

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

Injury No.: 02-090859

Employee: Earlene Smith  
Employer: APAC Kansas, Inc.  
Insurer: Pacific Employer's Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: August 15, 2002  
Place and County of Accident: Clay 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 March 15, 2006. The award and decision of Administrative Law Judge Rebecca S. Magruder, issued March 15, 2006, is attached and incorporated by this reference.

We deny employee's requests for costs. We deny employee's Motion to Commute Compensation Award. Most of the allegations in employee's Motion describe difficulties faced by employee's husband. Employee's allegations, if true, support a finding that it is in employee's best interest to receive permanent total disability benefits in installments.

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 5<sup>th</sup> day of September 2006.

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:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Earlene Smith

Injury No. 02-090859

Dependents: N/A

Employer: APAC Kansas, Inc.

Insurer: Pacific Employer's Mutual Insurance Company

Additional Party: Missouri State Treasurer, Custodian of Second Injury Fund

Hearing Date: February 21, 2006

Checked by: RSM/lh

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

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: August 15, 2002.
5. State location where accident occurred or occupational disease was contracted: Clay 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: During the course and scope of her employment, claimant was assaulted by an unknown passing motorist.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left side of face, left ear, head, left shoulder, right knee, left knee and low back.
14. Nature and extent of any permanent disability: Permanently and totally disabled.
15. Compensation paid to-date for temporary disability: \$77,611.42.
16. Value necessary medical aid paid to date by employer/insurer? \$122,226.49.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$744.63.
19. Weekly compensation rate: \$496.44/\$340.12.
20. Method wages computation: By agreement.

### **COMPENSATION PAYABLE**

21. Amount of compensation payable:  
Permanent total disability benefits from employer shall continue for Claimant's lifetime.
22. Second Injury Fund liability: None.

TOTAL: Unknown.

23. Future requirements awarded: Medical to be left open for Claimant's lifetime.

Said payments to begin as of the date of this award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Dan Brown.

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

Employee: Earlene Smith

Injury No: 02-090859

Dependents: N/A

Employer: APAC Kansas, Inc.

Insurer: Pacific Employer's Mutual Insurance Company

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

Hearing Date: February 21, 2006

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At the hearing, the parties stipulated:

- 1) that on or about August 15, 2002, APAC Kansas, Inc., was an employer operating under the provisions of the Missouri workers' compensation law and that their liability under said law was fully insured by Pacific Employer's Mutual;
- 2) that on or about August 15, 2002, Earlene Smith was an employee of APAC Kansas, Inc., and was working under the provisions of the Missouri workers' compensation law;
- 3) that on or about August 15, 2002, Earlene Smith sustained an injury by accident arising out of and in the course of her employment;
- 4) that the employer had notice of the injury and that a claim for compensation was filed within the time prescribed by law;
- 5) that Claimant's average weekly wage was \$744.63 and that the applicable compensation rate is \$496.44/\$340.12 per week;
- 6) that the employer has paid temporary disability benefits up to the present in a total amount of \$77,611.42, and that no additional claim for temporary total disability benefits was being made by the employee, and that the temporary benefits that were paid were properly paid;
- 7) that medical aid had been furnished by the employer in the amount of \$122,226.49, that this amount was for reasonable and necessary treatment, and that the employee was making no

- claim for unpaid medical bills;
- 8) that the employer is responsible for ongoing medical treatment for the lifetime of the employee with reference to the Claimant's right knee, left shoulder, left side of her face, and left ear so long as the treatment is related to the August 15, 2002 injury.

The issues in the case are as follows:

- 1) the nature and extent of permanent disability resulting from the August 15, 2002 accident;
- 2) the liability of the Second Injury Fund under §287.220 RSMo. 2000; and
- 3) the liability for future medical aid with regard to the Claimant's left knee.

At the hearing the Claimant and her son offered the only live testimony. Numerous medical records, reports and depositions were admitted into evidence by both the Employee and the Employer. Claimant alleges she is permanently and totally disabled under the Missouri workers' compensation law and therefore is entitled to lifetime benefits. She is also requesting that medical remain open for her lifetime and that the Employer provide ongoing medical treatment to her for any and all injuries she sustained as a result of the accident. The Employer admits liability for future medical treatment on all conditions complained of by the Claimant referable to the August injury except for the Claimant's left knee. Claimant alleges she sustained injury to her left knee as a result of her altered gait due to her right knee injury, and needs treatment for her left knee.

