

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

Injury No. 08-122569

Employee: Ottavio Tarpeo  
Employer: New World Pasta  
Insurer: New Hampshire Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 17, 2014. The award and decision of Administrative Law Judge John K. Ottenad, issued September 17, 2014, 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 15<sup>th</sup> day of January 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

# AWARD

Employee: Ottavio Tarpeo

Injury No.: 08-122569

Dependents: N/A

Employer: New World Pasta

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: New Hampshire Insurance Company  
C/O F.A. Richard & Associates

Hearing Dates: April 24, 2014 & May 7, 2014  
Record Closed on May 24, 2014

Checked by: JKO

## 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 27, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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: Claimant worked as a pressman for Employer and injured his right and left knees as a result of the extensive, repetitive stair climbing he performed as a part of his job for Employer, operating the presses for over 35 years.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right Knee and Left Knee
14. Nature and extent of any permanent disability: 50% of the Right Knee and 55% of the Left Knee, plus 15% multiplicity load factor
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Ottavio Tarpeo

Injury No.: 08-122569

- 17. Value necessary medical aid not furnished by employer/insurer? \$137,212.74
- 18. Employee's average weekly wages: \$830.21
- 19. Weekly compensation rate: \$553.47 for TTD/ \$389.04 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

140 5/7 weeks of temporary total disability (06/03/2009 to 02/13/2012)	\$77,881.13
193.2 weeks of permanent partial disability	\$75,162.52

22. Second Injury Fund liability:

Second Injury Fund Claim denied	\$0.00
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**TOTAL: \$153,043.65**

23. Future requirements awarded: Future medical care, including but not limited to, yearly follow-up visits with a physician that performs knee replacement surgeries, as well as any other care and treatment that physician, or any other authorized referral physician, would determine is needed for Claimant's bilateral knees to cure and relieve Claimant of the effects of his bilateral knee occupational disease injury.

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

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

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

Employee:	Ottavio Tarpeo	Injury No.: 08-122569
Dependents:	N/A	Before the
Employer:	New World Pasta	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	New Hampshire Insurance Company C/O F.A. Richard & Associates	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
		Checked by: JKO

On April 24, 2014, the employee, Ottavio Tarpeo, appeared in person and by his attorney, Mr. Kurt C. Hoener, for a hearing for a final award on his claim against the employer, New World Pasta, its insurer, New Hampshire Insurance Company C/O F.A. Richard & Associates, and the Second Injury Fund. The employer, New World Pasta, and its insurer, New Hampshire Insurance Company C/O F.A. Richard & Associates, were represented at the hearing by their attorney, Mr. Robert N. Hendershot. The Second Injury Fund was represented at the hearing by Assistant Attorney General Kristin M. Frazier.

Along with this Claim [Injury Number 08-122569, with a date of injury of May 27, 2008, alleging injury to the right and left knees], Claimant also tried his other open companion claim at the same time. Injury Number 09-063651, with an alleged date of injury of March 20, 2009, alleges injury to the left ankle. Separate awards have been issued for each of these cases.

To allow the parties time to obtain evidence on the appropriate wage rate and rates of compensation for this case, the record was left open for a period of time not to exceed 30 days from the date of the start of the hearing. On May 7, 2014, the same parties referenced above appeared and entered stipulations into the record regarding the appropriate average weekly wage and rates of compensation for this case. They were, then, given the balance of the 30-day period to work on submitting their briefs or proposed awards in this matter. Although we did not go back on the record or take any further evidence in this matter after May 7, 2014, the record was, then, finally closed on May 24, 2014 and the briefs were submitted by the parties by June 13, 2014, pursuant to the agreement of the parties.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

**STIPULATIONS:**

- 1) On or about May 27, 2008, Ottavio Tarpeo (Claimant) allegedly sustained an occupational disease.
- 2) Claimant was an employee of New World Pasta (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) The Claim was filed within the time prescribed by the law.
- 5) At the relevant time, Claimant earned an average weekly wage of \$830.21, resulting in applicable rates of compensation of \$553.47 for total disability benefits and \$389.04 for permanent partial disability (PPD) benefits.
- 6) Employer has not paid any benefits to date.

**ISSUES:**

- 1) Did Claimant sustain an occupational disease?
- 2) Did the occupational disease arise out of and in the course of Claimant's employment for Employer?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged occupational disease at work leading up to May 27, 2008?
- 4) Did Claimant provide Employer with proper notice of the injury under the statute?
- 5) Is Employer responsible for the payment of past medical benefits in an amount to be determined?
- 6) Is Claimant entitled to future medical care on account of this work injury?
- 7) Is Claimant entitled to the payment of temporary total disability benefits for a period of time to be determined?
- 8) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?
- 9) What is the liability, if any, of the Second Injury Fund?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

- A. Certified medical treatment records of Midwest Health Professionals, P.C.
- B. Certified medical treatment records of Midwest Health Professionals, P.C.
- C. Certified medical treatment records of Dr. Saad Khan
- D. Certified medical treatment records of Dr. Saad Khan
- E. Certified medical treatment records of Signature Health Services, Inc.
- F. Medical bills of Signature Health Services, Inc.
- G. Certified medical treatment records of Tesson Heights Orthopaedic & Arthroscopic Associates, P.C.
- H. Medical bills of Tesson Heights Orthopaedics
- I. Certified medical treatment records of Dr. Steven Stahle
- J. Certified medical bills of Dr. Steven Stahle
- K. Certified medical treatment records of U.S. Center for Sports Medicine
- L. Medical bills of Professional Athletic Orthoped
- M. Certified medical treatment records of U.S. Center for Sports Medicine
- N. Certified medical bills of U.S. Center for Sports Medicine
- O. Certified medical treatment records of Advanced Ambulatory Surgical Care
- P. Certified medical bills of Advanced Ambulatory Surgical Care
- Q. Certified medical treatment records of Des Peres Hospital
- R. Certified medical bills of Des Peres Hospital
- S. Certified medical treatment records of PRORehab, P.C.
- T. Medical bills of PRORehab, P.C.
- U. Certified medical treatment records of Watson Imaging Center
- V. Certified medical treatment records of Watson Imaging Center
- W. Certified medical treatment records of St. Anthony's Medical Center
- X. Certified medical treatment records of Metropolitan Orthopedics, LTD
- Y. Certified medical bills of Metropolitan Orthopedics, LTD
- Z. Medical report of Dr. Bruce Schlafly dated November 29, 2011
- AA. Deposition of Dr. Bruce Schlafly, with attachments, dated October 11, 2012
- BB. Vocational report of Mr. James England dated March 7, 2012
- CC. Deposition of Mr. James England, with attachments, dated September 27, 2012
- DD. *Objections sustained—Not admitted into evidence in this case*
- EE. *Objections sustained—Not admitted into evidence in this case*

