

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

Injury No.: 04-104621

Employee: Ricki E. Ross  
Dependent: Deborah Ross, spouse  
Employer: Saturn of Blue Springs  
Insurer: Universal Underwriters Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: May 3, 2004  
Place and County of Accident: Blue Springs, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 24, 2007. The award and decision of Administrative Law Judge R. Carl Mueller, issued August 24, 2007, 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 1<sup>st</sup> day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**FINAL AWARD**

Employee: Ricki E. Ross

Injury No: 04-104621

Dependents: Deborah Ross (spouse)  
Employer: Saturn of Blue Springs  
Additional Party: State Treasurer as Custodian of the Second Injury Fund  
Insurer: Universal Underwriters Ins. Co,  
Hearing Date: July 9, 2007  
Briefs Filed: July 24, 2007 Checked by: RCM/rm

**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: May 3, 2004
5. State location where accident occurred or occupational disease was contracted: Blue Springs, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee slipped on tire shine left on the floor and fell striking his left knee on the floor causing injury.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left knee and body as a whole
14. Nature and extent of any permanent disability: Employee is found to be permanently and totally disabled as a result of the injuries sustained on May 3, 2004
15. Compensation paid to-date for temporary disability: \$74,776.50
16. Value necessary medical aid paid to date by employer/insurer? \$88,972.03
17. Value necessary medical aid not furnished by employer/insurer? \$30,738.09 (Employer has stipulated that this sum was incurred for authorized medical treatment that remains unpaid and such expense shall be paid by Employer)
18. Employee's average weekly wages: \$1,235.00
19. Weekly compensation rate: TTD/PTD-\$662.55; PPD-\$347.05
20. Method wages computation: Employee was a full time employee earning an hourly wage MO. REV. STAT. §287.250.1(4)
21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred.....	\$119,710.12
Less credit for expenses already paid.....	(\$88,972.03)
Total Medical Owning.....	\$30,738.09

Temporary Disability

112 and 6/7s weeks (05/4/2004 to 07/2/2006)..... \$74,776.50

Less credit for benefits already paid..... (\$74,776.50)  
Total TTD Owing..... \$0.00

Accrued Permanent Total Disability

Accrued benefits for the period July 3, 2006 – July 9, 2007 (53 wks. x \$662.55/wk.)..... \$35,115.15  
Less credit for benefits already paid..... (\$35,115.15)  
Total accrued PTD owing..... \$0.00

Commencing July 10, 2007, PTD benefits shall continue to be paid at the rate of \$662.55/wk. for Employee’s lifetime and the lifetime of his dependant, Deborah Ross, should the dependant survive Employee in accordance with the holding in *Schoemehl v. Treasurer of the State*, 217 S.W. 3d 900 (Mo. banc 2007)

**Total Award:..... Indeterminate**

22. Second Injury Fund liability: None

23. Future medical treatment awarded: Yes

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

The permanent disability compensation awarded to Employee commencing July 3, 2006 shall be subject to a twenty-five percent (25%) lien in favor of Bill Manson, Attorney, for reasonable and necessary attorney’s fees pursuant to MO.REV.STAT. §287.260.1.

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

Employee: Ricki E.Ross, Claimant Injury No: 04-104621  
Dependents: Deborah Ross (spouse)  
Employer: Saturn of Blue Springs  
Additional Party: State Treasurer as Custodian of the Second Injury Fund  
Insurer: Universal Underwriters Ins. Co.  
Hearing Date: July 9, 2007  
Briefs Filed: July 24, 2007 Checked by: RCM/rm

On July 9, 2007, Employee, Employer, and the State Treasurer as Custodian of the Second Injury Fund (“Fund”) appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Ricki Ross, appeared in person and with counsel, Bill Manson. The employer appeared through Mark Kolich, and the Fund appeared through Assistant Attorney General Jason Lloyd. The primary issues to be resolved were whether the employer must provide Mr. Ross with additional medical care and whether he is permanently and totally disabled.

For the reasons noted below, I find that Mr. Ross is permanently and totally disabled as a result of the injuries he sustained on May 3, 2004 while working for Saturn of Blue Springs and is entitled to benefits for his lifetime and the lifetime of his dependant spouse, Deborah Ross, should she survive his death in accordance with the holding in *Schoemehl v. Treasurer of the State*, 217 S. W. 3d 900 (Mo. banc 2007) commencing July 3, 2006, as well as future medical treatment required for his left knee and any resulting complications that might arise there from.

**STIPULATIONS**

The parties stipulated that:

1. On or about May 3, 2004 ("the injury date"), Saturn of Blue Springs ("Saturn") was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by Universal Underwriters Ins. Co.;
2. Mr. Ross was its employee working subject to the law in Kansas City, Jackson County, Missouri;
3. Mr. Ross notified Saturn of his injury and filed his claim within the time allowed by law;
4. Mr. Ross earned a \$1,235.00 average weekly wage resulting in the maximum weekly compensation rate of \$662.55 for temporary total disability (TTD) and permanent total disability (PTD), and \$347.05 for permanent partial disability (PPD) compensation;
5. Saturn of Blue Springs has paid TTD totaling \$74,776.50 representing one hundred twelve and six-sevenths weeks from May 4, 2004 through July 2, 2006;
6. In addition, Saturn of Blue Springs has continued paying weekly benefits totaling \$662.55 per week from July 3, 2006 through today. This additional benefit paid totals \$35,115.15 and represents fifty three weeks of compensation. The employer and claimant stipulate that this additional benefit will apply as a credit to this final award;
7. Saturn of Blue Springs has provided Mr. Ross with medical care costing \$88,972.03; and,
8. The Claimant and Employer stipulate that authorized medical care resulted in expenses totaling \$30,738.09 that remain unpaid and that such expenses shall be paid by the Employer.

## ISSUES

The parties requested the Division to determine:

1. Whether Saturn of Blue Springs must provide the employee with additional medical care?
2. Whether Mr. Ross suffered any disability and, if so, the nature and extent of the Employee's disability and whether the employee is permanently and totally disabled?
3. Whether SIF is liable to Employee for any disability compensation?
4. Whether Mr. Manson's attorney's fee request is fair and reasonable?

## FINDINGS

Mr. Ross testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- A - May 3, 2004 Claim for Compensation
- B - Deposition, Theodore Sandow, MD, August 16, 2006
- C - Deposition, Mary Titterington, October 31, 2006
- D - Deposition, Terry Cordray, March 20, 2007

- E - Deposition, Charles Orth, DO, May 1, 2007
- F - Deposition, Timothy Smith, MD, May 4, 2007
- G - Deposition, Vito Carabetta, MD, May 22, 2007
- H - Deposition, Michael Dreiling, June 11, 2007
- I - Report, John Peterson, MD, September 6, 2006
- J - Report, John Peterson, MD, September 20, 2006
- K - Medical Records, SMMC
- L - Medical Records, James Webb, DO
- M - Medical Records, Charles Orth, DO
- N - Medical Records, Briarcliff Surgery Center
- O - Medical Records, St. Mary's Hospital of Blue Springs
- P - Medical Records, St. Joseph Medical Center
- Q - Medical Records, John E. Peterson, MD
- R - Medical Records, Timothy S. Smith, MD
- S - Itemization of Unpaid Medical Bills

Although Saturn of Blue Springs ("Saturn") did not call any witnesses, it did present Exhibit T, a Kansas Division of Workers' Compensation "Docket Report", which was admitted over the objection of the Fund. Exhibit T was added to the three ring binders of exhibits provided by Claimant's counsel.

The Fund did not call any witnesses or introduce any exhibits.

Based on the above exhibits and the testimony of Mr. Ross, I make the following findings:

Mr. Ross is a 53-year old married male, who lives with his wife of 33 years, Deborah Ross, in Kingsville, Missouri. Mr. Ross attended Center High School in Kansas City, Missouri, until he dropped out in the 11<sup>th</sup> grade in 1970. Mr. Ross received his GED in 1988. Mr. Ross attended vocational school in 1986 and completed a program in heating, refrigeration and air conditioning. He subsequently attended another vocational training school in 1993 where he completed training to be an auto mechanic. Mr. Ross continued to receive continuing education from his employer, Saturn, each year he was employed there.

In the 1970s, Mr. Ross worked as a handyman doing repair work for an amusement park. Afterwards, Mr. Ross worked as an attendant at a full-service gas station where he was responsible for pumping gas, servicing cars, and running a cash register. There were no service bays where he actually did mechanic work. Mr. Ross then worked for the Kansas City Water Department as a machine operator on heavy equipment. He was required to do general labor work in addition to working with heavy equipment. Mr. Ross also worked in the capacity of a plumber on homes that were being remodeled. All of these jobs were physically demanding and required him to stand on his feet, and be able to stoop, squat, bend and lift.

Afterward, Mr. Ross attended a vocational school where he learned heating, refrigeration and air conditioning. Mr. Ross worked in a part-time capacity performing this type of work for an instructor at the vocational school until he joined the United States Army from 1986-1989. While in the United States Army, Mr. Ross worked on large refrigeration units. Mr. Ross received his honorable discharge in 1989. After leaving the military, Mr. Ross went to work at Beverage Equipment Company where he worked on soda machines and other fast food equipment. He subsequently went to work for Ice Masters in Merriam, Kansas, where he worked on large ice machines. During that time, Mr. Ross was required to lift refrigeration units weighing as much as 500 lbs. with the assistance of other employees. Mr. Ross' primary job was to work on the refrigeration unit motors. He performed this work until he injured his neck on August 21, 1991 lifting a refrigeration unit. Mr. Ross' work on refrigeration units was physically demanding and required him to be able to stand, bend, squat, stoop and lift much of the time.

Mr. Ross required two cervical fusions in 1991 and 1992 at the C4-C5 and C5-C6 levels. Following his fusion surgeries, Mr. Ross continued to have neck pain and headaches. Mr. Ross continued to experience residual neck pain and headaches that required him to pay attention to how he performed work tasks. He also had to use over-the-counter analgesics from time to time for pain control. Mr. Ross filed a Kansas worker's compensation claim and settled that claim based on a 50% functional impairment. (Exhibit T).

After Mr. Ross' neck injury in 1991, he sought vocational training with the Missouri Division of Rehabilitation. However, the Division did not feel it could place him in a new line of employment that he desired, resulting in Mr. Ross attending vocational school at his own expense to become an auto mechanic.

After completing vocational school, Mr. Ross became employed at Saturn of Kansas City and later Saturn (the dealerships are owned by the same people) as an auto mechanic where he was required to do the type of work typically expected of an auto mechanic, including work on engines. Mr. Ross began work as an auto mechanic in 1993, and but for a brief time where he attempted to work as a diesel mechanic in 1998, continued in that employment until he was injured on May 3, 2004. Saturn was aware of his pre-existing neck condition and paid him a lower hourly rate than fellow mechanics with the same experience; Mr. Ross was paid \$18 per hour while the other mechanics were paid \$24 per hour. Even though Mr. Ross had difficulty looking up and extending his head, he was able to successfully complete his work tasks based on his auto mechanic experience and his general knowledge of where things were located on the vehicles on which he was working. Typically Mr. Ross did not have to lift over 30 lbs. at this job, as mechanics were expected to use various lifts and hoists to lift anything exceeding this amount and he generally followed this rule.

In 1998, during his brief hiatus from Saturn, Mr. Ross attempted to work as a diesel mechanic, but found the work more difficult because of the pre-existing neck problem and the physical demands of this work. He concluded it would be better for him to return to work in the role of an auto mechanic. Subsequently, Mr. Ross returned to Saturn in his capacity as an auto mechanic.

On May 3, 2004, Mr. Ross arrived at work and was let into the building by a Saturn customer representative. He went to the area where the mechanics performed their work. Mr. Ross believed one of the porters had left "tire shine" spilled on the floor. He stepped onto the "tire shine" and lost his balance, bluntly striking his left knee on the floor. Mr. Ross immediately reported this incident to his supervisor who directed him to OHS Comp Care, where he was seen by Dr. Webb after Dr. Webb's office opened in the morning of May 3, 2004. Dr. Webb initially diagnosed Mr. Ross with a left knee contusion and strain with a possible meniscus tear. Dr. Webb provided conservative treatment in the form of anti-inflammatory medication, restricted work, and a knee brace. On May 12, 2004, Dr. Webb ordered an MRI of the left knee. The May 12, 2004 MRI revealed a medial meniscal tear and effusion, as well as a Grade II chondromalacia of the patella.

Dr. Webb referred Mr. Ross to Dr. Orth (an orthopaedic surgeon) on May 19, 2004. Dr. Orth saw Mr. Ross on May 26, 2004. Dr. Orth performed an examination and reviewed diagnostic films and concluded Mr. Ross sustained a medial meniscus tear to his left knee with chondromalacia patella versus articular surface defect from a fall and possible old ACL injury. On June 11, 2004, Dr. Orth performed a left knee arthroscopy, patella chondroplasty and medial meniscectomy at the posterior horn. Following the initial surgery, Mr. Ross continued to experience pain sufficient to cause him to limp. Dr. Orth gave Mr. Ross steroid injections to help relieve the pain. Subsequently, Dr. Orth provided three Synvisc injections. Despite very aggressive care by Dr. Orth, including physical therapy, activity restrictions, nonsteroidal medication, corticosteroids, arthroscopic surgery, and Synvisc injections, Mr. Ross continued to have intolerable pain and discomfort.

Mr. Ross subsequently had a left knee replacement performed by Dr. Orth at St. Mary's Hospital on October 1, 2004. Prior to the knee replacement surgery, Dr. Orth explained the risks and complications of the knee replacement surgery, including neurovascular injury and blood clots. Following the knee replacement, Mr. Ross experienced a pop in his left knee while receiving physical therapy. Dr. Orth was concerned that Mr. Ross might have sustained a torn quadriceps muscle or patellar tendon. On October 27, 2004, Dr. Orth performed an exploratory surgery and found no evidence of further damage. Mr. Ross also developed a sensitivity to even light touch to his left knee following the knee replacement and was placed on Neurontin, as it was suspected he might be developing RSD (complex regional pain syndrome). Mr. Ross did not experience any relief from taking Neurontin and was administered sympathetic blocks for the RSD at St. Mary's Hospital in January and February 2005.

Further, although placed on Coumadin and Lovenox, in November 2004, Mr. Ross suffered a deep venous thrombosis resulting in a pulmonary embolism that was treated at St. Mary's Hospital. Unfortunately, in February 2005, Mr. Ross suffered a heart attack. He was initially seen at St. Mary's Hospital and was transferred to St.

Joseph Health Center for continued care. While at St. Joseph Health Center, his cardiac care was taken over by Dr. John Peterson (a cardiologist). Because of the risk of recurrent bleeding while on Coumadin, and the requirement of Coumadin because of the DVT and pulmonary embolism, it was decided that it was best to get Mr. Ross off of the Coumadin therapy and replace it with a vena cava filter. Dr. Petersen placed the vena cava filter in March 2005. Following the vena cava filter placement, Mr. Ross followed up with Dr. Timothy Smith, a pulmonologist, who treated him for DVT. Dr. Orth last saw Mr. Ross on April 20, 2005 and placed him at maximum medical improvement for his left knee at that time. Dr. Smith's office last saw Mr. Ross on November 28, 2005 when that office released him from care. Despite the foregoing, the parties stipulated that Mr. Ross reached maximum medical improvement on July 2, 2006.

