

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

Injury No. 12-023216

Employee: Daryl Majors  
Employer: City of Marshall (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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

**Preliminaries**

The parties asked the administrative law judge to determine the sole issue of the liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

The administrative law judge rendered the following determinations: (1) although employee's vocational expert persuasively testified that employee is permanently and totally disabled, under § 287.190.6(2) RSMo, no award of permanent total disability benefits can be made because employee did not provide a physician's certification that he is permanently and totally disabled; and (2) employee is entitled to 24 weeks of enhanced permanent partial disability benefits from the Second Injury Fund.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in finding that a medical doctor had to certify that employee is permanently and totally disabled; and (2) in denying permanent total disability benefits from the Second Injury Fund.

For the reasons stated below, we modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

**Discussion**

Section 287.190.6(2) RSMo

Employee presents expert medical testimony from Dr. James Stuckmeyer that he has significant and permanent disability referable to both of his knees as a result of his primary right knee injury and preexisting conditions of ill-being affecting the left knee, and that employee has a number of permanent restrictions in his physical functioning resulting from these injuries and conditions. Dr. Stuckmeyer reached his conclusions based on a history taken from employee, a physical examination, and a review of relevant medical records,

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and he rendered his opinions within a reasonable degree of medical certainty. With regard to employee's ability to compete for work in the open labor market, Dr. Stuckmeyer recommended employee proceed with a vocational assessment.

To that end, employee procured the expert vocational assessment of Terry Cordray, who believes that employee is unable to compete for work in the open labor market as a result of the primary right knee injury in combination with the previous left knee condition. Mr. Cordray explained that he reached this conclusion by relying upon the physical restrictions and limitations identified by Dr. Stuckmeyer and also the treating surgeon Dr. Daniel Stechschulte, as well as his own expertise regarding the positions in the open labor market that might be available to someone with employee's restrictions and limitations.

There is no contrary expert vocational or medical opinion evidence on this record. The administrative law judge indicated that he found the opinions from Mr. Cordray to be persuasive; after careful consideration, we agree. Nevertheless, the Second Injury Fund argues that we are prevented, as a matter of law, from finding, as a factual matter, that employee is permanently and totally disabled, because § 287.190.6(2) RSMo provides, in relevant part, that "[p]ermanent partial disability or permanent total disability shall be demonstrated and certified by a physician."

We disagree for a number of reasons. First, we note that the terms "demonstrated" and "certified," as set forth in § 287.190.6(2), are not defined anywhere in Chapter 287. The Second Injury Fund's argument asks us to construe both terms as if the legislature meant to require a medical expert to use the exact, specific phrase "permanent total disability" when assessing and describing an employee's level of functioning. Turning to our dictionary, however, we find the following definitions, set forth in relevant part:

**Certify**

- 1 : to attest especially authoritatively or formally: CONFIRM
- 2 : to inform with certainty : ASSURE

**Demonstrate**

- 1 a : INDICATE : point out b : to manifest clearly, certainly, or unmistakably : show clearly the existence of
- 2 a : to make evident or reveal as true by reasoning processes, concrete facts and evidence, experimentation, operation, or repeated examples
- b : to illustrate or explain in an orderly and detailed way especially with many examples, specimens, and particulars[.]

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 367, 600 (2002).

The foregoing does not, in our view, imply or mandate any requirement that a medical expert in a workers' compensation case employ specific language in order to make a certification or demonstration of an employee's physical functioning. Rather, it would appear that so long as the medical expert is able to "attest authoritatively," "confirm," "manifest clearly," or "make evident or reveal" the extent of an employee's physical

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functioning by making findings on examination, rendering diagnoses as to the employee's medical conditions, and rendering restrictions on the employee's physical activities referable to those diagnoses, the medical expert may thereby "demonstrate" or "certify" an employee's permanent and totally disabled status, without using the exact phrase "permanent total disability."