***Employer/Insurer Exhibits:***

- 1. Deposition of Dr. Richard Rende, with attachments, dated October 16, 2012
- 2. *Withdrawn by Employer/Insurer prior to admission*
- 3. *Withdrawn by Employer/Insurer prior to admission*
- 4. Records regarding a May 30, 1994 left knee work injury
- 5. Employer Response to Employee Request for Family or Medical Leave dated June 11, 2008

6. Claimant's short term disability application with Employer dated April 28, 2009
7. Claimant's Nissan Forklift Knowledge Evaluation (test) dated February 7, 2008
8. Computer notes of Earleen Ehlers and John McGrath from Employer
9. Claimant's time records from Employer from March 2009
10. Claimant's FMLA time records from Employer from 2007-2009
11. Employer's Short Goods Press Monitoring Log

***Second Injury Fund Exhibit:***

- I. Excerpt of Claimant's deposition from January 2014, pages 21-23

***Notes:*** 1) Unless otherwise specifically noted below, any objections contained in the deposition exhibits are overruled and the testimony is fully admitted into evidence in this case.

2) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on April 24, 2014.

**EVIDENTIARY RULINGS:**

At the time of hearing, objections were raised on the record regarding the admission of Employee's Exhibits DD and EE. Exhibit DD is an Affidavit, written in Italian, regarding the death of Claimant's father and Exhibit EE is a document from the Social Security Administration that basically indicates the amount and timing of the benefits Claimant will receive from the Social Security Administration. Objections as to relevance and foundation were raised by opposing counsel on the record at the time of trial. Having now had the opportunity to review the exhibits in detail and consider the objections, I *SUSTAIN* the objections as to both of these exhibits and will not admit them into evidence in this matter for that reason.

As for the Affidavit (Exhibit DD), although it is written in Italian, it was translated on the record by the Italian/Sicilian translator present for the trial testimony. It is apparently the affidavit of some of Claimant's siblings, discussing their father's death over 40 years ago and what medical conditions he may or may not have had at the time. Based on the dates in the affidavit, at least one of the siblings was a child at the time of his death. This affidavit obtained in 2012, was clearly obtained in anticipation of litigation. Neither Employer/Insurer nor the Second Injury Fund had any opportunity to cross-examine the affiants on the basis of their statements contained in the affidavit, and, quite frankly, there is no discussion in the affidavit as to the basis of their knowledge in this regard either. There is no indication that they have any medical knowledge, nor had any access to their father's medical records, to know what he may or may not have treated for during his life.

As for the Social Security Administration document (Exhibit EE), I find that the exhibit, as offered, amounts to nothing more than documentation of the amount and timing for the benefits Claimant will receive from Social Security, as well as a discussion of Claimant's responsibilities. There is no indication in the document as to the reasoning for, or basis of, their decision. That being that case, I find that this document amounts to nothing more than a

discussion of payments Claimant will receive from a collateral source, which has absolutely no relevance to any of the matters at issue in this Claim.

For all of these reasons, the objections regarding Exhibits DD and EE are *SUSTAINED* and the exhibits are not admitted into evidence in this matter.

### **FINDINGS OF FACT:**

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational expert opinion and deposition, the medical records, the medical bills, the other records, and the testimony of the other witnesses, as well as based on my personal observations of Claimant and the other witnesses at hearing, I find:

- 1) **Claimant** is a 64-year-old, currently unemployed individual, who worked as a pressman for approximately 35 years for one employer, first named R&F, then Borden, and finally New World Pasta (Employer). Claimant last worked approximately five years ago and stopped working because he was having surgery on his knee. He was hoping to be able to work until he was 65 years old.
- 2) Claimant testified that he was born in Sicily and came to the United States in 1971. He said that he only had a fifth grade education in Sicily and no other specialized training. Claimant testified that his English is limited. He never tried to take formal lessons, but only learned some English from television or from personal contacts. He said that he mostly spoke Sicilian and only a little English at Employer's plant. He acknowledged that he watches television programs in English, but he said that he only understands a word here and there.
- 3) On cross-examination, Employer tried to show that Claimant had a better grasp of English than he testified to on direct. Claimant admitted that he has had a Missouri driver's license since 1971, but noted that an Italian translator helped him obtain that. Claimant was presented with a **Nissan Forklift Knowledge Evaluation test** (Exhibit 7) that he took on February 7, 2008, which was all in English and required mostly true or false answers to be circled. He admitted that he took that test, but then noted that someone helped him do the forklift test, not only translating the questions for him, but telling him which answers to circle as well.
- 4) Claimant testified that his father was a farmer in Sicily. He said his father died of a heart condition, but he had no problems with his knees or with arthritis. He admitted that he never reviewed his father's medical records and his father did not come to the United States with him.
- 5) Claimant testified that as a pressman for Employer his job duties included operating the presses and going up and down stairs every 15 minutes to check the troughs and control how the pasta was being made with the mixing of the flour and semolina. Three to four times an hour, eight hours a day, five days a week, he would go up and down the 12 stairs to check the presses and ensure that they were running properly.

He said that there was a catwalk between the machines so that he could check the three he was responsible for running. He noted that when he first started there, it was actually 12-hour days. He said that twice a month, the whole time he was there, they also worked seven days a week. He testified that when he was not on a press, he was checking to see if the spaghetti was dry. He was always standing on a cement floor, with no mats or other padding on it.

- 6) **John McGrath** testified on Employer's behalf at the time of hearing. Mr. McGrath worked as a production supervisor for Employer in 2007 and 2008. He confirmed that Claimant worked for him and he was responsible for monitoring the daily work from Claimant. Mr. McGrath confirmed that a press operator, like Claimant, was responsible for running three presses. He said that a press operator monitors a screen or control panels at ground level while standing. He said that Claimant never required assistance to do his job that he could recall, and he never had any problems with Claimant's work. He explained the process of making the mix into dough, with the dough then extruded into pasta, followed by drying it. A press operator was responsible for monitoring the machines to make sure they ran properly. As far as an operator's need to climb the stairs on the machines, he estimated that if a machine was running properly, then an operator would only have to climb the stairs three to five times per shift, but if it was not running properly, then he would have to climb more often.
- 7) Mr. McGrath explained that the **Short Goods Press Monitoring Log** (Exhibit 11) is the form that press operators complete as they work. He explained that the form indicated the minimum number of checks on the machines was once every two hours. He said that the press operators fill out that form during their shift and give it to their supervisor. Claimant acknowledged that he had seen this form at work, but he said an Italian co-worker read the monitoring document to him. Claimant testified that no one told him to only check the presses one time every two hours. He noted, however, that checking more often, like he did, helped keep the pasta machines running. On cross-examination, Mr. McGrath acknowledged that there was no maximum number of times that an employee could go up to check on the machines and he does not know how many times Claimant actually climbed the presses to check on them during his shift. He simply believed that climbing more than two to four times a shift was not a regular occurrence for operators.
- 8) Claimant testified that he first started noticing problems with his knees in approximately 2007. He weighed approximately 177 pounds at the time and said that his weight was always around that same number prior to the onset of the knee problems. However, since the knee problems, and specifically after the first operation, his weight has gone up to approximately 250 pounds. He testified that his weight went up after he was put on the depression medications from Dr. Khan after the knee problems started.
- 9) Claimant testified that Dr. Khan treated him for depression in 2007 with medications. He admitted that the medications made him feel a little bit better. He said that he was diagnosed with depression because of working too much. He had three work