There is no dispute that the Claimant sustained a significant injury, which arose out of and in the course of her employment with APAC on August 15, 2002. On that date, the Claimant was working as a flagger on a paving construction site. She tried to direct an individual driving a car to avoid freshly laid asphalt. The driver went ahead and went across the asphalt and came back about 15 minutes later. He sat and waited for a while in his car and eventually got out of his car and as he approached her kicked off his shoes. The Claimant had turned her head to see where her coworkers were to see if anyone would be there to help her. The driver assaulted her by hitting her with the base of his hand on the left temporal area of the Claimant's head. The Claimant was knocked unconscious. The Claimant twisted her right knee as she fell to the ground. She also injured her left shoulder. She was taken to the emergency room at Liberty Hospital.

At Liberty Hospital the Claimant was assessed as having a closed-head injury and a right medial tibial plateau fracture. She was diagnostically evaluated with multiple x-rays, including x-rays of the right knee, which revealed degenerative changes and joint space narrowing, x-rays of the left shoulder, which revealed evidence of degenerative changes with no acute fractures or dislocations. The Claimant was seen in follow-up on August 19<sup>th</sup> by Dr. George. He treated the Claimant's right knee with a cylinder cast. On October 1<sup>st</sup>, Dr. George noted problems with impingement in the left shoulder. At that time he gave the Claimant a subacromial steroid injection. Multiple cast changes to the Claimant's right knee were performed and on November 5<sup>th</sup>, 2002, repeat x-rays revealed callous formation at the tibial plateau. She was instructed on a partial weight-bearing status. On December 3<sup>rd</sup>, the Claimant was using a brace and remained partial weight-bearing status. Dr. George prescribed a course of physical therapy at this time. The physical therapy notes on January 2, 2003, at HealthSouth Physical Therapy state the following: "Increase in edema noted left medial knee possibly secondary increase in function due to pain with right knee, lower extremity, in weight bearing." Claimant apparently complained of left knee problems to the physical therapist in early January of 2003. Claimant testified at the hearing that she complained both to Dr. George and to the physical therapist regarding her left knee pain, but Dr. George's records have no indication of any left knee complaints by the Claimant. This physical therapy record, however, of January 2, 2003, does demonstrate the Claimant was having left knee problems as early as January of 2003.

In February of 2003, Dr. George saw the Claimant again and noted that she was unable to do the standing requirements of work. He recommended an MRI scan of the right knee at that time. The MRI scan of the right knee performed on February 19, 2003, revealed a small effusion. There were changes of the posterior horn of the medial and lateral meniscus consistent with the tear. Following this diagnostic study, Dr. George reevaluated the Claimant and noted that she had significant arthritic changes in all three compartments with the most significant findings in the lateral compartment. He recommended proceeding with an arthroscopic exam. Dr. George commented in a letter

dated July 17, 2003, that the Claimant had not undergone an MRI scan at the time of her August 2002 injury. He stated that while the Claimant most likely had pre-existing degenerative changes of the meniscus, that the mechanism of the injury to the tibial plateau could very well have resulted in a tear through the degenerative meniscus.

Throughout the course of her treatment, the Claimant was evaluated by Dr. Koprivica. The first time being January 3, 2003, Dr. Koprivica commented in the subjective complaints section numerous notations of problems the Claimant now had with the right knee that she did not have before the accident. He also noted that the Claimant was complaining of pain and swelling in the left medial knee, which the patient associated with favoring the right lower extremity because of the August 2002 injury. He also noted disabling headaches and pain and weakness in the left shoulder. Dr. Koprivica connected the Claimant's left shoulder problems, headaches, and worsening of her right knee to the August 15, 2002 accident. He did, however, note that the Claimant gave a history of prior permanent partial disability to her right knee predating the August 15, 2002 injury. In fact, Dr. Koprivica commented that the Claimant's understanding was that Dr. Zipper had recommended a total knee replacement to her right knee prior to August of 2002.