The Second Injury Fund's argument to the contrary would require that medical experts use "magic language," without which their opinions (however persuasive) may never be relied upon by the fact-finder. The Missouri courts have never embraced this view, nor will we:

[Parties are] mistaken when [they] insist that "the substantial contribution factor" evidence requirement is not met unless a medical expert testifies in those exact words. There is nothing talismanic about the phrase in question. The words a medical expert uses when testifying are often important, not so much in and of themselves, but as a reflection of what impressions such witness wishes to impart.

*Mayfield v. Brown Shoe Co.*, 941 S.W.2d 31, 36 (Mo. App. 1997)(citations omitted).

Whether or not the employment is a substantial factor in causing the injury is a question of fact. The Commission, and not the physician, is the trier of fact in workers' compensation cases. Therefore, even if a testifying physician fails to use the exact words of Section 287.020.3, we will affirm the Commission's award if the substance of the physician's testimony establishes that there is substantial evidence upon which to base the award.

*Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo. App. 1999)(citations omitted).

In the words of the *Mayfield* court, there is nothing "talismanic" about the specific phrase "permanent total disability." Consequently, we read § 287.190.6(2) as permitting us to do as we have always done: consider the actual substance of the opinions from the testifying experts, weigh the persuasive value of those opinions, and then fulfill our fact-finding duty to determine the nature and extent of an employee's disability. Here, we deem Dr. Stuckmeyer's expert medical findings on examination, his diagnoses, and his identification of permanent physical restrictions as amounting to a "certification" or "demonstration" of employee's permanent and totally disabled status as fully as if he had used those specific words in describing employee's condition.

Second, we note that § 287.020.6 RSMo provides, as follows: "The term 'total disability' as used in this chapter shall mean 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 Missouri courts have identified the following test for permanent total disability:

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the

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ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

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

When the question is the nature and extent of permanent disability, the courts have consistently stated that the "degree of disability is not solely a medical question." *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007).

The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.

*Elliott v. Kan. City School Dist.*, 71 S.W.3d 652, 657 (Mo. App. 2002)(citation omitted).

We note that the legislature, in 2005, did not abrogate the foregoing case law principles setting forth the test for permanent total disability and making clear that the question of employability is not solely a medical question. Consistent with the well-established test for permanent total disability in Missouri set forth above, a proper analysis of employability requires not only the expert medical identification of physical limitations but also consideration of issues such as job requirements, job availability, transferable skills, and prospects for retraining. In many (and perhaps most) cases, physicians do not possess the training, experience, or access to information necessary to render competent opinions regarding an injured worker's prospects for returning to any employment.

While we agree that § 287.190.6(2) requires (at least in cases involving medical issues beyond the realm of lay understanding) that expert vocational opinions—as well as decisions from administrative law judges and this Commission—be fully supported by credible, competent, expert medical testimony, we do not believe the legislature intended, nor do we believe it would be reasonable to conclude, that expert medical testimony, particularly with regard to the issue of an injured worker's employability, cannot be supplemented (or refuted) by other expert testimony. We believe, and so hold, that the Commission maintains the authority to review evidence in the record in its entirety and to draw reasonable inferences therefrom. This position finds support in the recent case of *Patterson v. Cent. Freight Lines*, 452 S.W.3d 759 (Mo. App. 2015), wherein the court provided the following comments:

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[T]he record need not contain a single expert opinion addressing the entirety of a claimant's conditions. Rather, the Commission may consider the opinions of multiple experts of differing specialties to arrive at its factual determination as to the parts and sum of a claimant's conditions.

*Id.* at 767.

Third, assuming for the sake of argument that Dr. Stuckmeyer's opinions are deemed to fall below the threshold of "certifying" or "demonstrating" employee's permanent and totally disabled status, we note that although § 287.190.6(2) uses the word "shall" in describing the requirement of physician certification/demonstration, the statute does not prescribe any penalty (such as denial of the claim for permanent disability benefits) where a litigant fails to provide such evidence.