positions to handle and it became too much for him. He felt bad. He said that because work was too overwhelming for him, he would have his supervisor help him or send a co-worker to help him complete his work tasks. Despite admitting that he needed help to complete his job after the depression diagnosis and did not previously need such help, he denied that the depression was interfering with his job.

- 10) Medical treatment records from **Midwest Health Professionals, P.C.** (Exhibit A) begin on June 9, 2006 with a visit for complaints diagnosed as social anxiety disorder or possibly generalized anxiety disorder, for which he is given medications. He was reporting problems in social situations, although he was continuing to work. His weight was reported throughout 2006 and into early 2007 as ranging from 170-182 pounds. He continued to treat for this condition into 2007 and also began seeing **Dr. Saad Khan** (Exhibits C and D) for his psychiatric complaints in 2007. When Dr. Khan first examined Claimant on April 16, 2007, he noted that Claimant had been admitted into St. Anthony's Medical Center on December 31, 2006 for attempted suicide. He diagnosed Claimant with severe major depression and prescribed medications and follow-up visits. Dr. Khan has continued to see Claimant regularly up through February 10, 2014, with complaints that have ranged from normal to slight to moderate depression during the period, making adjustments to his medication regimen to try to gain good relief of his psychiatric issues/complaints.
- 11) Claimant testified that he started with pain in his knees that made it difficult to walk. It also prevented him from doing his normal job duties. He described that the knee pain got worse during the work week and while he was performing his job duties. He said that the knee pain worsened over the next several years after 2007. He could not remember when he first talked to Employer about his knee problems. He admitted that he treated on his own for his knees.
- 12) Claimant testified that he first saw Dr. Buck in 2007 with pain in his knees, left greater than right. He said he received an injection in his left knee and medications (pain and anti-inflammatory). He was examined by Dr. Doerr in 2008 with pain in his knees. Dr. Doerr injected the left knee, ordered an MRI and recommended surgery, but the surgery was not done at that time. Claimant testified that he continued to work for Employer in 2008 and into early 2009.
- 13) The first clear reference to knee complaints that I found in the medical treatment records of **Midwest Health Professionals, P.C.** (Exhibit A) was on July 2, 2007, when Claimant reported to **Dr. Denise Buck** that his knees were hurting more in the evening and he was using extra strength glucosamine. He said that he was having trouble walking and reported that he climbs lots of stairs at work. X-rays taken on July 5, 2007, revealed minimal osteoarthritis in the right knee and tri-compartment osteoarthritis, worse in the medial compartment, in the left knee. When Claimant continued to complain of knee pain on January 28, 2008, additional X-rays were taken showing no significant change from the last ones (moderate narrowing on the right side and moderately-severe narrowing on the left side), so Dr. Buck prescribed some pain medication in addition to the naproxen that he was already taking. She injected the left knee on February 5, 2008 and Claimant reported that the injection helped for a

- couple weeks, but the knee pain returned. Claimant continued to have bilateral knee pain. Other than the reference to Claimant climbing a lot of steps at work, I found no discrete opinion from the doctor in these records that the bilateral knee complaints were related to his job activities for Employer or not.
- 14) When Claimant's bilateral knee complaints continued, Dr. Buck referred Claimant to **Dr. Dale Doerr** (Exhibit E) for evaluation and treatment. Dr. Doerr first examined Claimant on May 27, 2008. He diagnosed degenerative arthritic changes of both knees, left worse than right, and injected the left knee. When Claimant returned on July 11, 2008, reporting that the injection did not provide long-term relief, Dr. Doerr ordered an MRI of the left knee, which showed degenerative arthritic changes, as well as a tear of the posterior horn of the medial meniscus. On July 18, 2008, it appeared as though he was suggesting surgery, but that was not scheduled in the short term, apparently because Claimant was unable to get off work for that purpose. Claimant was next seen by Dr. Doerr on March 25, 2009.
- 15) Claimant testified that he saw Dr. Buck for left ankle pain in 2009. He said that he had swelling, and X-rays were ordered. He testified that there was no specific accident or incident that caused the onset of the left ankle problems. Claimant said that he treated at St. Anthony's and with Dr. Doerr for the left ankle. He said that an MRI revealed a fracture of the distal tibia and he was placed in a boot to allow the fracture to heal. He said that he never returned to work after the left ankle issues, but his failure to return to work was because his knees hurt.
- 16) Medical treatment records from **Midwest Health Professionals, P.C.** (Exhibit B) document a visit on February 20, 2009 for left ankle pain with standing that had been present for two weeks. There was no injury or trauma reported to cause the pain and swelling in the ankle. The notes indicate that it gets better with rest, but worse with standing, and he has swelling by the end of the day. Claimant was diagnosed with left ankle pain, treated conservatively with medications, and had a venous Doppler study ordered to rule out blood clots as the cause of the pain. The left lower extremity venous Doppler ultrasound was performed at **Watson Imaging Center** (Exhibits U and V) on March 20, 2009 and showed no evidence of deep venous thrombosis.
- 17) When Claimant returned to see Dr. Doerr on March 25, 2009 (Exhibit E), he was still complaining of knee problems, but now also pain in the left ankle. Dr. Doerr indicates, "The patient has no history of injury to the left ankle." He reported an onset of pain in the left ankle a few days before and an inability to walk. X-rays from **St. Anthony's Medical Center** (Exhibit W) on March 24, 2009 were negative for fracture and showed only mild osteopenia. Dr. Doerr thought there was perhaps a partial tear, or at least, Achilles tendonitis in the left ankle. An MRI and X-rays performed by Dr. Doerr on April 7, 2009, showed a long oblique stress fracture of the distal tibia. Claimant was placed in a walking cast brace to allow the fracture to heal. By May 26, 2009, Dr. Doerr reported that the stress fracture was healing and minimally displaced, but Claimant had less complaints of pain, so Dr. Doerr allowed weight-bearing in his regular shoe.