With regard to the Claimant's right knee, Dr. George on August 11, 2003, recommended a total knee arthroplasty. She was seen in follow-up several dates in the fall and winter of 2003 by Dr. George. The Claimant was admitted to the hospital on January 23, 2004, wherein the Claimant had a total right knee replacement performed. Dr. Koprivica saw the Claimant again on June 9, 2004, and concluded that as a result of the work-related assault on August 15, the Claimant sustained multiple traumatic injuries. He recommended an MRI scan of the left shoulder and additional treatment for the right and the left knee injuries acquired. He also opined that the Claimant's left knee problems were related to her right knee injury in that the right knee injury had required her to alter her gait and had put increased pressure on her left knee, which caused an aggravating injury. In June of 2004, the Claimant was having severe pain in her facial area. It was an episodic type of pain that radiated into her left ear area. She said the problem was quite unpredictable. However, it was totally incapacitating when it occurred.

Dr. Frevert saw the Claimant on October 6, 2004, and opined that she had a probable left rotator cuff tear. After an MRI scan was performed to the Claimant's shoulder, Dr. Frevert performed an open rotator cuff repair with acromioplasty and Mumford procedure on January 4, 2005. Prior to the surgery to the Claimant's shoulder, however, Ms. Smith was seen by a Dr. Zwibelman on November 24, 2004. Dr. Zwibelman thought that the Claimant's neck could be a potential source for her complaints. He recommended various diagnostic studies, which were conducted. Dr. Zwibelman also recommended therapy for the Claimant's neck along with consideration of trigger injections and suggested prescribing Nortriptyline and Trazadone. In the meantime, the surgery to the Claimant's rotator cuff was repaired on January 4, 2005, by Dr. Frevert. She was seen in follow-up by Dr. Frevert through March 18, 2005. At that time he suggested aqua therapy at North Kansas City Hospital. Dr. Koprivica continued to be concerned about her left knee and eventually Claimant was sent to Dr. Parmet by the employer for an independent medical evaluation. Dr. Parmet did not believe that the Claimant's left knee complaints were related to her injury. He felt her left leg complaints were due to varicose veins involving her left lower extremity, which were totally unrelated to her August 2002 work injury. Dr. Parmet did suggest that the Claimant needed to complete the therapy on the left shoulder and also felt she needed to receive the specific treatment that Dr. Zwibelman had recommended for her head injury. On April 18<sup>th</sup>, the Claimant was hospitalized with surgical drainage of the left chest wall abscess following her rotator cuff surgery.

On July 9, 2005, Claimant was evaluated by Dr. Stuckmeyer at the request of the Employee. Dr. Stuckmeyer, like Dr. Koprivica, felt that the Claimant's left knee condition was related to the trauma to her right knee. It was Dr. Stuckmeyer's opinion that the development of the Claimant's left knee symptoms were initially reported by the Claimant and documented by Dr. Koprivica in January of 2003. Dr. Stuckmeyer opined within reasonable certainty that the development of left knee symptoms were directly causally related to an overcompensating mechanism where the Claimant had to rely on the left knee due to an impaired right knee function. He recommended an MRI scan of the left knee to further delineate her left knee condition.

In September of 2005, the Claimant was seen by another neurologist, Dr. Harlan, who diagnosed a post concussive left facial neuralgia that lead to recurrent classic migraine. Dr. Harlan prescribed Neurontin, which Ms. Smith was taking at the time of trial and testified helped alleviate some of her blackouts and excruciating head pain. Dr. Harlan recommended referral to an ear, nose and throat specialist. Dr. Maars evaluated Ms. Smith on September 27, 2005. Dr. Maars documented high frequency hearing loss with the left being greater than the right. He also recorded complaints of tinnitus. Dr. Maars opined that the August 2002 head trauma could, indeed, have caused these documented losses. He prescribed a hearing aid, which Claimant currently wears and helps her hearing to a great

degree.