[T]he use of 'shall' in a statute does not inevitably render compliance mandatory, when the legislature has not prescribed a sanction for noncompliance. Depending on context, "shall" may prescribe a mandatory duty, but it may be considered only directory. Determining if the word 'shall' is mandatory or directory requires courts to review the context of the statute and to ascertain legislative intent.

*State ex rel. State v. Parkinson*, 280 S.W.3d 70, 76 (Mo. 2009)(citations omitted).

We find nothing in § 287.190 or elsewhere in Chapter 287 describing sanctions for non-compliance with § 287.190.6(2). Nor do we find evidence of any legislative intention to require expert medical witnesses to testify as to non-medical topics on which they may not possess the relevant background, training, resources, or expertise. Consequently, it would appear that the terms of § 287.190.6(2) are directory, rather than mandatory.

Finally, we wish to note that we have previously addressed, and consistently rejected, identical arguments. See, e.g., *Pamela Simpson v. Board of Education of the City of St. Louis*, Injury No. 07-095109 (LIRC, May 26, 2011); and *Michael Onder v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, Injury No. 09-035715 (LIRC, Sept. 19, 2013). In the absence of any contrary decisions from the Missouri courts on this topic, the policy of the Commission remains unchanged with respect to the application of § 287.190.6(2).

#### Second Injury Fund liability

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

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

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

After careful consideration, we are convinced that employee's preexisting left knee condition (thoroughly described in the administrative law judge's award) constituted a preexisting permanent partially disabling condition that was serious enough to constitute a hindrance or obstacle to employment for purposes of § 287.220.1 RSMo. This is because we are convinced this condition had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of this preexisting condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). We turn now to the question whether employee has proved Second Injury Fund liability for his permanent total disability.

In *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144 (Mo. App. 2014), the court stated the following test for determining whether the employee is entitled to permanent total disability benefits from the Second Injury Fund:

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

*Id.* at 157.

Accordingly, we first consider the nature and extent of the primary injury considered alone and in isolation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). After careful consideration, we agree with and hereby adopt the administrative law judge's determination that employee suffered a 50% permanent partial disability of the right knee as a result of the primary injury. We find no evidence on this record to suggest that employee would be permanently and totally disabled by the effects of this injury considered alone and in isolation.

We now consider whether employee has proven that the combination of his last injury and his preexisting disabilities resulted in permanent and total disability. As indicated above, we agree with the administrative law judge's determination that employee's vocational expert, Mr. Cordray, persuasively testified that employee is unable to compete for work in the open labor market as a result of the combination of his preexisting left knee conditions and the primary injury affecting the right knee. We find, accordingly, that employee is permanently and totally disabled as a result of this combination.

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In light of the foregoing considerations, we conclude that the Second Injury Fund is liable for permanent total disability benefits. The treating surgeon, Dr. Stechschulte, released employee from treatment on September 11, 2012. We find that employee reached maximum medical improvement, and that the Second Injury Fund's liability for permanent total disability benefits, commenced on that date.

**Conclusion**

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning September 11, 2012, at the stipulated weekly permanent total disability benefit rate of \$406.09. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued July 22, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of February 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
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: Daryl Majors

Injury No. 12-023216

Dependents:

Employer: City of Marshall (settled)

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: Self-insured (settled)

Hearing Date: May 20, 2015

Checked by: RJD/cs

### 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: March 29, 2012.
5. State location where accident occurred or occupational disease was contracted: Saline 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? Employer was self-insured through a group trust.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was stepping off the street sweeper truck onto a cobble stone curb, when his foot slipped in a hole thereby twisting his right knee.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right knee.
14. Nature and extent of any permanent disability: 50% permanent partial disability of the right knee.
15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.

Employee: Daryl Majors

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18. Employee's average weekly wages: \$609.13.