- 18) Claimant testified that he began treating with Dr. Benz in June 2009 for his knees. He received injections in both knees and ultimately, after a second opinion from Dr. Stahle, had surgery and knee replacements for each knee. In fact, Claimant testified that he has had three knee replacement surgeries for the left knee. His most recent knee replacement on the left side was performed by Dr. Mudd on February 12, 2014 and he was still in therapy for the left knee.
- 19) The medical treatment records of **Dr. Stephen Benz** (Exhibit G) confirm that he first examined Claimant on June 3, 2009, with a complaint of left greater than right knee pain present for years. The note indicates that Claimant walks a lot with his job and does a lot of stair climbing. X-rays showed a significant amount of degenerative arthritis in all three compartments and the physical examination showed crepitus and severely restricted range of motion. Dr. Benz opined that Claimant needed total knee replacements, but suggested possibly trying Synvisc injections first to see if that helped. He believed a knee arthroscopy would be “a total waste of time.” After the Synvisc injection in each knee did not help his complaints, Dr. Benz recommended joint replacement surgery for Claimant. He took Claimant off work from June 3, 2009 “until further notice.”
- 20) Before proceeding with surgery, Claimant had a second opinion examination with **Dr. Steven Stahle** (Exhibit I) on July 14, 2009. Claimant again reported pain in both knees and again reported that when he goes up and down steps at work, they are sore. Dr. Stahle diagnosed bilateral knee degenerative joint disease and meniscus damage. He ordered MRIs of the knees to assess the damage. The MRIs of the knees taken on July 15, 2009, showed extensive cartilage loss, chondromalacia with chondral erosion, and meniscus and ligament damage in each knee.
- 21) Following the MRIs, Dr. Stahle referred Claimant to **Dr. Corey Solman** (Exhibits K and M) for evaluation and treatment. Dr. Solman examined Claimant on July 22, 2009. Claimant presented with chronic bilateral knee pain, with an onset two years earlier. Claimant reported that his condition is worsened with climbing up and down inclines or stairs. He denied any precipitating event, but noted that he worked at a pasta plant and “feels that some of the pain may be due to walking up and down stairs for 37 years.” Dr. Solman diagnosed bilateral knee osteoarthritis and degenerative medial meniscus tears. He recommended an arthroscopic surgery on the right knee, but acknowledged that a knee replacement may still be necessary in the future. Dr. Solman noted, “Also he and his wife understand that this is NOT a work related condition, as he has no work related injuries or surgeries that would predispose him to arthritis other than normal chronic progressive degeneration of the knees.”
- 22) Dr. Solman took Claimant to surgery on August 4, 2009 at **Advanced Ambulatory Surgical Care** (Exhibit O). He performed a right knee arthroscopy, partial medial meniscectomy and chondroplasty of the trochlea, patella and medial femoral condyle, to treat Claimant’s right knee osteoarthritis, grade IV chondromalacia and medial meniscus tear. Despite the surgery, a course of physical therapy, a knee brace and a cortisone injection, he still had pain complaints as he continued to follow up with Dr. Solman. Dr. Solman continued his off-work status starting in August 2009. Claimant

was hopeful that he could return back to work with the knee brace, but instead, he ended up having the right total knee arthroplasty performed by Dr. Solman at **Des Peres Hospital** (Exhibit Q) on November 20, 2009 to treat his end-stage osteoarthritis of the right knee. Claimant attended a course of physical therapy and continued to follow up with Dr. Solman through March 22, 2010, reporting some improvement in his complaints and increased function in the right knee following the knee replacement surgery. He still had some weakness and occasional soreness, as well as trouble going up and down stairs, which the doctor noted was a “major part of his job which he has done for the last thirty-seven years at the pasta plant that he works at.” Dr. Solman recommended continued physical therapy to see if he could improve his ability to go up and down stairs. Dr. Solman noted that if he did not improve in this regard, then Claimant may not be able to go back to his normal job at the plant, but perhaps a different job that did not require so much work on stairs. By May 24, 2010, Claimant was doing well with the right knee, but no longer had a job with Employer. Dr. Solman suggested that he continue with his home exercise program and continue to work on regaining his strength, to see whether or not he was capable of returning to any gainful employment.

- 23) Physical therapy records from **PRORehab, P.C.** (Exhibit S) document the physical therapy Claimant received at the direction of Dr. Solman from August 6, 2009 through March 15, 2010.
- 24) Claimant returned to Dr. Solman on November 15, 2010, reporting that his right knee was doing well and he was ready to have his left knee replacement surgery scheduled. Dr. Solman (Exhibit M) performed a left total knee arthroplasty on Claimant on January 14, 2011 at Des Peres Hospital to treat Claimant’s left knee osteoarthritis. On February 9, 2011, Dr. Solman noted that his left knee was doing fairly well, but Claimant had been hospitalized twice since the left knee surgery for congestive heart failure, atrial fibrillation and recurrent dizziness. He continued Claimant in physical therapy for the knee. When Dr. Solman discovered on March 14, 2011 that Claimant had some swelling and stiffness in the knee, he scheduled a closed manipulation of the left total knee arthroplasty under anesthesia, which he performed on March 17, 2011 at Des Peres Hospital, to treat Claimant’s mild arthrofibrosis in the left knee. Dr. Solman kept Claimant in physical therapy to work on range of motion. On May 2, 2011, Dr. Solman found some continued pain and swelling in the left knee, which he believed was attributable to a loose lateral joint fragment. He took Claimant back to surgery on May 5, 2011 at Des Peres Hospital for a removal of a foreign body from the subcutaneous tissue of the left knee. Claimant showed improvement in terms of pain, swelling and function following this third procedure. Dr. Solman was continuing to find pitting edema in his legs and complaints of dizziness for which he recommended Claimant see his personal physician.
- 25) When Claimant continued to have left knee pain and intermittent swelling on September 26, 2011, Dr. Solman suggested a need to perhaps revise the knee replacement, since he may have some loosening in the knee, resulting in the continued pain. On November 15, 2011, Dr. Solman took Claimant back to surgery again at Des Peres Hospital and performed a revision of the tibial component of the left total knee

arthroplasty, to treat Claimant’s aseptic loosening of the tibial component of the total left knee arthroplasty. As Claimant continued to follow up with Dr. Solman after this last surgery, he was reporting improvement in the left knee, but by January 9, 2012, he was having a lot of lower back and SI joint pain. Dr. Solman diagnosed lumbar spine osteoarthritis/spondylosis, sacroiliac joint pain and mild bilateral hip osteoarthritis. At the last visit with Dr. Solman on February 13, 2012, he was doing better with the left knee, but needed an injection into the IT band area of the left knee because of pain on the lateral side of the knee.<sup>1</sup>

