Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-068958

Employee: Joyceanne Seal

Employer: Quality Lodging of Joplin

Insurer: Missouri Chamber of Commerce Group

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

Date of Accident: July 19, 2006

Place and County of Accident: Newton County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated March 25, 2008.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Karen Wells Fisher, issued March 25, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of August 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

_____

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Joyceanne Seal Injury No: 06-068958

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

Dependents: N/A

Employer: Quality Lodging of Joplin

Additional Party Second Injury Fund

Insurer: Missouri Chamber of Commerce Group

Checked by:

Hearing date: November 30, 2007 Checked by:

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: JULY 19, 2006
5. State location where accident occurred or occupational disease contracted: NEWTON 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 happened or occupational disease contracted:
    SQUATTING TO MOVE ELECTRICAL CORDS WHILE VACUUMING
12. Did accident or occupational disease cause death? NO
13. Parts of body injured by accident or occupational disease: RIGHT KNEE

14. Compensation paid to-date for temporary disability: NONE

15. Value necessary medical aid paid to date by employer/insurer? NONE

16. Value necessary medical aid not furnished by employer/insurer? $800.00

Employee: Joyceanne Seal Injury No: 06-068958

17. Employee's average weekly wages: $254.13

18. Weekly compensation rate: $169.42

19. Method wages computation: STIPULATION

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: $800.00

6 5/7 weeks of temporary total disability (or temporary partial disability)

AUGUST 16, 2006 THROUGH OCTOBER 2, 2006 ($1,137.53)

Future Medical: YES

Total: UNDETERMINED AT THIS TIME

Each of said payments to begin IMMEDIATELY and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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

TOM CARLTON

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joyceanne Seal Injury No: 06-068958

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

Dependents: N/A

Employer: Quality Lodging of Joplin

Additional Party Second Injury Fund

Insurer: Missouri Chamber of Commerce Group

Checked by:

Hearing date: November 30, 2007

AWARD ON HEARING

A hardship hearing was held on November 30, 2007, in the above-referenced workers' compensation claim before the undersigned Administrative Law Judge. The parties stipulated that on or about July 19, 2006, the claimant was in the employment of Quality Lodging of Joplin; the employer was operating under the provisions of the Missouri Workers' compensation law; the employer's liability was insured by the Missouri Chamber of Commerce Group; the employer had notice of the injury and a Claim for Compensation was filed within the time prescribed by law; the claimant's average weekly wage resulted in a PPD and a TTD/PTD rate of $169.42.

The issues to be resolved are whether there was an accident which arose out of and in the course of employment; whether treatment resulting from the alleged accident was causally related; responsibility for past medical expenses; responsibility for temporary total disability, past and future; and the need for additional medical treatment. The Second Injury Fund is a party to the claim but the Employer and Claimant agreed that any evidence presented would not be held against the Second Injury Fund at a final hearing. The Employer / Insurer requested that the award be final if the injury is not found to be compensable.

EVIDENCE

The following exhibits were offered and admitted on behalf of employee.

Exhibit A Dr. Koprivica independent medical examination
Exhibit B Certified Division of Workers' Compensation file
Exhibit C Recorded Statement
Exhibit D Freeman Hospital records
Exhibit E St. John's Orthopedic Specialists records
Exhibit F Center for Family Health records
Exhibit G Doctors Hospital records
Exhibit H Foote Hospital records
Exhibit I Orthopaedic Therapy Inc. records
Exhibit J Baxter Regional records
Exhibit K Bills

The following exhibits were offered and admitted on behalf of the employer/insurer.

Exhibit 1	Seal deposition
Exhibit 2	Steps to Cleaning a Good Room
Exhibit 3	Photograph

FACTS

The claimant, Joyceanne Seal, was an employee of Quality Lodging of Joplin on July 19, 2006. She was employed as a housekeeper for the Baymont Hotel owned by Quality Lodging of Joplin, between May 13, 2006 and August 16, 2006.