19. Weekly compensation rate: \$406.09.

20. Method wages computation: Stipulation.

**COMPENSATION PAYABLE**

21. Second Injury Fund liability:

24 weeks of permanent partial disability benefits	\$9,746.16
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Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

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## **AWARD**

Employee: Daryl Majors

Injury No. 12-023216

Dependents:

Employer: City of Marshall (settled)

Additional Party: Second Injury Fund

Insurer: Self-insured (settled)

Hearing Date: May 20, 2015

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

## **ISSUES DECIDED**

The evidentiary hearing in this case was held on May 20, 2015 in Marshall on Claimant's claim against the Second Injury Fund. Claimant's claim for compensation against the City of Marshall ("Employer") was previously settled by stipulation. The hearing was held to determine the liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on June 15, 2015.

## **STIPULATIONS**

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Saline County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Employee's average weekly wage was \$609.13, with resultant compensation rate of \$406.09;
6. That Employee, Daryl Majors, sustained an accident arising out of and in the course of his employment with the City of Marshall on March 29, 2012 in Saline County;  
and

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7. That the notice requirement of §287.420 does not serve as a bar to the claim for compensation against the Second Injury Fund.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Daryl Majors, the transcript of the deposition testimony of Dr. James Stuckmeyer taken November 5, 2013, as well as Dr. Stuckmeyer's narrative report of February 1, 2013; the transcript of the deposition testimony of Terry Cordray, a vocational rehabilitation counselor, taken October 1, 2013, as well as Mr. Cordray's narrative report of May 22, 2013; medical records; photographs; Report of Injury; Stipulation for Compromise Settlement.

### **DISCUSSION**

Daryl Majors ("Claimant") is a very pleasant gentleman who was born March 31, 1951. He has a tenth grade education with no GED and no computer skills. Claimant has driven backhoes, dump trucks, concrete trucks, snowplows, and street-sweeping trucks during his decades of employment.

After working at factory jobs, including on the production lines at International Shoe, Wilson Foods, and as a member of a clean-up crew at ConAgra, Claimant became a cement truck driver. He worked for the Taylor Concrete Company for about ten years and for a redi-mix company in Marshall for about five years. He started working for the City of Marshall ("Employer") in 1994.

Claimant initially started as a laborer, driving dump trucks, fixing potholes, and pouring concrete to repair curbs. Following a left total knee replacement, Employer accommodated Claimant's limitations by allowing him to switch to a street sweeper job. Therefore, for Claimant's last six years of employment with Employer, Claimant worked as a street sweeper. During his years as a street sweeper, he was the only employee who did that work. He testified that the street sweeper job was easier on his knee. He did only minor mechanical work on the street sweeping machine such as changing and checking the oil which required him to climb up two steps on the back of the machine. The machine had an automatic transmission and had no clutch.

As stipulated, Claimant sustained an accident arising out of and in the course of his employment with the City of Marshall on March 29, 2012. The accident occurred as Claimant was stepping off the street sweeper truck onto a cobble stone curb. His foot slipped in a hole thereby twisting his right knee. His body twisted and he went to the ground. He felt immediate pain in his right knee. Claimant reported the accident the next day.

Claimant was initially sent for treatment to Timothy Ryan, M.D., at Missouri Valley Physicians who sent him for an MRI at Fitzgibbon Hospital. The MRI showed a tear of the posterior horn of the medial meniscus along with cartilage loss and chondromalacia of the

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patella. He was thereafter referred to Daniel Stechschulte, M.D., Ph.D., an orthopaedic surgeon in Johnson County, Kansas. He complained of pain and locking.

Dr. Stechschulte performed surgery on the right knee at the Kansas City Orthopaedic Institute consisting of:

- Medial and lateral partial meniscectomies;
- Patellofemoral chondroplasty;
- Removal of multiple loose bodies;
- Arthroscopic debridement of a partial thickness ACL tear.

Following the surgery, there were 27 physical therapy visits from about April 27, 2012, to about July 3, 2012. Claimant was given a hinge brace which he testified he used until it wore out.