- 26) Claimant acknowledged that he developed low back pain that was first treated after his knees became symptomatic. He said that he has pain with sitting too long or getting up. He also admitted that he was recently diagnosed with vertigo since he stopped working for Employer.
- 27) Claimant was examined by **Dr. Christopher Mudd at Metropolitan Orthopedics, LTD.** (Exhibit X) on December 17, 2013. Claimant was still complaining of left knee pain, especially with doing stairs. Dr. Mudd recommended additional tests to try to determine the etiology of his complaints, but he did not see any obvious mechanical or radiographic reason to consider another revision surgery on the left knee. When Claimant returned on January 13, 2014, Dr. Mudd noted that the bone scan showed increased uptake diffusely in the left knee, lateral tibial plateau and medial femoral condyle, suggesting either loosening or infection. The knee was aspirated to rule out infection, and if no infection was found, then Dr. Mudd was going to perform a revision knee arthroplasty.<sup>2</sup>
- 28) Claimant submitted into evidence a number of medical bills and the corresponding medical records described above, for the care and treatment he received for his alleged bilateral knee work injury. The bills submitted into evidence are as follows:

Signature Health Services, Inc. (Exhibit F)	\$2,896.00
Tesson Heights Orthopaedics (Exhibit H)	\$3,183.00
Dr. Steven Stahle (Exhibit J)	\$319.00
U.S. Center for Sports Medicine (Exhibit N)	\$39,097.75 <sup>3</sup>
Advanced Ambulatory Surgical (Exhibit P)	\$11,216.00
Des Peres Hospital (Exhibit R)	\$64,037.10
PRORehab, P.C. (Exhibit T)	\$15,639.89
<u>Metropolitan Orthopedics, LTD (Exhibit Y)</u>	<u>\$824.00</u>
Total charges	\$137,212.74

<sup>1</sup> It should be noted that while Claimant placed in evidence the Des Peres Hospital records and bills for the November 20, 2009 right knee replacement surgery, no such records or bills from Des Peres Hospital were placed in evidence for the multiple surgical procedures performed on the left knee by Dr. Solman at that facility in 2011.

<sup>2</sup> Based on Claimant’s testimony, it appears that Claimant had the additional revision surgery suggested by Dr. Mudd, but the record of evidence does not contain any medical records or bills for the hospitalization or surgery.

<sup>3</sup> Claimant also submitted into evidence medical bills from Dr. Solman under the name of Professional Athletic Orthoped (Exhibit L). In comparing those charges to the bills contained in Exhibit N, I find that all of the charges in Exhibit L have exact duplicate charges in Exhibit N. Therefore, I am not including any charges from Exhibit L to prevent duplicate bills from being considered in the record.

- 29) Claimant also submitted into evidence some medical bills and the corresponding medical records described above, for the care and treatment he received for his alleged left ankle injury. The medical bills from Signature Health Services, Inc. (Exhibit F) totaled \$3,678.00.
- 30) Regarding his current condition/complaints with his knees, Claimant testified that his left knee hurts so much that he can hardly walk on it. He is in constant pain and can only stand or walk for about five minutes around the house. He limps now. He said that he also has limited movement in the knee because of the pain. He admitted that his right knee moves better than his left, but he is still unable to kneel like he once could. He described that he sits down in a recliner and elevates his knees to relieve the pain. Claimant said that he must stop on every step as he is climbing stairs, so it takes a long time to climb stairs. He said that he cannot work or do anything else because of his knees. He used to work around the yard, trim bushes, cut grass and help his wife around the house, but he cannot do any of that anymore.
- 31) In terms of his current medications, he said that he takes medication for depression and one or two medications for pain. He said that his wife takes care of his medications for him. He admitted that the medications make him feel a little better, but once in a while he gets dizzy from them.
- 32) Claimant described his daily activities now as getting up, eating breakfast, watching television in a recliner, having lunch, sitting down again and watching more television until dinner, having dinner, watching more television, and, then, going to bed. He said that he could not return to work for Employer because he cannot walk with his knees the way they are now. He said that he has always done physical work and does not know what he would be able to do in his current condition.
- 33) On cross-examination, Claimant admitted that his first treatment for the left knee was actually in 1994. **Records regarding a May 30, 1994 left knee work injury** (Exhibit 4) show that Claimant received a brief period of conservative treatment for a left knee strain. There was also a mention in those records of degenerative osteoarthritis changes in the left knee. Claimant received no payment of disability on the left knee at that time. Claimant also admitted that he was hospitalized for depression for two weeks in 2007 and missed work during those two weeks on account of his depression treatment. He admitted that he applied for a leave of absence for his left knee pain from Employer in May 2008, but he did not remember if he said it was work related or not. He noted that it was only for a period of two days.
- 34) The deposition of **Dr. Bruce Schlafly** (Exhibit AA) was taken by Claimant on October 11, 2012 to make his opinions in this case admissible at trial. Dr. Schlafly is a board certified orthopedic surgeon, with added qualifications in hand surgery. He examined Claimant on one occasion, November 29, 2011, at the request of Claimant's attorney and issued his report on that same date (Exhibit Z). Interestingly, Claimant was still in a wheelchair at the time of Dr. Schlafly's examination, having just had a left knee surgery two weeks earlier. He was still under follow-up treatment from the surgeon for the left knee. Dr. Schlafly took an extensive history from Claimant of his

work activities, problems and complaints, as well as the medical treatment he received. That history included a description of the work activities, walking and climbing stairs repetitively, that he performed for Employer for over 35 years. The history from Claimant also included a description of an injury in 2009, when his right knee gave out and he jammed his left lower leg against the steps at work. Claimant denied any ongoing complaints or problems with the left lower leg. Dr. Schlafly also reviewed extensive medical records regarding treatment he received. His physical examination of Claimant revealed swelling at the knees, left greater than right, and surgical scars consistent with the bilateral knee surgeries. Dr. Schlafly did not ask Claimant to get out of the wheelchair, so there were some range of motion measurements on the right knee, but none for the left knee.