Mr. Ross continues to experience sharp, constant pain in his left lower extremity around the outside area of his knee along with swelling and discoloration. Mr. Ross has not been able to wear long pants and is required to wear shorts because of the pain that clothing creates when it touches his left leg.

Mr. Ross is able to walk half a city block, but on occasion pushes himself in an attempt to stay conditioned. Mr. Ross indicated he has gained 25 lbs. since the accident and has to walk with a cane constantly. Mr. Ross is unable to work on cars as he used to do before the May 3, 2004 accident and is no longer able to perform activities with his son or grandson, such as fishing, baseball or throwing the football.

Mr. Ross did indicate he is able to perform various chores around the house that do not require substantial bending, stooping or squatting. Mr. Ross will do these chores in short intervals and not at the same time. Mr. Ross also is unable to do any house maintenance, although he is able to mow his lawn with a riding lawn mower. And, while he is able to drive, his driving time is limited because he must get out of the car. He is unable to take long trips because of the condition of his left knee.

Mr. Ross is aware of restrictions from Dr. Orth that have limited him from squatting, stooping or bending. Further, he is aware of a restriction that limits his walking more than 50 feet at one time without rest. Mr. Ross is required throughout the day to elevate his leg above his heart in order to control swelling and pain and will typically do this twice a day at 30-minute to 2-hour intervals. Mr. Ross indicated that when he does this, he typically elevates his leg while lying on his back.

Prior to the May 3, 2004 work accident, Mr. Ross was able to do the work of an auto mechanic, but because of his pre-existing cervical spine condition, was paid less than other auto mechanics similarly situated. Also prior to the May 2004 work accident, he would experience episodes of neck and arm pain that he would control with over-the-counter medications. Because of the cervical spine fusions Mr. Ross was unable to continue as a commercial refrigerator repairman, and initially sought vocational retraining, but opted for returning to vocational school at his own expense to learn how to be an auto mechanic. Mr. Ross attempted to become a diesel mechanic in 1998, but that work bothered his neck to the point that he felt more comfortable working as an auto mechanic.

Mr. Ross was evaluated by Dr. Sandow on December 14, 2005 at the request of Mr. Ross' counsel. Dr. Sandow is a retired orthopaedic surgeon and has extensive experience with both knee and cervical spine surgeries. Dr. Sandow noted Mr. Ross had three operative procedures performed from the May 2004 work accident, including a left knee replacement. Dr. Sandow also noted Mr. Ross had a pre-existing herniated cervical disc at the C4-5 and C5-6 levels resulting in two cervical fusions being performed at Shawnee Mission Medical Center in 1991 and 1992.

Following the October 27, 2004 exploratory surgery, Dr. Sandow noted that Mr. Ross developed a deep venous thrombosis in his left leg resulting in a pulmonary embolism. Dr. Sandow explained that essentially Mr. Ross experienced a blood clot which resulted in blockage of blood flow to his lung. Dr. Sandow explained that deep venous thrombosis is a commonly seen complication of a total joint replacement. Dr. Sandow noted Mr. Ross subsequently experienced a heart attack, but was unable to relate whether the heart attack was related to the deep venous thrombosis or pulmonary embolism. See, Claimant's Exhibit B at 27-28.

Dr. Sandow noted Mr. Ross complained on several occasions to Dr. Orth about sensitivity to the area of his left knee. Dr. Sandow noted that when he performed his own medical evaluation, Mr. Ross had significant

complaints of tenderness and paresthesia in the area of his left knee. Dr. Sandow explained that paresthesia means the nerve is functioning, but it is sending inappropriate messages to the brain. Dr. Sandow felt this sensation Mr. Ross was experiencing was a complication of the knee replacement surgery. Dr. Sandow felt Mr. Ross was experiencing a form of reflex sympathetic dystrophy. *Id.* at 26-27.

Dr. Sandow diagnosed a torn left medial meniscus, chondromalacia of the left patella, degenerative joint disease of the left knee, status post left total knee replacement, status post venous thrombosis with a resulting pulmonary embolus, and complex regional pain syndrome. *Id.* at 32. Dr. Sandow opined (1) he did not believe the degenerative joint disease was caused by the fall, but thought it was aggravated by it, (2) the torn meniscus was caused by the May 3, 2004 fall, (3) the chondromalacia of the patella (knee cap) was probably pre-existing, but aggravated by the fall, and (4) the venous thrombosis, the pulmonary embolus, and the complex regional pain syndrome were post operative complications following the knee surgeries. *Id.* at 32. Dr. Sandow also felt any pre-existing chondromalacia or degenerative joint disease of the left knee was asymptomatic at the time of the May 3, 2004 fall. *Id.* at 33. Dr. Sandow thought Mr. Ross was a medical "mess". *Id.* at 34.

Dr. Sandow thought Mr. Ross should have the following restrictions due to the left knee condition:

1. No lifting over 25 lbs. on an occasional basis and no lifting over 10 lbs. on a frequent basis;
2. Avoid repetitive squatting, climbing, kneeling, and crawling;
3. Avoid prolonged standing or walking; and
4. Mr. Ross should have the ability to take 15 to 20 minute sit down breaks every two hours of his work day for pain control.

See, Claimant's Exhibit B at 35.

With regard to Mr. Ross' neck, Dr. Sandow related that while he did not specifically examine Mr. Ross' neck, he did review medical records related to his neck treatment and did question Mr. Ross about how his neck was feeling. Dr. Sandow indicated Mr. Ross reported to him that his symptoms had improved enough that he could tolerate the residual symptoms he had, allowing him to return to work; but, would experience occasional neck and right arm pain, which generally occurred one time per week, and that Mr. Ross took over-the-counter ibuprofen for this problem. *Id.* at 36-37.

Dr. Sandow testified that had Mr. Ross been his patient, he would have placed the following permanent restrictions on him regarding his cervical spine:

1. Avoid repetitive extension and flexion of the neck; and
2. Avoid heavy lifting.

*Id.* at 47.

Dr. Sandow assigned a 75% permanent partial disability of the left lower extremity at the 160 week level due to the left knee injury on May 3, 2004 and also felt Mr. Ross sustained an additional 30% permanent partial disability at the 400 week level due to the complications from the surgeries (including the deep venous thrombosis, pulmonary embolus, and complex regional pain syndrome). *Id.* at 38-40. Dr. Sandow also gave his opinion that Mr. Ross had a 30% permanent partial disability at the 400 week level due to his pre-existing cervical neck fusions. *Id.* at 40.

Dr. Sandow believed that that Mr. Ross was disabled alone on the effects of his left total knee and the complications that resulted from the knee injury. *Id.* at 42:10-17. When asked for the basis of that opinion, Dr. Sandow stated:

Because he cannot really be on his feet for very long. He cannot sit at a desk, and I don't think he has any training that would allow him to work at job of that sort. He might have to keep his leg elevated for a great amount of time because that's a variable on whether the swelling goes down or it doesn't or relieves his symptoms. So I think he has enough injury from the knee problem and subsequent complications to not allow him to return to work.

*Id.* at 42:20-43:4.

Dr. Sandow opined that Mr. Ross was not capable of obtaining or maintaining gainful employment. *Id.* at 34, 42, and 71-72.

Dr. Sandow also felt that a total knee replacement was not designed to last forever and given Mr. Ross' age, it was likely that at least one more total knee replacement would be required; however, it would be difficult to find a surgeon to take on his future care because of the complications resulting from the first replacement. *Id.* at 44:20-45:13.

Dr. Orth was the authorized surgeon who performed the left knee replacement. On April 20, 2005, the last date Dr. Orth saw Mr. Ross, Dr. Orth noted Mr. Ross was still using a cane for ambulation, and had hypersensitivity in his left knee and leg. Dr. Orth noted Mr. Ross' range of motion was fairly good at 0 to 100 degrees. Dr. Orth also noted 1+ edema (swelling) to Mr. Ross' left leg. This was characterized by a little imprint that would be left in the leg if a finger were pushed into his leg. Dr. Orth further felt Mr. Ross had stable RSD in his left leg. Dr. Orth noted muscle atrophy from the knee replacement and the RSD. Dr. Orth provided Mr. Ross with a handicap parking document so Mr. Ross could obtain a handicap parking sticker.

Dr. Orth felt Mr. Ross should have the following restrictions as of the last day he was seen:

1. Do not climb ladders;
2. Do not lift over 25 lbs.;
3. No crawling;
4. Bending and stooping should be infrequent; and
5. Long walks should be infrequent (nothing beyond 50 ft.).

See, Claimant's Exhibit E at 13-14.

Dr. Orth did not restrict Mr. Ross from sedentary work. *Id.* at 14). Dr. Orth also felt Mr. Ross had Type 1 RSD and that RSD could progress anywhere into Mr. Ross' whole body at a later time. *Id.* at 14. As of the date he was last seen, Dr. Orth felt Mr. Ross' RSD was stable. Dr. Orth also felt it was reasonable for Mr. Ross to have to elevate his leg to control swelling and pain on a trial and error basis and on an "as needed" basis throughout the day. *Id.* at 17-19 and P. 28). Dr. Orth did not think a 'Jobst' stocking or 'Tet' hose would work in Mr. Ross' case because of the RSD. *Id.* at 28-29.

Dr. Orth expected Mr. Ross' knee replacement to last in the neighborhood of 15 – 20 years. *Id.* at 22. Dr. Orth recommended x-rays periodically if Mr. Ross begins having problems with his knee to see whether the knee replacement is coming loose *Id.* at 23.

Dr. Orth assigned a 58% permanent disability at the level of the knee based on the current AMA Guidelines as of September 12, 2005. *Id.* at 12 and P. 24-25. Dr. Orth's rating did not take into account the complications that resulted, nor did it take into account Mr. Ross' ability to return to his line of work as an auto mechanic. *Id.* at 25. Dr. Orth had no opinion regarding whether the February 2005 heart attack was related. *Id.* at 27. Dr. Orth gave no rating to Mr. Ross's cervical spine.