This cursory review of the treatment Claimant has received since the accident of 2002 demonstrates that she had a very significant on-the-job injury and suffers multiple disabilities due to the assault of August 2002. In short, as a result of the 2002 accident, the Claimant suffered injury to her right knee, left shoulder and head. Initially the medical treatment was directed to the Claimant's right knee, which was eventually replaced in 2004, then to her left shoulder for which she had a rotator cuff repair in January of 2005 with a May 2005 repeat operation for folliculitis. She also sustained injury and has had treatment for continuing left facial pain, a stabbing sensation moving down to the left cheek or jaw, diminished hearing, and migraine headaches. Each of these conditions is clearly related to the August 2002 accident. None of the parties dispute the relationship between these conditions of ill and the accident of 2002, or the fact that these conditions are significantly disabling.

With regard to the right knee, all of the physicians who rated the disability resulting from the 2002 accident rated that disability between 30 and 40 percent. Dr. Parmet opined that the Claimant's disability to her right knee resulting from the 2002 accident was between 30 and 40 percent at the 160-week level and Dr. George opined that the disability was 30 percent at the 160-week level. Dr. Koprivica rated the Claimant's disability to her right knee resulting from the 2002 accident at 31.25 percent at the 160-week level. Clearly all the experts found that Claimant had significant disability due to the 2002 injury to her right knee. All of the experts also agree that the Claimant's left shoulder injury was causally related to the 2002 accident and the ratings of permanent disability referable to Claimant's left shoulder range between 20 and 30 percent. Dr. Koprivica initially rated the disability at 20 percent but raised that disability to 25 percent after Claimant suffered the infection subsequent to the surgery. Dr. Parmet rated the Claimant's disability to her left shoulder at 30 percent at the 232-week level. With regard to Claimant's complaints of facial pain, hearing loss, migraine headaches, brief blackouts, and tinnitus, there is virtually no evidence that these conditions of ill are not related to the assault she sustained on August of 2002. Rather the testimony of Dr. Zwibelman, Dr. Harlan, and Dr. Maars establishes the necessary causal connection between these conditions of ill and the 2002 accident when the circumstantial evidence is also considered, i.e., Claimant had no symptoms with regard to any of these conditions other than possible neck pain prior to the assault of August of 2002. Moreover, Dr. Koprivica specifically opines that these conditions relative to the Claimant's head, face, and ears are caused by the trauma and ensuing loss of consciousness the Claimant sustained in August of 2002. He initially rated these disabilities at 15 percent to the body as a whole but he raised his disability rating to 20 to 25 percent of the body as a whole due to the additional tinnitus and possible cervical involvement which he did not consider when he gave his first disability rating. It is quite clear that the Claimant sustained significant disability as a result of the last accident.

Claimant also has suffered significant disability prior to August 2, 2002. She had two work-related injuries in the state of Missouri and had two compromised settlements approved with regard to those injuries. In the fall of 1985, while working for Ellis Construction Company, the Claimant sustained an injury to her right knee in the course and scope of her employment. Arthroscopic surgery was performed to her right knee and at the time of the surgery, it was noted that the Claimant had a degenerative tear of the lateral meniscus patellar plica as well as degenerative arthritis in the lateral compartment and patellar femoral arthritis. It was noted at that time that the medial meniscus was not exactly normal but no treatment was rendered to it. The Claimant settled that case for 43.75 percent at the 160-week level referable to her right knee. The records consistently indicate that Dr. Zipper had recommended at that time that the Claimant get a knee replacement. Claimant obviously did not get the knee replacement at that time, nor did she get one until after the injury in 2002. The evidence clearly demonstrates that the Claimant had a permanent disability referable to her right knee prior to the work accident of 2002. Furthermore, the evidence clearly demonstrates that the Claimant's pre-existing disability to her knee was a hindrance or obstacle to her employment. It affected her performance in her job with APAC, as well as intensive labor job she had between 1985 and 2002. She had difficulty getting up and down off of a three-foot trailer because of her knee and had difficulty getting in the truck to drive it due to her knee. Walking for long distances caused her to suffer pain at night because of her knee. Her trial testimony and the testimony of her son were replete with evidence that her pre-existing right knee condition was a hindrance to her employment.

Claimant also had significant pre-existing disability with regard to an injury she sustained to her right shoulder in November of 1990. While working as a housekeeper for Embassy Suites Hotel, the Claimant sustained an injury to her right shoulder and/or neck when she was making a bed. She testified that she had two surgeries as a result of that accident. Although no medical reports were attached to the Stipulation for Compromise Settlement approved by Judge Siedlik on December 22, 1992, the settlement document shows that the claim was settled for 17.5 percent to the body as a whole. As with Claimant's prior right knee injury, the injury in 1990 to her right shoulder clearly constituted a significant permanent disability. Additionally, the evidence definitely demonstrated that this

disability to the Claimant's right shoulder was a hindrance and obstacle to her employment. She testified that carrying and lifting and overhead reaching had continued to be painful and that she had to have help at work due to her right shoulder problems. Pushing and pulling and climbing, as well as loading and unloading various heavy items were very difficult for her and she eventually was asked to quit unloading barrels filled with sand off and on to the trailer bed. Her boss asked her to start driving the truck instead of loading and unloading the barrels. Immediately prior to that, the men had helped her load and unload the barrels. There is little doubt then that the Claimant had significant disability both before and after the 2002 work-related accident.

In addition to the significant injuries, limitations, impairments, and disability the Claimant suffered before and after the 2002 injury, the Claimant has a limited educational background and limited work history. The Claimant completed the eighth grade and quit school during her ninth grade year. She never obtained a GED and has had no college or skilled training after eighth grade. She has no typing skills and has no experience using computers. Claimant is currently 61 years of age and has a work history of performing primarily physically oriented work. After quitting school, the Claimant started a family and had four children from 1958 through 1964. She first began working in 1965 packing fireworks. She next worked as a production worker for a furniture company that manufactured furniture. She next worked as an injection mold machine operator for a plastic company. She also has worked as a packer and worked in the construction industry as a roller operator. All of these prior jobs were physically demanding jobs. In 1982, she began working as a union laborer and stayed with the union up until her injury 20 years later in 2002. She always worked on a road crew and generally worked as part of a dirt crew or asphalt crew. She spent about 50 percent of her time over the past 50 years working with the dirt crew and about 50 percent of her time working with the asphalt crew. She did work for various employers but worked approximately 85 percent of her time as a flag person where she was constantly standing and directing traffic by utilizing a flag. The remaining 15 percent of her time was spent doing more general labor duties such as moving orange construction barrels weighing 40 to 50 pounds, picking up rocks weighing anywhere from several pounds up to 30 to 40 pounds and also shoveling dirt and cleaning up the oil spills. There was a period during 1990 during the wintertime in the off-season construction that she worked at a hotel as a maid for about six months. Again this was a physically demanding job, which required her to clean the bathroom floors and appliances on her hands and knees. All of the foregoing work required the Claimant to be physically active. Clearly the Claimant's work background indicates that she has not acquired any significant transferable job skills according to Mr. Dreiling who reviewed her work history and performed a vocational exam. According to Mr. Dreiling, the Claimant "has performed work in the labor market consistent with her limited educational background and she has always relied on fairly good physical capabilities to perform work versus any type of formal academic or vocational training skills." Michael J. Dreiling as part of his vocational assessment had the Claimant participate in the Wonderlic Personnel Test (WPT), which is a short-form test of general cognitive ability. The Claimant scored in the 8<sup>th</sup> percentile rank of the adult-working population, and the 9<sup>th</sup> percentile among high school graduates. The average scoring for all applicants was approximately 21 and the Claimant scored 11. Mr. Dreiling explained that lower scoring applicants such as the Claimant would require more time specific and instruction in standardized job routines than higher scoring applicants.

It was Mr. Dreiling's opinion that the Claimant would be unable to compete for any gainful employment on the open labor market due to her physical restrictions prior to the 2002 injury combined with her physical restrictions after the 2002 injury and considering her limited educational and vocational background as well as her general intelligence level. While Dr. Koprivica also testified unequivocally that the Claimant would be unable to compete for gainful employment on the open labor market, it was Dr. Koprivica's opinion that the results of the last accident alone would render this individual unable to compete for gainful employment.

Having reviewed all the evidence in this case, I find that there is virtually no evidence to support a conclusion that the Claimant will ever compete in the open labor market again. This is a case where the evidence overwhelmingly demonstrates that this particular individual is permanently and totally disabled under the Missouri workers' compensation law. §287.020.7 RSMo 2000 defines total disability as "an inability to return to any employment and not merely...inability to return to the employment in which the employee was engaged at the time of the accident." The terms "any employment" mean any reasonable or normal employment or occupation. Missouri courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the employer, in the usual course of business would reasonable be expected to employ the employee in his present physical condition. *See e.g., Faubion v. Swift Adhesives Company*, 869 S.W.2d 839 (Mo.App. 1994); *Hines v. Constine of Missouri*, 857 S.W.2d 546 (Mo.App. 1993).

Total disability means the inability to return to any reasonable and normal employment. It does not require that the employee be completely inactive or inert. *Isaac v. Atlas Plastic Corporation*, 793 S.W.2d 165 (Mo.App 1990), *Kowalski v. MG Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo.App. 1982). The following factors are to be

considered in determining whether an individual is permanently and totally disabled: The Claimant's physical condition, including his limitations and capabilities, his age, education, occupational background and skills, as well as his general intelligence capacity. *See General Lee Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. 1990); *Isaac v. Atlas Plastic Corporation*, 793 S.W.2d 165 (Mo.App. 1990); *Reece v. Kendal's Mercantile Company, Inc.*, 793 S.W.2d 917 (Mo.App. 1990); *Apachin v. National Supermarkets, Inc.*, 738 S.W.2d 166 (Mo.App. 1987). In order to determine whether an individual is permanently and totally disabled under Missouri workers' compensation law it is necessary, therefore, to consider the Claimant's age, education, occupational history and job skills, as well as his physical condition and limitations in determining his ability to compete in the open labor market. The Claimant in this case is a 60-year-old woman who has performed manual labor all of her life and has no advanced training or education. She completed only the 8<sup>th</sup> grade and has a limited intellectual capacity at this stage in her life. The Claimant in this case is undoubtedly permanently and totally disabled under Missouri workers' compensation law.

The only real issue in this case is whether the Second Injury Fund or the Employer is liable for the permanent total disability benefits. The Employer argues that the Fund is liable and the Fund argues that the Employer is liable. Dr. Koprivica, one of the Claimant's medical experts in this case, and Mr. Dreiling, the Claimant's vocational expert in this case both determined that the Claimant was unable to compete for gainful employment. Dr. Koprivica, however, was of the opinion that the Claimant was unable to compete for gainful employment due to the effects of the last accident alone, thus making the Employer liable for benefits. Mr. Dreiling was of the opinion that the Claimant was unable to compete for gainful employment in the open labor market due to the combined effects of the 2002 injury and her pre-existing disabilities.

The Missouri Supreme Court in the case of *Stewart v. Johnson*, 398 S.W.2d 850 (Mo. 1966) explained the procedure, which must be undertaken when there is the dispute as to whether the employer or the Second Injury Fund is liable for permanent total disability benefits. The Court explained that the first consideration is the disability resulting from the last injury alone. Otherwise, the words in §287.220 "considered alone and of itself" were meaningless. Therefore, a claimant's pre-existing disabilities are irrelevant until employer's liability for the last injury is determined. And if a Claimant's last injury in and of itself renders a claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *See Huey v. Chrysler Corporation*, 34 S.W.3d 845 (Mo.App. 2000); *Keysior v. TransWorld Airlines*, 5 S.W.3d 195, 201 (Mo.App. 1999); *Maas v. Treasurer of Missouri*, 964 S.W.2d 541 (Mo.App. 1998); *Roller v. Treasurer of Missouri*, 935 S.W.2d 739, 741 (Mo.App. 1996).

Before making the determination of the effects of the last accident alone, however, it must be determined whether or not the Claimant's left knee condition and need for future treatment is attributable to the accident of 2002. Employer relies on the testimony of Dr. Allen Parmet for their assertion that Claimant's left knee condition is unrelated to her injury in 2002 to her right knee. Claimant relies on the testimony of Dr. Koprivica and Dr. George, as well as the report of Dr. Stuckmeyer for their assertion that the left knee is indeed related to Claimant's injury on the job to her right knee in 2002. As was stated earlier, some three to four months after her 2002 injury to her right knee, a physical therapy note on January 3, 2003, from HealthSouth reports an increase in edema in Claimant's left medial knee. The note also states "possibly secondary to an increase in function due to pain with the right knee." A December 11, 2002 note from HealthSouth also notes that one of the Claimant's problems is "abnormal gait." Thus, Claimant contends that her development of left knee symptoms are directly related to her overcompensating because she was forced to rely on her left knee due to her impaired right knee. Dr. Koprivica, Dr. Stuckmeyer, and Dr. George all opined that the Claimant's left knee problems were most likely due to this overcompensation and reliance on her left knee for the period of time that her right knee was immobilized or casted. Dr. Parmet, on the other hand, strongly disagreed as to the causal connection between the Claimant's knee symptoms and over-reliance on her left knee and instead found that all of her problems were caused by unrelated varicose veins. Having read the deposition testimony of Dr. Parmet and his explanations as well as the deposition testimony of Dr. George, I find Dr. George's testimony much more persuasive. Furthermore, both Dr. Koprivica and Dr. Stuckmeyer found and expressed their opinion that Claimant's overcompensation and overuse of her left knee were aggravating factors of her current symptomatology. Therefore, I find that the left knee is clearly related to the accident of August 2002 and that the Employer is responsible for any permanent disability the Claimant has in her left knee and is responsible for providing medical treatment to the Claimant's left knee.

As was stated earlier, the Employer has agreed to leave medical open with regard to the other conditions of ill in this case, but disputed their responsibility for the left knee. The Employer is hereby ordered to leave medical open on the left knee as well as the right knee, the left shoulder, and any and all of Claimant's problems related to being hit on the left side of her face. Employer is specifically ordered to provide Claimant to have an MRI of Claimant's left knee taken, as that was the recommended treatment by the physicians in this case. This apparently would help the

physicians delineate and to find exactly what is wrong with the Claimant's left knee, whether it's a torn meniscus or just exactly what the problems is as well as help them determine what course of treatment to take.

The last issue to be determined before the amount of disability resulting from the 2002 injury can be assessed is whether or not Claimant has any low back problems as a result of the accident of August of 2002. Only Dr. Koprivica assigns a disability rating to the Claimant's low back and he assesses a 5 percent disability rating and due mostly to her altered gait. The Claimant did complain of low back problems. Dr. Koprivica noted that Ms. Smith was having low back pain in June of 2004. He indicated that the low back pain impacted her tolerance as to sitting. On examination, the doctor found that the Claimant did suffer significant back pain. Dr. Koprivica opined in June of 2004 that the Claimant's development of chronic mechanical low back pain was a direct and natural consequence of her altered gait and need to intermittently use a cane. Although Claimant's low back pain is probably the most minimal condition resulting from the 2002 accident, I do find that she has some low back pain attributable to her continued altered gait. I find in accordance with Dr. Koprivica that she has sustained 5 percent permanent partial disability to the body as a whole referable to her low back, and that this disability is attributable to the 2002 accident.

I have found that the accident the Claimant suffered in 2002 caused significant injury to her left shoulder, right and left knee, low back, the left side of her face, her left ear and her head. These injuries have caused numerous restrictions and significant medical problems. The Claimant's treatment has included a partial rotator cuff tear of her left shoulder leading to surgery, a medial tibial plateau fracture and meniscus tear of her right knee leading to total arthroplasty, left leg and knee pain and possible future treatment to that knee, ringing in her left ear and various ongoing head, neck and back problems. I find Dr. Koprivica's testimony the more credible of the two experts in this case regarding the cause of the Claimant's total disability. I find that the results of that 2002 assault and injury in isolation would render the Claimant permanently and totally disabled under the Missouri workers' compensation law. Even Mr. Michael Dreiling who testified that the Claimant was permanently and totally disabled as a combination of the primary and pre-existing injuries indicated that the restrictions imposed by Dr. Koprivica for Mrs. Smith 2002 injury in isolation would have restricted her to sedentary work. Given the Claimant's limited educational and background and limited work experience, I find the Claimant would have been unable to return to any gainful employment due solely to the effects of the last injury. Therefore, the employer is liable for permanent total disability benefits to the Claimant for the remainder of her life.

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

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

Rebecca S. Magruder  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*