- 35) Dr. Schlafly diagnosed a torn medial meniscus of each knee, a torn anterior cruciate ligament of the left knee and medial collateral ligament strain of the right knee, as well as cartilage loss with arthritis of the knee, status post left total knee replacement and revision surgery, and right knee arthroscopic partial medial meniscectomy followed by right total knee replacement. Dr. Schlafly also diagnosed a stress fracture of the left distal tibia, which he found to be completely healed and asymptomatic. As for the stress fracture, Dr. Schlafly opined that it probably arose from altered gait, due to arthritis of the right knee, but the stress fracture was appropriately treated and completely healed, with no residual disability associated with the stress fracture of the distal tibia. Dr. Schlafly was “uncertain about any separate work injury that produced the stress fracture of the left leg.” However, he testified in deposition that a stress fracture is caused by repetitive exposure to the forces, such as going up and down stairs, and, in that respect, believed it to be related to Claimant’s work for Employer. As for the bilateral knee condition, Dr. Schlafly opined that Claimant’s unusually repetitive work climbing up and down metal stairs for Employer, is the prevailing factor in the cause of the torn cartilage in the knees, and as a result of the torn cartilage, Claimant developed progressive arthritic changes in the knee joints, producing progressively increasing pain in the knees, forcing Claimant to seek treatment for the knees. He believed Claimant’s work for Employer was the prevailing factor in the need for the bilateral total knee replacements, as well as the other knee treatment.
- 36) Dr. Schlafly rated Claimant as having permanent partial disabilities of 55% of the right knee and 70% of the left knee, further opining that the work injury dated May 27, 2008 is the prevailing factor in the cause of these knee disabilities. Since there was disability in each knee, Dr. Schlafly opined that a condition of multiplicity exists, which should be compensated by a loading factor applied to these knee disabilities. He believed Claimant was unable to return to his previous job for Employer, because of his knees, and limited Claimant to sedentary work. He opined that Claimant was limited to sedentary work since he developed the stress fracture in his left leg. Finally, he opined in his report, “I have no opinion regarding pre-existing disability due to depression. I have no opinion regarding Mr. Tarpeo’s need for any future medical care, other than physical therapy, for the left knee.” However, in his deposition, Dr. Schlafly was asked about Claimant’s need for future medical treatment, and he responded, “Nothing specific that I can indentify.”

- 37) On cross-examination, Dr. Schlafly admitted that some of the findings on the physical examination would be expected given his recent left knee surgery and he would also expect the complaints and function to improve for several months after the surgery. He acknowledged that he has not seen any more recent medical records and does not know anything about Claimant's condition subsequent to his examination on November 29, 2011. He simply rated Claimant's permanency as of that date, further acknowledging that Claimant had not completed treatment and was not yet at maximum medical improvement for the left knee. He also confirmed that he did not even evaluate, nor rate, any pre-existing conditions (depression or high blood pressure).
- 38) The deposition of **Dr. Richard Rende** (Exhibit 1) was taken by Employer on October 16, 2012 to make his opinions in this case admissible at trial. Dr. Rende is a board certified orthopedic surgeon, who has performed about 12,000 total knee replacement surgeries. He examined Claimant on one occasion, June 19, 2012, at the request of Employer's attorney, and issued his report on that same date. He took a history from Claimant, reviewed the medical treatment records and performed a physical examination of Claimant, in reaching his conclusions in this case. Overall, Claimant reported that his right knee was doing better than his left knee. Based on the description of some of his complaints, Dr. Rende concluded that some of his pain going down the left leg into the foot, is actually coming from the low back, not the knee. Dr. Rende found excellent range of motion in the right knee and good range of motion in the left knee, with no effusion and good stability. Dr. Rende opined that Claimant's bilateral knee condition is related to severe degenerative osteoarthritis, a condition of aging and wear and tear. He did not believe it was a work-related condition. He suggested that Claimant told him his father was very impaired because of severe arthritis, and, so, Claimant's condition was more related to genetics and his weight, than to repetitive trauma at work.
- 39) In his report, Dr. Rende opined that Claimant reached maximum medical improvement and was not in need of any further care for either knee. However, on direct examination, Dr. Rende opined, "whenever you have knee replacements, you always need yearly follow-up visits with the physician that placed the knee replacements. In the sense that they would require yearly follow-up visits, he would need additional care." He did not provide any ratings of disability and opined that Claimant could work with permanent restrictions of no kneeling, squatting or climbing repetitively, and no running, jumping or lifting in excess of 50 pounds. He described these restrictions as "typical" for anyone with knee replacement procedures.
- 40) On cross-examination, Dr. Rende agreed that recurrent stress to the knee joint could contribute to osteoarthritis. He agreed that going down stairs increases the stress on a person's knees, as does going up stairs, but not at the same level as descending. He even agreed that studies have shown that going up and down stairs has a potential for aggravating a pre-existing arthritic condition. However, he continued to opine that osteoarthritis is a wear-and-tear process that is directly related to age. Dr. Rende admitted that he took into account the recurrent stress that Claimant's knees were

exposed to at work as a part of the wear and tear that caused Claimant's knee condition, but he still did not think the work exposure was the prevailing factor. He admitted that the history Claimant gave him of his father having arthritic problems was not contained anywhere in his notes, which he used to produce his report, but he insisted that Claimant told him that. There was a discussion of the difference between risk factors and causation, and when confronted with questions about whether his opinion would change, if his assumptions on Claimant's weight and genetics were incorrect, he testified that the opinion would not change. Finally, he admitted that, "It's reasonable that his work may have hastened his osteoarthritis but not caused it." I should also note that during cross-examination, Dr. Rende became rather combative and refused to explain a basis for one of his opinions, indicating, "I don't feel I need to explain it to you. I'm the orthopedic knee specialist, you aren't."

- 41) The deposition of **Mr. James England, Jr.** (Exhibit CC) was taken by Claimant on September 27, 2012 to make his opinions in this case admissible at trial. Mr. England is a certified vocational rehabilitation counselor. He met with Claimant on one occasion, February 29, 2012, at the request of Claimant's attorney. He reviewed extensive medical treatment records; took a family, social, educational and vocational history from Claimant; administered vocational testing; determined his functional restrictions/limitations; and then issued his report dated March 7, 2012 (Exhibit BB). Mr. England did not believe that Claimant had any usable, transferable skills to jobs at the light or sedentary levels of exertion. He found that Claimant is functionally illiterate in English and scored at the fourth-grade level in math. He determined that his academics would not be sufficient to allow Claimant to handle even entry-level service employment. He acknowledged that Dr. Schlafly limited Claimant to a sedentary level of work activity. Considering his lack of transferable skills, his age, education, inability to read or write effectively, limitation to sedentary work, and need to elevate his leg a good part of the day, Mr. England concluded that Claimant was not competitively employable.
- 42) When asked at deposition about the reasons Claimant is unable to compete in the open labor market, Mr. England replied that, "it would be due to the combination of the effects of the knee problems, in combination with his limited education, his inability to effectively communicate in English, or to read and understand in English. It's the combination of those things, I think, with the physical problems, that would totally disable him." He testified that the depression he found references to in Claimant's medical records "wasn't something that I considered as a limiting factor." Therefore, it was not a factor he included in determining that Claimant was unemployable. Mr. England described the difficulties that Claimant would have even trying to get a GED, because of his age, his limited education in his country of origin, and his inability to communicate in English. However, nowhere in his report or testimony was there any opinion, or even suggestion, that Claimant was unable to learn English or get a GED because of some mental defect or disability, just that it would be difficult given his age and failure to learn English already.
- 43) Mr. McGrath denied that Claimant ever reported knee pain to him from doing his job. He said that on March 24, 2009, Claimant complained to him about having problems

walking and said he needed to go home. He said that he sent the e-mail on April 7, 2009 (Exhibit 8) because the company has a policy about reporting injuries and wanted to make it clear that Claimant did not report an injury, and, in fact, denied that he injured himself at work. Mr. McGrath testified that Claimant never said he was leaving for a work-related injury.

- 44) **Earleen Ehlers**, Employer's Human Resources Manager, also testified live at trial for Employer. She is responsible for all of the workers' compensation, FMLA, hiring, firing, and short and long term disability for Employer. She acknowledged that she spoke mostly to Claimant's wife, not Claimant, about the various issues with his claimed injury and other benefit applications. Regarding his time actually worked, as opposed to taking off for FMLA, Ms. Ehlers showed in Exhibits 9 and 10, that Claimant took off completely for FMLA from January through May 2007, worked full time until May 2008, when he missed two days for FMLA for his knees (Exhibit 5), and again worked full time until March 2009, when he went out on FMLA on March 24, 2009, received short term disability for 26 weeks, then long term disability, but never returned to work. Interestingly, although the **FMLA paperwork** (Exhibit 5) was dated June 11, 2008, and only had a doctor's note for two days in May 2008 attached to it, it was back dated to January 1, 2007 to apparently pull in that time from 2007 even though no prior FMLA paperwork had been filed for that time period at or around the time the lost time occurred.
- 45) With regard to his second claimed injury from 2009, Ms. Ehlers showed on **the time logs** (Exhibit 9) that Claimant was not even working on March 20, 2009. He was not even scheduled to work that day. A review of **Employer's computer notes** (Exhibit 8) shows that in discussions between Ms. Ehlers and Claimant's wife, there was some uncertainty about what was going on with Claimant's left ankle/leg, and once a fracture was diagnosed, Ms. Tarpeo was certain it did not happen at home, so it must have happened at work. According to the notes, when Claimant's short term disability paperwork was originally submitted, Claimant listed it as a work-related injury with a date of March 10, 2009, so Claimant's wife was told by Ms. Ehlers that the STD application would be denied. Upon further discussions between Ms. Ehlers and Ms. Tarpeo, the **short term disability application** (Exhibit 6) was changed to "unknown" for where the accident happened and the date line was left blank, so that Claimant would be approved for the short term disability.

## **RULINGS OF LAW:**

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational expert opinion and deposition, the medical records, the medical bills, the other records, and the testimony of the other witnesses, as well as based on my personal observations of Claimant and the other witnesses at hearing, and based on the applicable statutes of the State of Missouri, I find:

Considering the date of the alleged injury, it is important to note the statutory provisions that are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court

“shall construe the provisions of this chapter strictly” and that “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.” Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, “In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”

Claimant bears the burden of proof on all essential elements of his Workers’ Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

As the first three issues in this matter are inter-related, I will address all three of them in the same section of the Award.

***Issue 1: Did Claimant sustain an occupational disease?***

***Issue 2: Did the occupational disease arise out of and in the course of Claimant’s employment for Employer?***

***Issue 3: Are Claimant’s injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged occupational disease at work leading up to May 27, 2008?***

Under **Mo. Rev. Stat. § 287.067.1 (2005)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, under **Mo. Rev. Stat. § 287.067.3 (2005)**, “An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” That section then defines “prevailing factor” as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” It continues, “Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), provided guidance on the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that he contracted an occupationally-induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) Whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony,

the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Id.* at 48. Finally, the Court noted, “where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Id.*

Based on Claimant’s credible testimony and the competent, credible and persuasive testimony of Dr. Bruce Schlafly, I find that Claimant has met his burden of proving the presence of an occupational disease that arose out of and in the course of his employment for Employer. I further find that he has met his burden of proof to show that his bilateral knee condition is medically causally related to his employment for Employer.

In order to meet his burden of proof in this matter, Claimant, first, needed to present credible testimony on his own behalf regarding the nature of his work activities for Employer and the onset of his complaints/problems. I find that he has. Claimant credibly described his work activities, which included going up and down 12 stairs 3 to 4 times an hour, 8 hours a day, 5 days a week to check the presses and ensure that they were running properly. Even using the lower estimate of 3 times up and down the steps per hour, that means Claimant navigated approximately 576 stairs per workday, or approximately 2,880 per week, assuming that he did not work any overtime and did not have problems with the machines that necessitated more frequent trips. That 2,880 stairs per week is then multiplied by the 35 years that Claimant spent performing these same duties for Employer. Based on Claimant’s credible description of his work activities, I find that his job duties for Employer on a daily basis as a pressman included extensive, repetitive work up and down stairs that involved the use of his knees.

Employer tried to dispute Claimant’s description of his stair-climbing activities at work through the testimony of Mr. John McGrath and the Short Goods Press Monitoring Log. However, I was unpersuaded by their attempts in this regard. Mr. McGrath estimated that if a machine was running properly, then an operator would only have to climb the stairs three to five times per shift, but if it was not running properly, then he would have to climb more often. To bolster his contention in this regard, he offered the Short Goods Press Monitoring Log, which showed that the minimum number of checks on the machines was once every two hours, or approximately four times per shift. While I acknowledge that the *minimum* climbing a pressman would perform is once every two hours, unless there were problems with the machine, I find that Employer offered no evidence that employees, including Claimant, only performed that minimum amount of climbing, or that they were dissuaded or directed not to climb more often than that. Furthermore, Mr. McGrath acknowledged that there was no *maximum* number of times that an employee could go up to check on the machines and he does not know how many times Claimant actually climbed the stairs to check the presses during his shift. While Employer offered into evidence a blank Short Goods Press Monitoring Log, Employer did not admit any of the completed logs that might have shown how many times Claimant actually climbed that machine per day when he worked there. Further, both Mr. McGrath and Claimant admitted that Claimant’s job was to keep the presses running efficiently, so the checks helped in that respect. I find that having provided no direct evidence to dispute the amount of climbing Claimant testified that he performed, and having only shown the minimum climbing requirement without any maximum or prohibition on climbing more than the minimum, Employer failed to impeach or

otherwise contradict Claimant's credible testimony on the nature of his work activities, and specifically, the amount of stair climbing he performed as a part of his job for Employer.

In order to meet his burden of proof in this regard, Claimant, next, needed to offer competent, credible and persuasive medical testimony to support his contention that his work activities for Employer resulted in an occupational disease that caused his bilateral knee condition/injury. To meet this burden of proof, Claimant offered the opinions and testimony of Dr. Bruce Schlafly, who opined that Claimant's unusually repetitive work climbing up and down metal stairs for Employer, is the prevailing factor in the cause of the torn cartilage in the knees, and as a result of the torn cartilage, Claimant developed progressive arthritic changes in the knee joints, producing progressively increasing pain in the knees, forcing Claimant to seek treatment for the knees. He believed Claimant's work for Employer was the prevailing factor in the need for the bilateral total knee replacements, as well as the other knee treatment. To counter this opinion, Employer offered the opinions and testimony of Dr. Richard Rende, who opined that Claimant's bilateral knee condition is related to severe degenerative osteoarthritis, a condition of aging and wear and tear. He did not believe it was a work-related condition and was instead related to genetics and weight. Having considered both opinions and reviewed them in light of the rest of the extensive medical treatment records and evidence in this case, I find that the opinions and testimony of Dr. Schlafly are more competent, credible and persuasive than the contrary opinions of Dr. Rende in this case.

Admittedly, when looking at the competing qualifications of these two experts, I found that Dr. Rende had an advantage in terms of expertise, because while both doctors are board certified orthopedic surgeons, Dr. Rende has specialized in knees and Dr. Schlafly has specialized in hands. However, a thorough review of the basis of their opinions in this case, leads me to conclude that Dr. Schlafly had a more sound basis and explanation for this ultimate conclusion, than did Dr. Rende. Dr. Rende relies heavily on Claimant being overweight and having a genetic history of arthritis (allegedly from his father) as the basis for his belief that this is a wear and tear, age-related problem and not a work-related problem. As for the genetic history, despite that opinion being contained in his report, there was no such history in his handwritten notes from his examination of Claimant and it runs completely contrary to Claimant's credible testimony at hearing that his father did not have arthritis. As for whether Claimant was overweight, the medical treatment records from Midwest Health Professionals, P.C. show that his weight was reported throughout 2006 and into early 2007 as ranging from 170-182 pounds. Consistent with Claimant's testimony, it was not until his knees really became symptomatic that his weight increased. Therefore, on both accounts, weight and genetics, I find that Dr. Rende relied on inaccurate information in reaching his conclusions in this case, thus, undermining the ultimate persuasiveness of his medical opinions in this case.

On the other hand, Dr. Schlafly clearly explained how the extensive, repetitive stair climbing over many years on the job for Employer caused the torn cartilage in the knees, and as a result of the torn cartilage, Claimant developed progressive arthritic changes in the knee joints, producing progressively increasing pain in the knees, forcing Claimant to seek treatment for the knees. I find that this causation opinion was even bolstered by some of the admissions from Dr. Rende that going up and down stairs increases the stress on a person's knees and that recurrent stress to the knee joint could contribute to osteoarthritis. Dr. Rende even admitted that, "It's reasonable that his work may have hastened his osteoarthritis but not caused it." For all these

reasons, I find the medical causation opinions and testimony of Dr. Schlafly more competent, credible and persuasive than the contrary opinion of Dr. Rende in this case.

Dr. Schlafly's opinion on the relationship between the repetitive stair climbing, and the development of the bilateral knee conditions is supported by the other evidence in this case. I find that there was an exposure to the disease greater than or different from that which affects the public generally because of the work Claimant was doing with the extensive, repetitive stair climbing as a part of his job. I also find that there is a recognizable link between the disease (bilateral severe knee osteoarthritis) and some distinctive feature of the employee's job (extensive, repetitive stair climbing) which is common to all jobs of that sort. Dr. Schlafly credibly described a recognizable link between a distinctive feature of Claimant's job (the extensive, repetitive stair climbing) and the severe bilateral knee osteoarthritis. Considering all these things, I find Dr. Schlafly credibly established that Claimant's work was the prevailing factor in causing the bilateral knee conditions.

Employer argues that the timing of Dr. Schlafly's examination, only days after Claimant's November 2011 left knee revision surgery, should negatively impact the credibility or persuasiveness of his medical causation opinion. I disagree. Admittedly, as is addressed later in this award, I agree that the timing of the examination and his inability to perform a complete examination on the left knee negatively impacts his opinion on the amount of permanent partial disability Claimant may have in the left knee, but I find that it has little, if anything, to do with the credibility or persuasiveness of his medical causation opinion in this matter. After all, there is no real dispute regarding the diagnosis of the bilateral knee condition. The factors that need to be considered in reaching a medical causation opinion, the nature of Claimant's work activities, the relationship of those work activities to his diagnosis, and the presence or absence of any other medical conditions/issues that could account for the diagnosis, can all be ascertained whether the examination is two weeks or two years after a surgery for this same condition. I find the timing of Dr. Schlafly's examination has no effect on the persuasiveness of his medical causation opinion in this case.

Employer also argues that Dr. Rende's medical causation opinion is supported by the causation comment in Dr. Solman's treatment records (that the knee condition is not related to Claimant's employment), thus, enhancing the credibility and persuasiveness of Dr. Rende's conclusions. While it is true on its face, that Dr. Solman's comment seemingly supports Dr. Rende's opinion in this matter, I must note that Dr. Solman was not deposed and never testified about the basis of his comment/opinion. In that respect, I do not know if Dr. Solman reached his decision after taking into account a complete history of the amount of stair climbing Claimant performed for over 35 years for Employer on a daily basis. As is suggested in some of the other deposition testimony in this matter, I do not know if this comment from Dr. Solman is actually predicated on a desire to have his medical bills paid by Claimant's personal health insurance company, so he could provide the needed treatment to Claimant, since it was not being accepted by the Workers' Compensation insurer. In fact, without any other explanation or testimony from Dr. Solman regarding the facts and history he had that contributed to his formulating this comment/opinion, I find that it is impossible to know if he had an adequate and reliable basis for this comment/opinion. As such, I find that I cannot rely on Dr. Solman's comment as a basis for my decisions in this matter.

Accordingly, on the basis of Claimant's credible testimony and the credible and persuasive testimony of Dr. Bruce Schlafly, I find that Claimant met his burden of proving the presence of an occupational disease of severe bilateral knee osteoarthritis that arose out of and in the course of employment for Employer, and which was medically causally connected to it. I find that Claimant's extensive, repetitive stair climbing for Employer over the 35 years that he worked there as a pressman was the prevailing factor in causing this medical condition and any disability Claimant currently has in his knees as a result of it. I find that his work for Employer was the primary factor, in relation to any other factor, in causing both the medical condition and disability in the knees.

***Issue 4: Did Claimant provide Employer with proper notice of the injury under the statute?***

Under **Mo. Rev. