

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

Injury No.: 04-041483

Employee: Maria Peck-Miller  
Employer: JPS Automotive (Settled)  
Insurer: American Home Assurance Company (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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 10, 2010. The award and decision of Administrative Law Judge Linda J. Wenman, issued February 10, 2010, 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 29<sup>th</sup> day of July 2010.

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

## AWARD

Employee: Maria Peck-Miller Injury No.: 04-041483  
Dependents: N/A Before the  
Employer: JPS Automotive (settled) **Division of Workers'**  
**Compensation**  
Additional Party: Second Injury Fund Department of Labor and Industrial  
Relations of Missouri  
Insurer: American Home Assurance Company (settled) Jefferson City, Missouri  
Hearing Date: November 9, 2009 Checked by: LJW

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 26, 2004 (corrected date)
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While walking to her car at the end of her work shift, employee slipped on ice and twisted her right knee as she slipped.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right and left knees.
14. Nature and extent of any permanent disability: 40% PPD referable to the right knee, and 15% PPD referable to the left knee previously paid by Employer.
15. Compensation paid to-date for temporary disability: \$15,843.27 representing 25 weeks of benefits.
16. Value necessary medical aid paid to date by employer/insurer? \$1,555.88

Employee: Maria Peck-Miller Injury No.: 04-041483

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Sufficient to produce rates noted below.
- 19. Weekly compensation rate: \$633.00 / \$347.05
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Second Injury Fund liability: Yes

19.2 weeks of permanent partial disability from Second Injury Fund	\$6,663.36
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TOTAL:	\$6,663.36
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22. Future requirements awarded: None

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

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

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

Employee: Maria Peck-Miller

Injury No.: 04-041483

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: JPS Automotive (settled)

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

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company (settled)

Checked by: LJW

**PRELIMINARIES**

A Second Injury Fund hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on November 9, 2009. The parties filed post-trial briefs, and the case was formally submitted on December 7, 2009. Attorney Brian Stokes represented Maria Peck-Miller (Claimant). Assistant Attorney General Lacy Fields represented the Second Injury Fund (SIF).

On October 23, 2008, Claimant and JPS Automotive (Employer) reached a compromise settlement regarding Employer's liability in this claim. The stipulation for compromise settlement represented 40% PPD referable to Claimant's right knee, and 15% PPD referable to her left knee.

Prior to the start of the hearing the parties identified the issue for disposition in this case: accident; arising out of and in the course/scope of employment; medical causation; and the liability of SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits. Claimant offered Exhibits A-C, and F-N. SIF offered Exhibits I-IV. All exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

**FINDINGS OF FACT**

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is sixty years old, a high school graduate, who is approximately six credit hours shy of obtaining an associates degree. Claimant's work history includes working as an administrative secretary; as a production supervisor for Chrysler Corporation; as a project completion supervisor at the local General Motors plant; and for Employer, as a quality liaison at the local Chrysler plant. As a quality liaison, Claimant's job duties included: supervising and coordinating with Chrysler management staff; providing complete inspections of front and rear fascias and bumpers; supplying parts; inspecting the yard; and resolving any work site issues at the plant. Chrysler provided Claimant's office space, and a parking spot on Chrysler's parking lot.

2. On January 26, 2004, Claimant had completed her work shift, and while walking to her car, she slipped on a patch of ice and started to fall. While trying to stop her fall, Claimant twisted her right knee and experienced immediate pain in the knee. The next morning Claimant contacted an orthopedic surgeon and obtained the first appointment the physician had available, which was the following week. Throughout the remainder of the week Claimant's right knee symptoms continued and increased, and by February 1, 2004, Claimant sought medical treatment for her right knee at Christian Hospital Northeast (CHNE), after hearing a pop in her knee while walking. Claimant came under the care of an orthopedist, Dr. Sheridan, who diagnosed a complex tear of the posterior horn of her medial meniscus. On February 4, 2004, Dr. Sheridan performed arthroscopic right knee surgery to correct the medial meniscus tear, and Grade II-III chondromalacia. Claimant recovered poorly, and ultimately Claimant underwent a right total knee replacement on June 21, 2004.

3. During October 2004, while recovering from right total knee replacement, Claimant developed pain in her left knee. By March 2005, Claimant underwent a left total knee replacement.