As a housekeeper, it was her responsibility to clean hotel rooms. This included making the beds, emptying the trash, refilling supplies, cleaning the sink, bathtub and toilet, and vacuuming the room. The claimant testified that she would clean between 11 and 21 rooms a day, and that she normally worked 8 hours a day and between 30 and 40 hours a week. The claimant testified that, as part of her duties, she was required to bend, stoop, squat, and kneel 35-50% of the time. She also testified that, when cleaning rooms, she had to kneel to move telephone cords in 8 out of 10 rooms.

Becky Crum, the manager of the Baymont and a former housekeeper supervisor, testified that she estimated a housekeeper only had to bend, stoop, squat, or kneel 10-15% of the time. She indicated that only rarely would a housekeeper have to kneel to move telephone cords against a wall. She also testified that she felt that, in her personal life, she would kneel far more often than she was required to do as a housekeeper.

On July 19, 2006, the claimant was cleaning room 229 of the Baymont Hotel. She testified that she had to squat down to move some telephone cords that had been moved away from the wall. After she had moved them, she was raising up from her squatted position when she heard a pop in her right knee. She saysshe felt immediate pain and reported the injury to her supervisor, Fabra Cochrane.

That same day, the claimant was taken to the Occupational Health Clinic and was treated by Dr. Abigail Neighmond. X-Rays taken that day were negative. The impression was a right knee strain. She was placed in a knee immobilizer and given prescriptions for her pain. She was told she could return to work that day with the restriction of no standing. The claimant was seen at least once more by Dr. Neighmond and then by Dr. Estep. Eventually an MRI was ordered which, according to Dr. Estep, revealed a medial meniscus tear. The actual MRI report is not in evidence.

At that point, the employer/insurer denied any additional treatment. The claimant was seen by Dr. Brent Koprivica. Dr. Koprivica opined that the injury of July 19, 2006 was the direct and proximate cause of her permanent injury, and that it was the prevailing factor for her current condition and need for additional treatment. He recommended a referral to an orthopedic surgeon for consideration of an arthroscopy. Dr. Koprivica also indicated that the claimant would have been disabled from work between August 16, 2006 and October 2, 2006.

The claimant was evaluated by Dr. Todd Harbach on April 3, 2007 on behalf of the employer/insurer. Dr. Harbach concluded that the claimant did have a medial meniscus tear which had occurred on July 19, 2006 whileat work. He also felt that she had a right ACL deficient knee that was unstable. He did not think the injury of July 19, 2006 caused the ACL injury. He recommended that an ACL reconstruction be done at the same time the meniscus repair is done, however.

EMPLOYER'S ARGUMENT

The significant issue in this case is whether the claimant sustained an accident which arose out of and in the course of her employment with the Baymont Hotel. If the answer to that question is yes, there is no dispute that she is entitled to treatment and to some back temporary total disability. If the answer is no, then the claimant is entitled to no benefits under the workers' compensation statutes.

The incident in this case occurred on July 19, 2006. As such, there is no dispute that the amendments enacted to the workers' compensation statutes in 2005 shall apply. In relevant part, Section 287.020 now reads:

2. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

…

10. In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: Bennett v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo.banc 1999); and Drewes v. TWA, 984
S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

In this case, the employer argues that Section 287.020.3(2)(b) applies in that the claimant's knee popped when she simply raised up after kneeling and this was a "risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal unemployment life."

This is an argument which had been raised by employers in many cases before with no success. Three prominent cases discussed application of this section. In Kasl v. Bristol Care, Inc. 984 S.W.2d 852 (Mo.banc 1999), the claimant was working in a residential care facility. While sitting, her foot fell asleep. When she arose to dispense some medicine, she fell and broke her ankle. The employer in that case argued that the injury did not arise out of and occur in the course and scope of her employment. The Supreme Court found the case compensable, however, since "without having to arise to dispense medicine (a job requirement), with a foot that had fallen asleep, Kasl would not have fallen, breaking her ankle."

Similarly, in Drewes v. Trans World Airlines, 984 S.W.2d 512 (Mo.banc 1999), the claimant fell while on her unpaid lunch break in a break room not controlled or leased by the employer. One of the arguments made by the employer was that the employee was equally exposed to that risk outside of her employment in that she could have fallen anytime. As in Kasl, the Supreme Court rejected that argument, pointing out that the claimant was not "equally exposed outside of her employment to the risk of falling during her lunch break."

