.220.1 RSMo. She also must prove that she had a preexisting permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to her employment or reemployment should she become unemployed; and (3) equals a minimum of 50 weeks of

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<sup>2</sup> All further references to statutory provisions are to the statutes in effect at the time of the work injury.

compensation for injuries to the body as a whole or 15 percent for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008).

In this case, where permanent total disability is alleged, the Administrative Law Judge must first consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 4 (Mo. App. W.D. 2007). If Claimant is not permanently and totally disabled from the last accident, then the degree of disability attributable to all injuries is determined. 227 S.W.3d at 4. Permanent total disability means an employee is unable to compete in the open labor market. *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533, 537 (Mo.App. E.D. 2005). “The critical question is whether an employer could reasonably be expected to hire the claimant, considering his present physical condition, and reasonably expect him to successfully perform the work.” 165 S.W.3d at 537.

Claimant’s preexisting disability to the right knee impacted her personal life and the manner in which she performed her job. I find and conclude that the preexisting disability to the right knee posed a hindrance or obstacle to employment. Given the opinion of Dr. Bennoch, and the settlement agreement in the 2007 case, I conclude that the preexisting permanent partial disability from the 2007 injury, which is equal to 15 percent of the right lower extremity at the 160-week level, meets the statutory threshold of at least 15 percent of a major extremity.

Based on the whole record, I have found that Claimant is not permanently and totally disabled from the last accident, alone. Claimant suffered a 12.5 percent permanent partial disability to the left knee.

### **Permanent Total Disability from the Combination**

The inability to return to any employment means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). In determining whether Claimant can return to employment, Missouri law allows the consideration of an employee’s age, education, along with physical abilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). While “total disability” does not require that the Claimant be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W. 2d 220 (Mo. banc 2003), it does require a finding that the Claimant is unable to work in any employment in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). The central question is: In the ordinary course of business, would any employer reasonably be expected to hire Claimant in her physical condition? *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

Based on the whole record, I have accepted the expert opinions of Dr. Bennoch and Mr. Lala, who have opined that Claimant is permanently and totally disabled as a result of the combination of the preexisting right knee disability and the disability to the left knee from the August 4, 2008 accident. Although there was a vigorous cross examination of Mr. Lala, the Second Injury Fund offered no contrary vocational opinion. I conclude that Claimant is not employable on the open labor market due to the combination of disabilities. Claimant's date of maximum medical improvement, based on Dr. Bennoch's report, is February 9, 2009.

If Claimant had not settled with Employer, Employer would be liable for 20 weeks of disability. There is no differential between the permanent partial disability and permanent total disability rates. Therefore, beginning June 29, 2009 (20 weeks after the date of maximum medical improvement), and continuing for the remainder of Claimant's lifetime, the Second Injury Fund is liable for the full permanent total disability amount of \$316.56 per week.

This award is subject to modification and review as provided by law. Interest shall be paid as provided by law.

Claimant's attorney of record, Rick Vasquez, shall have a lien of 25 percent of all compensation awarded as a reasonable fee for necessary legal services rendered.

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
*Administrative Law Judge*  
*Division of Workers' Compensation*