4. On October 23, 2008, Claimant settled her case with Employer for 40% PPD referable to her right knee, and 15% PPD referable to her left knee.

5. Claimant had a prior left knee injury that preceded her last work related injury. During 1999 Claimant injured her left knee and sought medical with Dr. Lux, an orthopedic surgeon. Claimant underwent surgery on her left knee on September 1, 1999, for debridement of her unstable articular surface of the medial femoral condyle, and resection of a tear of her medial meniscus. Prior to surgery, Claimant had been diagnosed with avascular necrosis of her left medial femoral condyle. Following a post-operative period, Claimant returned to work without physical restrictions, and continued to work without restrictions until her January 26, 2004 injury.

6. Claimant has not returned to work since her knee replacements. As of hearing, Claimant complains of pain and stiffness in both knees. She is unable to walk for distances greater than ½ mile, and she is unable to sit for longer than 20 minutes. She spends her day watching television or reading, and her daughter or granddaughter assist her with grocery shopping and household chores. Claimant currently takes Vicodin for pain relief.

7. Dr. Lichtenfeld examined Claimant at her request on April 6, 2006. Upon examination, Dr. Musich noted the following abnormalities: right thigh atrophy, mild to moderate crepitus of both knees; lateral instability of both knees; and moderate to severe pain in both knees. Dr. Lichtenfeld diagnoses included: status post operative right knee replacement, depression, and exacerbation with acceleration of left knee degeneration all caused by the January 26, 2004 work injury. Dr. Lichtenfeld rated Claimant's January 2004 injuries at 75% PPD referable to the right knee; and 17.5% PPD referable to the left knee. Dr. Lichtenfeld rated the following preexisting disabilities: 50% PPD referable to the left knee; and 30% BAW PPD referable to chronic obstructive pulmonary disease (COPD). Dr. Lichtenfeld deferred to a psychiatrist regarding a rating for Claimant's depression. Dr. Lichtenfeld suggested numerous physical and environmental restrictions. Dr. Lichtenfeld opined Claimant's preexisting injuries were a hindrance to employment prior to her last injury, and the last injury and preexisting injuries combined to create an overall disability greater than the simple sum. Dr. Lichtenfeld further

opined Claimant is PTD due to a combination of her disabilities, taking into account her education, job history, and advanced work age.

8. Dr. Nogalski examined Claimant at the request of Employer on September 14, 2006. Dr. Nogalski did not find Claimant had sustained a work related injury on January 26, 2004, given Claimant's alleged injury was un-witnessed, medical records used inconsistent dates of injury, and she reported hearing her knee pop several days after the alleged date in injury. Upon cross-examination, Dr. Nogalski conceded there was a pattern of consistency in reporting to medical care providers regarding the actual date and mechanism of injury.

9. Vocational rehabilitation counselor, Mr. James Israel, M.Ed., interviewed Claimant on January 16, 2007, and issued his report during May 2007 after reviewing the report issued by Dr. Lichtenfeld. Prior to receiving Dr. Lichtenfeld's report, Mr. Israel was "inconclusive" in reaching an opinion regarding Claimant's employability. Mr. Israel deemed Dr. Lichtenfeld's report to be "important because it defined abilities and limitations." During his evaluation Mr. Israel administered the Purdue Pegboard Test. Claimant scored from 1-5<sup>th</sup> percentile on the Purdue Pegboard Test. After reviewing Claimant's medical records, Mr. Israel noted her various treating physicians had not placed physical restrictions on Claimant's activities, but Dr. Lichtenfeld had placed numerous physical and environmental restrictions due to her knee replacements and pulmonary condition. Mr. Israel opined Claimant had transferable skills, but with the restrictions placed by Dr. Lichtenfeld, Claimant would not be able to return to her former job in the automotive industry, and Claimant was vocationally unprepared and very substantially disadvantaged to compete in the open labor market. Taking into account Claimant's medical history, educational aptitude, relevant work history, and age, Mr. Israel opined Claimant was PTD and unable to compete in the open labor market due to a combination of her last injury and her preexisting medical conditions. Mr. Israel further opined there was no reasonable expectation that an employer would hire Claimant.

### **RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

#### **Issues relating to accident, arising out of and course/scope of employment & medical causation**

Section 287.020 RSMo (2000), defines accident as an unexpected or unforeseen event or series of events that occur suddenly, without fault, and produce objective symptoms of an injury. The injury must be "clearly work related", and that term is defined as work being a substantial factor in the resulting medical condition. Further, an injury is not compensable merely because work was a triggering or precipitating factor. To be medically causally related, the work must be a substantial factor in the cause of the resulting medical condition and disability. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining "substantial factor." *Id.* Whether employment is a substantial factor in causing the injury is a question of fact.

*Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds). Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). SIF appears to question accident and medical causation due to the concerns regarding Claimant's credibility and perceived inconsistencies found in Claimant's medical records recording the date the injury occurred. However, as demonstrated during Dr. Nogalski's cross-examination, Claimant's medical records demonstrate a pattern of consistent reporting of how and when the accident occurred to multiple medical providers over a sustained period of time. I find Claimant has met her burden establishing accident and medical causation.

I do not find the pop Claimant experienced in her knee while walking to be an intervening injury. Claimant was not engaged in any unusual activity when the pop occurred. Claimant's right knee problems began with the slip on the ice at work, she continued to experience knee symptoms from that time until treatment ensued, and she was patiently waiting to see an orthopedic surgeon and had promptly made that appointment to be seen the day after her injury.

Section 287.020.3(1) defines injury as that which has arisen out of and in the course of employment.<sup>1</sup> Section 287.020.3(2) instructs that to arise out of and in the course of employment an injury must meet four requirements; (a) the employment is a substantial factor causing the injury, (b) the injury is a natural incident of the work/employment, (c) the employment was a proximate cause of the injury, and (d) the injury is not from risk unrelated to the employment to which other workers would be equally exposed outside of employment in normal life. Further, under the extended premises doctrine, injuries while going or coming from work are compensable if the injury producing accident occurs on premises not actually owned or controlled by the employer, but which have been appropriated by the employer, or have been approved, or permitted as the accepted route used by workers to get to and depart from their place of labor. *Wells v. Brown*, 33 S.W.3d 190, 192 (Mo. 2000). In the instant case, Employer did not own the parking lot Claimant was assigned to park on, but did accept the parking arrangement as Claimant's accepted route of ingress and egress to the work site. Based on accepted law in effect at the time of Claimant's injury, I find Claimant's injury of January 26, 2004, arose out of, and in the course and scope of her employment.

### **Issues related to liability of SIF for PTD benefits**

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. See *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the

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<sup>1</sup> All references are to RSMo 2000 unless otherwise noted.

claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). If the last injury standing alone did not cause the employee to become PTD, the inquiry turns to potential liability for PTD by Second Injury Fund. The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone.

§287.220.1 *RSMo*. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993).

Two experts have offered opinions regarding Claimant's employability, Dr. Lichtenfeld and Mr. Israel. Mr. Israel reserved his opinion regarding Claimant's employability until he was provided a copy of Dr. Lichtenfeld's report, and Mr. Israel greatly weighted the restrictions placed by Dr. Lichtenfeld. However, Dr. Lichtenfeld's report is unreliable and internally contradictory. First, Dr. Lichtenfeld rated a 30% BAW PPD *preexisting* pulmonary condition of COPD when Claimant's medical records reflect no such condition ever being contemplated by any of her treating physicians. No notations of *any* pulmonary conditions were noted by any of the surgeons that performed Claimant's various knee surgeries, a condition that would be of great concern to any surgeon when anesthesia is required. I do not accept the COPD opinion of Dr. Lichtenfeld. Of the thirteen restrictions placed by Dr. Lichtenfeld and relied upon by Mr. Israel, six of the restrictions were directed to this diagnosis. Second, on numerous occasions Dr. Lichtenfeld contradicts his ultimate opinion of finding Claimant's PTD status to be the result of a combination of her last work injury and her preexisting 50% PPD left knee indicating in his deposition as follows:

Q. And if avascular necrosis progresses and bones surrounding the joint surface collapse, can that result in a dramatic increase of pain: is that correct?

A. Certainly. Certainly wasn't the case in this situation with the – with the left knee. It initially wasn't the case in the left knee. It was really the trauma that she suffered in January of '04 that kind of hastened the further worsening of the arthritis that subsequently necessitated the need for the left knee total arthroplasty. Because she actually went on for another five years without having any major problems that required further surgery in that left knee prior to her work injury to the right knee in January of '04.

(Exhibit F, pgs. 76-77)

and:

. . . While it is clear that the problems Ms. Peck-Miller had with her left knee prior to her work injury on January 26, 2004 would have eventually necessitated a left knee total arthroplasty at some time in the future and it is also clear that the injury to her right knee of January 26, 2004, which caused her to favor her right knee and place more of the burden of walking and getting around on her left knee *hastened the development of further deterioration of the left knee as well as the premature need for a left total knee arthroplasty.* (emphasis added)

(Exhibit F, pg 52)

Section 287.220.1 RSMo directs that the degree of disability be determined by “the degree or percentage of employee’s disability that is attributable to all injuries or conditions existing *at the time the last injury was sustained*” (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, 916 S.W.2d 263 (Mo.App.1995) quoting *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993). Claimant’s medical condition on the date of her last work injury did not include a diagnosis, or any evidence of complaints of, or treatment of COPD. The only evidence of left knee disability on the date of her last work injury was her diagnosis of status post left knee arthroscopy for repair of her medial meniscus, and shaving of her medial femoral condyle for avascular necrosis, with the condition of Claimant’s left knee remaining stable for the preceding five years. By Dr. Lichtenfeld’s own admission, Claimant’s left knee condition worsened due to the effect of the January 26, 2004 injury, and if Claimant had COPD on January 26, 2004, it was undetectable by multiple medical professionals. I do not find Dr. Lichtenfeld’s report or opinion to be credible, and because Mr. Israel relied so heavily of Dr. Lichtenfeld’s opinion when forming the opinion that Claimant was unemployable, Mr. Israel’s opinion is also flawed and not credible. On the date her injury was sustained, Claimant’s left knee condition was stable, and she displayed no disability related to COPD (if it existed at that time). Claimant’s condition did worsen during treatment for her right knee injury, but that worsening occurred well after the date of initial injury. Based on the credible evidence presented, Claimant has not met her burden to establish her disability is due to a combination of last and preexisting conditions, and I do not find SIF to be liable for PTD benefits.

### **Issues related to SIF liability for PPD benefits**

Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the last injury standing alone. Again, §287.220.1 RSMo directs that the degree of disability be determined by “the degree or percentage of employee’s disability that is attributable to all injuries or conditions existing *at the time the last injury was sustained*” (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, 916 S.W.2d 263 (Mo.App.1995) quoting *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993).

Employer and Claimant entered into a compromise PPD settlement of 40% referable to Claimant’s right knee, and 15% referable to Claimant’s left knee to settle all issues regarding the primary injury. I find these percentages appropriate and supported by competent evidence, and I adopt the percentages when considering Claimant’s SIF PPD claim. Claimant’s documented preexisting condition is her 1999 surgical left knee. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App.1983) (overruled on other grounds). I find Claimant’s preexisting left knee condition

to present a disability of 25% BAW PPD, and I adopt this percentage when considering Claimant's SIF PPD claim. I further find these conditions to have been a hindrance or obstacle to her employment or reemployment.

Taking into account Claimant's remaining preexisting disability of 25% PPD referable to her left knee, and when combining this disability with her work related bilateral knee injuries, I find the combination synergistically produces a disability greater than the simple sum. Applying a 15% load factor, I find SIF to be liable for 19.2 weeks of PPD disability or \$6,663.36.

**CONCLUSION**

Claimant's work at Employer was a substantial factor in causing injury to her bilateral knees. Claimant's PTD case fails because her expert testimony is not credible. Claimant is not entitled to PTD benefits, but is entitled to PPD benefits from SIF. Claimant's primary and preexisting injuries meet the statutory threshold for SIF liability. Claimant's preexisting condition was a hindrance or obstacle to her employment. SIF is liable for 19.2 weeks of additional PPD benefits. Claimant's attorney is entitled to a 25% lien.

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

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

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
*Naomi Pearson*  
*Division of Workers' Compensation*