Finally, there is Bennett v. Columbia Healthcare, 80 S.W.3d 524 (Mo.App. WD 2002). In that case, the claimant was employed as a nurses aid who had previous problems with her right knee. She claimed that while at work on several occasions she felt her knee pop. This occurred when she was walking up stairs and when she was walking around a patient's bed. None of the incidents involved a fall or other traumatic event. The ALJ denied compensation, finding that there was no accident in that she did not fall or otherwise sustain a trauma during the incident. The ALJ also found that the incidents occurred when she was just walking and that, as such, she was equally exposed to the same risk outside of her employment. The Court of Appeals reversed the case. They specifically disagreed with the ALJ's findings that a claimant who was just walking was equally exposed outside of her

employment life.

The employer argues if this case were to arise under the old statutory scheme, the claimant would be entitled to compensation. Several changes in the 2005 statute, however, indicate that cases such as this are no longer compensable. Two changes in Section 287.020.2 are relevant. First, the new statute indicates that an "accident" shall "mean an unexpected traumatic or unusual strain". The statute in place when Kasl, Drewes, and Bennett were decided did not contain this language. Applying this language, it is clear there was no "unusual" strain at the time of the injury. The testimony is that the claimant was required to get down on her knees to move items from time to time and would be required to rise up. Likewise, it would not appear that the claimant sustained a "traumatic" strain in that she was simply doing the same type of movement she would do everyday in both employment and non-employment life.

The second change in Section 287.020.2 is also relevant. The old language, under which Kasl, Drewes, and Bennett were decided, stated "An injury is not compensable merely because work was a triggering or precipitating factor." The new statute takes out the "merely" and reads "An injury is not compensable because work was a triggering or precipitating factor." In this case, the event on July 19, 2006 wasa triggering or precipitating factor in that it just happened to have happened at work, but could have happened at any time in which the claimant was rising up from a squatted position.

The two changes noted in Section 287.020.2 are even more important when read in conjunction with another statutory change from 2005. Section 287.800 now reads:

287.800. 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

At the time Kasl, Drewes, and Bennett were decided, the law in place required the law to be liberally construed in favor of the claimant. Elrod v. Treasurer of Missouri, 138 S.W.3d 714 (Mo.banc 2004). As such, it is understandable why the courts would have stretched the law to find compensable injuries in those cases. Strictly applying 287.020.3(2)(b), however, it is clear that the claimant's injury is not compensable. In addition to there being no traumatic or unusual strain, a strict construction of the statute indicates that the claimant would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. In this case, the claimant was simply rising up after squatting to move some cords. This is the type of movement which everybody does from time to time in their normal nonemployment life.

The final statutory change which is relevant to this case is the most telling. Section 287.020.10 reads:

10. In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: Bennett v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo.banc 1999); and Drewes v. TWA, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.
As if it were not clear already that the legislature meant to change the law in these so called "positional risk" cases, they specifically set forth that they intended to overrule the Kasl, Drewes, and Bennett case as they related "accident," "arising out of" and "in the course of the employment." The legislature's intent was, that when faced with similar facts, the statute would dictate a different result. The facts of this case are similar to those in earlier cases. Like those cases, the claimant was doing a routine activity at work, one that she was equally exposed to outside of work, and happened to get injured. The legislature clearly intended that, when faced with similar facts again, the injury would not be compensable under the workers compensation system.

The employer and insurer are aware that a case with similar facts has recently been heard by the Commission. In Norman v. Phelps County Regional Insurer, the claimant was a custodian at a hospital. Prior to cleaning an

operating room, the custodian was putting on booties over her shoes. When she lifted her leg up to put on the booties, her left knee popped and dislocated. The ALJ found that there was no "accident" within the meaning of the statute in that the claimant was just doing a routine task which she was equally exposed outside of work. The Commission reversed in a 2 to 1 vote. This case, however, is distinguishable on its facts. In Norman, the claimant was required to put "booties" on over her boots. This was both mandated by the employer and an unnatural act which the claimant would not have had the need to do except at work. In the present case, the claimant was simply rising up from a squatted position. This is something that all individuals are required to do in their nonemployment life.

The far more relevant recent Commission decision is Johnson v. Town & Country Supermarkets, Inc., Injury No. 06-078999. In that case, an employee was walking through a supermarket aisle when he "stepped wrong" and rolled his ankle. There was nothing in the aisle that he tripped over. In this case, the Commission carefully examines the history of the "positional risk" cases and concludes that the legislature intended that they were no longer compensable. The Commission wrote:

In the instant case, the employee was walking down a grocery aisle, at a rapid pace, however, there was no evidence that the rapid pace at which he was walking was remotely connected to the fact that he misstepped causing his injury. According to Dr. Pearson, the misstep resulted in an inversion type injury, and there was no other contributing factor. As further opined by Dr. Pearson, the event/trauma could have occurred anywhere. From the record presented the Commission cannot conclude or find any unique condition of employment which contributed to the resultant injury. On the other hand, the evidence does lead to the conclusion that the injury resulted from a hazard or risk unrelated to the employment.

The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be issued if the injury were a rational consequence of some hazard connected with the employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and as a part of the employment. It is not sufficient that the employment may simply have furnished an occasion for an injury from some unconnected source.

The Commission cannot establish a causal connection between the conditions under which the employee was performing his work and the resultant injury. An award of compensation, given the facts of the instant case, can only be justified by accepting the but for reasoning of the positional or actual risk doctrine, i.e., an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed employee in the position where he was injured.

In 2005, the legislature abrogated such earlier case law interpretations, and required proof greater than the fact that the conditions and obligations of the employment placed employee in the position where he was injured. An employee must satisfy the concept of causation, i.e., establishing some rational connection between his work and his injury. That is the element of proof employee's case is lacking.

In the present case, as in Johnson, the claimant cannot establish she was at any greater risk at work than she would have been outside of work. It is not enough to establish that she was injured while at work.

EMPLOYEE'S ARGUMENT:

Ms. Seal testified that on July 19, 2006 she was required to bend down and move the cords in room 229 of the Baymont Inn & Suites in order to properly vacuum under the desk. As she came up from her squat she felt her knee "snap." She testified she had never felt a pain or snap like that in her knee before. She testified that being able to bend at the knee and being able to squat down was a vital part of her job. The Employer/Insurer produced a witness who also testified at trial that being able to bend down, stoop or squat was a vital part of being able to clean rooms at the Baymont Inn & Suites. In fact, Ms. Seal was eventually terminated from Baymont Inn & Suites because of her inability to bend at the knee. The Employer/Insurer's witness testified that up to 15% of the time spent cleaning a room would potentially require bending, kneeling or squatting. Ms. Seal testified that she did not do the housework at

her own home and thus wasn't exposed to this activity outside of work.

Because Employee's injury occurred on 07/19/06 the Workers Compensation Act as amended in 2005 governs this case.

The case most closely on point is the Kristen Norman v. Phelps County Regional Medical Center case decided by the State of Missouri Labor and Industrial Relations Commission on July 3, 2007. In that case, Employee was performing work for her employer as a house keeper. Employee was assigned to clean a sink in the operating room of the Employer. Pursuant to the rules of the employer, the employee was required to put scrubs on over her clothes as well as booties over her shoes prior to performing the house keeping duty of cleaning the operating room. At the time of the accident employee had put scrubs on over her clothes and was preparing to put on booties over her shoes. Employee testified that "she was standing in the doorway between the locker room and the operating room. While standing in the doorway and holding the bootie she shifted her entire weight to her right lower extremity with her right side/right shoulder leaning against the doorway for support. Employee then lifted her left leg interiorly crossing her right knee attempting to slip the bootie over her left shoe, in that instant her left knee popped and dislocated". The facts of this case are analogous to the Joyce Seal case. In Ms. Seal's case the Employer/Insurer do not dispute that the incident described by Employee occurred. They offered no evidence and did not impeach the Employee's testimony as to how the accident occurred. Employer/Insurer merely argue that the injury does not fall under the definition of accident or injury pursuant to 287.020.