Claimant had continuing problems with the knee and underwent three Orthovisc injections to the knee by Dr. Stechschulte in July 2012. On September 11, 2012, Claimant told Dr. Stechschulte that he could walk only in severe pain Dr. Stechschulte issued permanent light duty restrictions of:

- wearing the brace at all times;
- no kneeling, squatting, climbing, crawling, running, jumping, or pivoting;
- no lifting below the knee.

Claimant tried to go back to work and went to Marshall City Hall three times requesting a light duty job but he was told there was no light duty work and Employer refused to allow Claimant to work.

Claimant was forced to retire and he applied for and received Social Security Disability benefits. The claim against Employer was settled for 38.5% permanent partial disability of the right knee with future medical treatment to be left open either by way of a Medicare Set Aside Account or at the direction of Employer, whichever method Employer deemed suitable.

Claimant's only significant prior injuries or disabilities involved numerous injuries to the left knee. Claimant testified that he originally injured his left knee in 1972 or 1973 playing softball. His first surgery was on May 23, 1973, performed by Garth Russell, M.D., at the Boone Hospital Center. Dr. Russell excised some medial cartilage and repaired tears of the MCL and ACL. Claimant testified that he was in a cast for six weeks due to this injury. After some physical therapy he returned to work wearing a brace on the left knee.

On August 20, 1997, Claimant injured his knee while patching potholes. He was off work 3 3/7 weeks and ultimately settled his workers' compensation claim.

Claimant testified that on November 18, 1997, he sustained a bone contusion in the left (knee) medial tibia plateau region while stepping off a truck and missed about six weeks of work. He testified that on August 20, 1997, while working as a pothole patcher, he stepped off a truck

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and felt a “pop” in his left knee. He testified that he missed another six weeks or so from work due to this injury. There is no evidence to suggest that these last two injuries led to any settlements.

On January 24, 2001, Claimant again twisted his knee getting off of a truck. This injury ultimately led to surgery on February 25, 2001, by Ryan Edwards, M.D., which was a resection of an anterior horn tear of the lateral meniscus. Claimant testified he was off work about 8 ½ weeks (the settlement stipulation stated 8.58 weeks of TTD was paid). On September 4, 2002, Claimant fell off a ladder twisting his left knee. This ultimately led to a total knee replacement on the left on October 16, 2002, with Dr. Edwards. Claimant testified he missed about a three and a half months of work as a result of this injury. He testified that Dr. Edwards placed permanent restrictions on him of no bending, stooping, or carrying heavy objects. Despite these permanent restrictions, the City of Marshall accommodated Claimant by allowing him to take the street sweeping job. He testified that the left knee would swell up after he was on it all day.

Claimant was on Hydrocodone following these injuries all the way up to January 20, 2012. Claimant testified that the left knee replacement and injury caused him to take Hydrocodone from 2002 to 2012. Following the left total knee replacement, he would not squat down or lift anything heavy. He would not get on his knee at work. He testified that eventually he did not have to wear the brace on the left knee.

At the request of his attorneys, Claimant was examined on January 10, 2013, by James Stuckmeyer, M.D., a Board Certified orthopaedic surgeon. Dr. Stuckmeyer rated the last injury to the right knee at 60% permanent partial disability and recommended a right total knee replacement. As of the date of the hearing, Claimant had not yet had the knee replacement surgery.

Dr. Stechschulte, the authorized treating doctor, agreed that a total knee replacement was needed on the right but attributed the need thereof to pre-existing arthritis. Dr. Stuckmeyer opined that Claimant’s pre-existing left knee injuries, resulting in multiple surgeries including a left total knee replacement, resulted in a 50% permanent partial disability of the left knee. Regarding the combined effect of the prior significant left knee disability and the right knee disability occasioned by the work accident of March 29, 2012, Dr. Stuckmeyer stated in his report:

When one considers the significant preexisting disability regarding the left knee, status post left total knee replacement, in combination with the disability resulting from the accident of March 29, 2012, it would be the opinion of this examiner that the simple arithmetic sum of these disabilities does not equate to the disability of the body as a whole, and I would render a 15% multiplicity factor.