Dr. Smith was the authorized pulmonologist who treated the DVT and pulmonary embolism beginning in March 2005. Dr. Smith was of the opinion that the DVT and pulmonary embolism resulted from the knee replacement. See, Claimant's Exhibit F at 5. Dr. Smith indicated he was uncomfortable giving a disability rating regarding the DVT and pulmonary embolism. *Id.* at 11. Dr. Smith also did not offer an opinion regarding whether the DVT and pulmonary embolism prevented or in some way limited Mr. Ross from working. *Id.* at 12. Finally, Dr. Smith could not say for sure whether Mr. Ross would require future treatment for the DVT and pulmonary embolism, as it depended on whether Mr. Ross was having symptoms. *Id.* at 17. Dr. Smith was not sure of Mr. Ross' current condition on the day his deposition was taken.

Dr. Carabetta evaluated Mr. Ross at the request of counsel for Saturn. Dr. Carabetta is a physiatrist

specializing in physical medicine and rehabilitation. Dr. Carabetta found Mr. Ross had a guarded gait pattern with a limp, as well as swelling of the knee and shin. Dr. Carabetta also found weakness in the left knee had had the ability to flex the knee to 80 degrees (a significant shortcoming). See, Claimant's Exhibit G at 8-9. Dr. Carabetta also found crepitus, which was abnormal. Nevertheless, Dr. Carabetta did not feel Mr. Ross had true RSD. *Id.* at 12. However, on cross examination, Dr. Carabetta conceded it could not be ruled out and it would be best if a triple based bone scan were performed to determine whether Mr. Ross truly had RSD. *Id.* at 12 and 15-18. It should be noted that a triple based bone scan was not performed.

Dr. Carabetta was of the opinion Mr. Ross should not kneel, crouch, crawl or stand for a prolonged period of time. *Id.* at 13 and 31. Dr. Carabetta also felt Mr. Ross should be allowed to elevate his leg as needed. *Id.* at 32. Dr. Carabetta commented he would not be surprised if Mr. Ross had to elevate his leg every hour or two. *Id.* at 32. Dr. Carabetta felt the need to elevate the leg was as a result of the May 2004 work accident. *Id.* at 36-37.

Dr. Carabetta assigned a 50% permanent partial disability at the level of the knee. *Id.* at 13:14-16. Dr. Carabetta did not provide a rating for the complications resulting from the knee replacement. *Id.* at 28-29. Dr. Carabetta felt the only type of work Mr. Ross might be able to do would be sedentary and specifically indicated Mr. Ross was medically restricted from working as a mechanic *Id.* at 14. Dr. Carabetta testified Mr. Ross might be able to work:

If he had the option of being able to get up and change positions and possibly elevate his leg if he needed to, if he found that sort of cushy job that wasn't much more than watching TV, he could do something like that.

*Id.* at 14:3-8.

Dr. Carabetta opined the DVT and pulmonary embolism were complications of Mr. Ross' knee replacement. *Id.* at 21-22. Dr. Carabetta also conceded knee replacements do not last forever and that given Mr. Ross' age, he would likely require future medical treatment to his left knee. *Id.* at 22-23. Dr. Carabetta did not provide a rating on Mr. Ross' cervical spine. *Id.* at 27.

Dr. Petersen was the cardiologist who treated Mr. Ross at St. Joseph Health Center in February 2005. Dr. Petersen stated in a September 6, 2006 report and September 20, 2006 supplemental report that the vena cava filter was needed as a result of the knee replacement, but that the heart attack and stenting required due to the heart attack were not related to the May 2004 work accident. Dr. Petersen gave no opinions on permanent disability.

Mary Titterington, a vocational expert, evaluated Mr. Ross for approximately three hours regarding his ability to return to the open labor market. She conducted several tests including an intelligence test, several achievement tests, a number of dexterity tests, and a typing test. See, Claimant's Exhibit C at 18. Ms. Titterington concluded Mr. Ross was a slow learner following the May 2004 work accident probably due to focus issues as a result of pain. *Id.* at 18-19. On the achievement tests, Mr. Ross fell anywhere from a fourth grade level (grammar) to as high as a tenth grade level (word reading). *Id.* at 21. She noted his grades in school generally were poor and Mr. Ross was not required to use his academic skills in the work force. *Id.* at 22. Mr. Ross tested poorly in the dexterity tests to the point that Ms. Titterington concluded he would be below standard production rates. *Id.* at 23. Ms. Titterington felt Mr. Ross was giving maximum effort. Ms. Titterington concluded Mr. Ross was not a good candidate for re-training based on the tests administered. *Id.* at 26. Ms. Titterington was of the opinion Mr. Ross would have problems staying on task, meeting production goals, and reporting to work on a consistent basis and staying on task throughout the work day. *Id.* at 38.

Ms. Titterington was of the opinion that to elevate the leg throughout the work day would be an unacceptable work practice. *Id.* at 34. Ms. Titterington likened this to lying down while working. *Id.* Ms. Titterington noted that work stations were not designed to have somebody elevate their leg. *Id.* Ms. Titterington also felt Mr. Ross would have trouble learning new tasks based on her testing. *Id.* at 34- 35.

Ms. Titterington concluded that Mr. Ross was unemployable primarily because he had to elevate his leg throughout the course of a day. *Id.* at 34-35 and 51. Further, Ms. Titterington did not feel any employer

reasonably could be expected to hire Mr. Ross given his condition and need to elevate the leg. *Id.* at 39. Ms. Titterington conceded that the neck injury was a hindrance to employment, but that the knee problem taken in isolation was the predominant reason why Mr. Ross was unable to return to the open labor market. *Id.* at 51.

Mr. Ross was also evaluated by Terry Cordray, a vocational expert for four hours. Mr. Cordray also performed intelligence and achievement testing and found Mr. Ross to perform in the low average range of reading, spelling, and arithmetic. Mr. Cordray concluded from the work history provided that Mr. Ross always worked in jobs with at least a medium physical demand and required standing for extensive periods of time. He determined that the only transferable skill Mr. Ross had to a sedentary job would be that of a parts counter worker. Mr. Cordray felt Mr. Ross was open and giving good effort on all testing.

Mr. Cordray felt that sleep deprivation was a barrier to employment, but not the primary problem for Mr. Ross. Mr. Cordray also felt the pre-existing neck problem would be a hindrance or obstacle to doing jobs that required a lot of extension and flexion of the neck (looking up and down). Mr. Cordray noted that auto mechanics do more bending at the waist than looking up and down.

Mr. Cordray concluded Mr. Ross was totally disabled and unable to engage in the open labor market in any capacity. See, Claimant's Exhibit D at 27:8-21. Mr. Cordray came to this conclusion based on three reasons: (1) Mr. Ross could not return to work as an auto mechanic, as he could no longer do any constant standing, (2) although Mr. Ross had the skill to be a parts counter worker, the constant looking up and down required of that position would be prevented by the pre-existing cervical spine fusions, and (3) realistically any other type of work that he might be qualified to do would also require the extension and flexion of the neck which would be precluded by the cervical spine fusions. *Id.* at 28-29. Mr. Cordray also concluded that if Mr. Ross did have to elevate his leg as suggested by Dr. Sandow, no employer would make this accommodation to an unskilled worker. *Id.* at 29. Mr. Cordray opined that a normal employer trying to make a profit in Missouri would not hire Mr. Ross for any position and would hire any other job applicant before hiring Mr. Ross. *Id.* at 34.

It should be noted that Mr. Cordray did perform a job survey and found that Mr. Ross would unlikely be able to perform any of the unskilled jobs available. *Id.* at 34-35. Mr. Cordray concluded that if Mr. Ross had to keep his leg elevated along the lines suggested by Dr. Sandow, that restriction in and of itself would preclude Mr. Ross from engaging in any gainful employment, including any sedentary skilled or unskilled jobs. *Id.* at 36. However, if his leg did not have to be elevated throughout the day, Mr. Ross would still be precluded from engaging in any gainful employment because of a combination of the restrictions placed on him from the May 3, 2004 work accident and the inability to repetitively flex and extend his neck. *Id.* at 36.

Finally, Mr. Ross was evaluated by Mike Dreiling, a vocational expert, at the request of counsel for Saturn. Mr. Dreiling spent an hour and a half interviewing Mr. Ross, but did not repeat the intelligence and achievement testing conducted by Ms. Titterington and Mr. Cordray. Mr. Dreiling obtained an educational and work history from Mr. Ross. He also reviewed medical reports and records, the reports of the other two vocational experts, and the deposition of Dr. Sandow. Mr. Dreiling concluded that Mr. Ross did more hands-on type of work that was quite physically active. Mr. Dreiling noted that Mr. Ross changed his line of work following the neck injury in the early 1990s after attending a vocational school. Mr. Dreiling stated his opinion that it was his experience that workers with the cervical spine injury that Mr. Ross experienced were typically required to avoid job activities requiring significant twisting of the neck from side to side or frequent looking up and down. See, Claimant's Exhibit H at 13-14. Mr. Dreiling felt the pre-existing neck injury was a hindrance or obstacle to employment, as Mr. Ross had to change jobs due to the physical demands of an ice machine installer and also had to return to work as an auto mechanic after a brief attempt at being a diesel mechanic. *Id.* at 14-15.

Mr. Dreiling concluded that based on a combination of the pre-existing cervical spine injury and the May 3, 2004 injury, Mr. Ross was unable to work in the open labor market. *Id.* at 16-17. However, Mr. Dreiling conceded on cross examination that if a worker had to elevate his leg throughout the course of a work day, that is going to be a problem for most employers. *Id.* at 22, and 45-46. Mr. Dreiling also conceded statistically speaking there were not many job options with Mr. Ross's restrictions, even if he could do a "cushy" TV monitoring job, or work with customers who purchased warranties. *Id.* at 27-28. Finally, Mr. Dreiling conceded that the leg elevation restriction would be prohibitive in obtaining employment. *Id.* at 29-30 and 45-46. Mr. Dreiling concluded that Mr. Ross was no doubt permanently and totally disabled based on the entire presentation. *Id.* at 46.

## RULINGS

### Medical Benefits

\$119,710.12 in medical expenses was incurred for the treatment of the injuries sustained by Mr. Ross as a result of the May 3, 2004 work accident. The parties stipulated that as of July 9, 2007, \$88,972.03 of these expenses has been paid by Saturn or its insurance carrier. The parties stipulated that \$30,738.09 of authorized treatment remains unpaid and should be paid by Saturn or its insurance carrier. Thus, based on the stipulation, I find that Saturn or its insurance carrier should satisfy in full the \$30,738.09 in authorized, but unpaid, medical bills.

### Temporary Total Disability Benefits

The parties stipulated that Mr. Ross received TTD benefits at the rate of \$662.55 per week for the period May 4, 2004 – July 2, 2006 (112 6/7 wks.) in the total sum of \$74,776.50. The parties stipulated that Mr. Ross reached maximum medical improvement on July 2, 2006. Saturn or its insurance carrier has paid all TTD benefits due. I therefore award no additional TTD benefits.

### Permanent Total Disability Benefits

Missouri's Workers' Compensation Law provides, in pertinent part, that "'total disability' . . . 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." MO.REV.STAT. § 287.020.7. "The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his...present condition." McCormack v. Carmen Schell Construction Company, 97 S.W. 3d 497, 511 (Mo. App. 2002). "In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." Landman v. Ice Cream Specialties, Inc., 107 S.W. 3d 240, 248 (Mo. banc 2003). Thus, if the last injury in and of itself renders the employee permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire amount of the compensation. *Id.*

I find that Mr. Ross was rendered permanently and totally disabled as a result of the injuries incurred from the May 3, 2004 work accident taken in isolation and without regard for the pre-existing cervical spine condition. Mr. Ross required a left knee replacement and experienced numerous complications, including RSD, DVT, and at least one pulmonary embolism. Dr. Sandow, Dr. Orth and Dr. Carabetta all gave restrictions that applied to the left knee that precluded Mr. Ross from returning to any type of work that he had performed since high school. These doctors also agreed that it would be reasonable for Mr. Ross to have to keep his leg elevated on an as needed basis and that this would have to occur throughout the day. Further, these doctors felt it was reasonable for Mr. Ross to keep the leg elevated as little as a half-hour interval and as much as two hours, which Mr. Ross has to do every day to control swelling and pain.

Mr. Ross is unable to wear long pants and these doctors all felt that Mr. Ross would be unable to wear a 'Tet' hose or 'Jobst' stocking. Ms. Titterington, Mr. Cordray, and Mr. Dreiling, the vocational experts who evaluated Mr. Ross, all agreed that the need to keep the leg elevated would effectively preclude Mr. Ross from even maintaining a sedentary job were an employer able to accommodate the other restrictions placed on him by the various doctors. I found Mr. Ross' testimony to be credible. Because the injuries from the last accident taken in isolation are enough to render Mr. Ross permanently and totally disabled, it is not necessary to determine if there is any Second Injury Fund liability. The parties stipulated to a PTD rate of \$662.55/wk. and also stipulated that maximum medical improvement was reached on July 2, 2006. Therefore, I find that PTD benefits are due from Saturn or its insurance carrier and should commence as of July 3, 2006. The parties stipulated that permanent disability benefits were paid by Saturn or its insurance carrier at the rate of \$662.55/wk. for the period July 3, 2006 - July 9, 2007 (the date of trial), thus Saturn and its carrier are entitled to a credit for these benefits already *paid*. Saturn and its carrier are also entitled to a credit for any PTD benefits paid to Mr. Ross since July 9, 2007 to the extent payment has actually been made. Further, no award for PTD benefits is made against the

Second Injury Fund. I further find that PTD benefits should continue to be paid to any dependent entitled to receive Mr. Ross' benefits (including his spouse of 33 years, Deborah Ross) in the event of his death, even if his death results from reasons unrelated to the May 3, 2004 work accident, pursuant to the Missouri Supreme Court's holding in Schoemehl v. Treasurer of the State, 217 S.W. 3d 900 (Mo. banc 2007).

Future Medical Treatment

Dr. Sandow, Dr. Orth, the authorized surgeon, and Dr. Carabetta all testified that future medical treatment would likely be required due to the fact that Mr. Ross received a knee joint replacement. Dr. Orth testified that his recommendation would be to x-ray the knee if Mr. Ross began experiencing pain. Mr. Ross testified at trial that he has pain in the left knee joint. It is my belief that Mr. Ross should have his left knee examined soon. I find sufficient evidence to support an award of future medical treatment to Mr. Ross' left knee and for any resulting complications arising out of the knee replacement, including the DVT, pulmonary embolism, and RSD.

Attorney's Fees

Bill Manson, counsel for Mr. Ross, requested a 25% attorney's fee on all PTD benefits awarded and/or paid since July 3, 2006. Mr. Manson did not request a fee on the unpaid medical bills in the sum of \$30,738.09, as the parties stipulated to that amount being outstanding and to be paid directly to the health carriers by Saturn or its insurance carrier. I find that the attorney's fee request made is fair and reasonable, and order a lien attach to all PTD benefits awarded and/or paid since July 3, 2006.

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

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

Carl Mueller  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
*Director*  
*Division of Workers' Compensation*