In the Norman case the Labor and Industrial Relations Commission found:

"applying the plain meaning of this language to the facts in the instant case Employee satisfied her burden of proof as to the existence of an accident. Employee testified that while standing on her right leg, and lifting her left leg interiorly across her right knee while attempting to put a bootie over her shoe her left knee popped and dislocated causing her to fall. This described activity constitutes a traumatic stimulus or unexpected traumatic event clearly identifiable by time and place of occurrence and clearly producing at the time objective symptoms of an injury caused by a specific event during a single work shift.".

The Labor and Industrial Relations Commission found "the definition of trauma included 1) an injury to the living tissue caused by an extrinsic agent" as well as 2) an agent, force or mechanism that causes trauma". There is no evidence contra and Employee's description satisfies the statutory definition of an accident." Norman

The Commission further concluded that the statutory definition of injury was proven by the employee in that there was violence to the physical structure of the employee's body i.e., a left knee dislocation. The Commission found the testimony of "Dr. Walds credible, reliable and worthy of belief in that Employee's left knee dislocation was directly related to her attempt to affix a surgical bootie over her left foot and this injury at work was the primary factor leading to her left knee dislocation." The Commission found "the activity of Employee affixing a surgical bootie over her left foot was a hazard or risk related to her employment in that it was the act of Employee complying with the Employers rule."

Again, this is analogous to the facts of Ms. Seal's case. Ms. Seal clearly was acting and complying with the Employer's rule which required her to bend down and move the cords in order to sweep and vacuum the rooms. The Commission in the Norman case also found that the "Employer had a mandatory rule that all Employee's wear plastic booties over their shoes and at the time of the Employee's injury it was readily apparent that the injury sustained arose out of the Employees employment as a causal connection existed between the conditions under which the Employee was performing her work and the resultant injury to her left knee dislocation". Again, in Ms. Seal's case it was the testimony of the Employer that it was a rule that the cords had to be moved prior to vacuuming if those cords were laying in the floor.

The Labor and Industrial Relations Commission in the case of Randy Johnson v. Town and Country

Supermarket's examined the increased risk doctrine, the actual risk doctrine and the positional risk doctrine. The Commission clearly defines those in that case. The Commission also acknowledges that the Legislature, in "2005 specifically abrogated certain earlier case law interpretation's concerning the meaning of accident as well as out of and in the course of employment, section 287.020.10 RSMo.". However, the Commission clearly found "all three of the cases referred to in the statute that were abrogated have one component in common, i.e., it was difficult or impossible to ascertain where or if the employment subjected the employee to some risk or hazard greater than that to which an employee regularly experiences in everyday life. In other words there was no rational connection between the employment and the injury". It is clear in Ms. Seal's case there is an obvious connection between the Employment and the injury. Ms. Seal testified it was a rule of her employer and it was a major portion of her job duties that she would be required to bend over to move things off the floor in order to sweep and vacuum. Clearly, there is a rational connection between the employment and the injury.

Another recent decision of the Labor and Industrial Relations Commission is the case of Jason Gamet v. Dollar General Corporation. In that case the Employee testified that he was bending over to pick up an empty pallet off the floor when he felt immediate pain in his lower middle back above the belt line and slightly to the left. This injury occurred on July 8, 2006 after Mr. Gamet was moved from his normal department and sent to a separate department in order to help pack cases. His duties in "case pack" required lifting boxes or cases off a pallet sometimes stacked as high as head height or sometimes as low as chin height. Again, Mr. Gamet's injury occurred after he bent over to pickup an empty pallet. The Commission found:

"the Employer argues that the act of bending over to pick up the empty pallet is not compensable because bending is also an activity of non-employment daily life. While I agree that bending is an activity in which we all engage in our normal non-employment life, the statute does not provide a list of activities that are automatically prohibited from compensability. Indeed, since so many of the physical activities associated with our employment are also associated with our normal non-employment lives; such as bending, lifting, carrying, pulling, pushing, turning, twisting, packing, climbing, etc…, a very extensive list of automatically prohibited activities would essentially render the act meaningless".