Dr. Stuckmeyer also outlined certain significant activity restrictions, and further stated:

(w)ith these restrictions in mind, I would recommend proceeding with a vocational assessment to determine Mr. Majors’ employability in the open labor market.

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I note that Dr. Stuckmeyer's deposition testimony was totally consistent with his report.

Claimant also underwent a vocational evaluation conducted by Terry Cordray. Vocational testing showed that Claimant could spell at the 7<sup>th</sup> grade level and do mathematical computations almost at the 10<sup>th</sup> grade level. The key elements as to vocational placement, according to Mr. Cordray, were that Claimant did not have a GED, most likely could not pass a DOT physical with two bad knees, and he had no computer training. Because Claimant had always been an unskilled laborer, he had no transferable skills. Due to all the injuries, a labor market search showed that Claimant had lost access to 97% of the jobs in Saline County; 96% of the jobs in Missouri; and 95% of the jobs in the United States because he was limited by the restrictions placed on him by the doctors to the sedentary physical demand category of jobs.

Mr. Cordray therefore opined that Claimant was neither employable nor placeable in the open labor market as a result of a combination of the injuries to the left knee and to the right knee.

The Second Injury Fund offered no vocational or medical evidence.

Claimant is alleging permanent total disability and is seeking weekly permanent total disability benefits from the Second Injury Fund. Alternatively, Claimant is seeking permanent partial disability benefits from the Second Injury Fund.

While I find Mr. Cordray's opinions and conclusions to be quite consistent with the evidence in the case, it is impossible, from both a legal and factual standpoint, to overlook the obvious fact that Dr. Stuckmeyer did not find Claimant to be totally disabled. While Dr. Stuckmeyer did recommend a vocational assessment (an indication that he was *concerned* about Claimant's employability), he was never asked to re-opine about Claimant's disability status after Mr. Cordray's vocational assessment.

The first sentence of Section 287.190.6(2) states: "Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician." Mr. Cordray is not a physician. Dr. Stuckmeyer is a physician. What Dr. Stuckmeyer has certified is that Claimant has a significant permanent partial disability of each knee, and that the combination has resulted in additional permanent *partial* disability.

In my opinion, the cited portion of §287.190.6(2) clearly mandates a physician "certification" of permanent total disability as a prerequisite to an award of permanent total disability benefits under Chapter 287. There is no such physician certification in this case.

In *Patterson v. Central Freight Lines*, 452 S.W.3d 759 (Mo. App. E.D. 2015), the Court held (at p. 766) that §287.190.6(2) did not require a physician certification regarding the *causation* of permanent total disability, but did require physician certification regarding permanent total disability *status*.

In light of the above, I can make no award of permanent total disability benefits.

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In regard to the alternative request for an award of permanent partial disability benefits from the Second Injury Fund, Claimant has clearly satisfied all the statutory requirements.

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

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. Section 287.190.6(2) states, in part: “Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician.”;
2. Section 287.190.6(2) mandates a physician “certification” of permanent total disability as a prerequisite to an award of permanent total disability benefits under Chapter 287;
3. There is no physician certification of permanent total disability in this case;
4. There is a physician certification of permanent partial disability in this case;
5. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 50% of the right knee (80 weeks);
6. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of 50% of the left knee (80 weeks) which meets or exceeds the statutory threshold for Second Injury Fund liability and was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment;
7. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disability, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 80 weeks for last injury + 80 weeks for preexisting injuries = 160 weeks x 15% = 24 weeks of overall greater disability.

### **ORDER**

The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay Claimant the sum of \$9,746.16 for permanent partial disability benefits.

Claimant’s attorney, Jerry Kenter, is allowed 25% of the benefits awarded herein as and for necessary attorney’s fees and the amount of such fees shall constitute a lien on those benefits.

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

Employee: Daryl Majors

Injury No. 12-023216

Made by \_\_\_\_\_  
Robert J. Dierkes  
Chief Administrative Law Judge  
*Division of Workers' Compensation*