The Commission also found in the Gamet case "the question is not whether he would have been exposed to the activity of bending over in his non-employment life but rather would he have been equally exposed." It is obvious in the case of Ms. Seal that the Employee spent between 30% and 45% of her time bending, squatting or kneeling as part of her job duties in cleaning the rooms at Baymont Inn & Suites. Ms. Seal testified she did not do the housekeeping at her own home as that duty was performed by her roommate. Therefore, she was not exposed at all to the same risks in her everyday life as she was in performing her daily job duties at the Baymont Inn & Suites and certainly not equally exposed.

It is clear from the current decisions of the Labor & Industrial Relations Commission that Ms. Seal was performing an act pursuant to the rules of her employer, that there was a rational connection between her employment and her injury and she was not equally exposed to the same risks in her everyday life. Therefore, the language or tests employed by the Commission in all 3 cases have been met in this case.

ADMINISTRATAIVE LAW JUDGE'S CONCLUSION

I find the argument of the employee to be most compelling in this case. In particular the argument as presented in *Norman v. Phelps County Regional Medical Center* is particularly persuasive . The Commission in that case found that the employee was fulfilling the duties of her employment when engaged in the performance of a task incidental thereto and, in fact, was an act complying with the employer's rule. So, too, in the case at hand employee is complying with a requirement of the employer by vacuuming under the cords and replacing them back against the wall which required a squatting position and resulted in the traumatic stimulus and traumatic event which produced the objective symptoms of injury. The Court appreciates the legislature's intent and the employer's argument that perhaps going into a

squatting position is an activity that might be incurred in a person's everyday life and that such an activity on a random basis might not be compensable. However, the Court believes that the reading of the *Norman v. Phelps* case would indicate that when such an activity is required in order to fulfill a job function, and in particular in this case, a function that was required on a repeated basis throughout the day and not necessarily a behavior that one would perform repeatedly in everyday life that this injury would be found to be in the course and scope of employee's work. Therefore, I find that there was an accident arising out of and in the course and scope of employment.

The claimant was evaluated by Dr. Todd Harbach on April 3, 2007, on behalf of the employer/insurer. Dr. Harbach concluded that the claimant did have a medial meniscus tear which had occurred on July 19, 2006, while at work. He also felt that she had a right ACL deficient knee that was unstable. He did not think the injury of July 19, 2006, caused the ACL injury. However, he recommended that an ACL reconstruction be done at the same time the meniscus repair is done. Dr. Koprivica states in his report that it is his opinion that claimant's injury at work on July 19, 2006, is the prevailing factor resulting in the current internal derangement of the right knee. Dr. Koprivica found objective findings of an increased circumference of the right knee suggestive of the feeling of swelling on an ongoing basis. Claimant had developed atrophy consistent with the ongoing dysfunction of the right knee as well. He was suspicious about a medial meniscus tear at a minimum. It was his recommendation that claimant be referred to an appropriate orthopedic surgeon for consideration of arthroscopy. Dr. Koprivica indicated that in his opinion claimant was temporarily and totally disabled from the date of her termination of August 16, 2006, until she was successful in finding employment on October 2, 2006. He noted that it was actually remarkable that an employer was willing to employ her with the ongoing swelling, pain, and limited ability to stand and walk that she currently suffered.

Employer/insurer's doctor recommended surgery for claimant's work-related injury. I therefore order that the past medical of $800.00 for the initial report from Dr. Koprivica be paid by employer/insurer. I further order that temporary total disability benefits be paid from August 16, 2006, through October 2, 2006, at the rate of $169.42 per week. Additionally, I order the evaluation and treatment recommended by Dr. Koprivica be provided by employer/insurer. Once treatment has been provided the allocation of permanent disability specifically resulting from the accident can be address.

I order attorney fees be paid to Attorney Tom Carlton in the amount of 25 percent of any amounts awarded herein.

Date: _____March 25, 2008_____

Made by: ____/s/ Karen Wells Fisher_____
Karen Wells Fisher
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

____/s/ Jeffrey W. Buker_____
Jeffrey W. Buker
***D**irector*
Division of Workers' Compensation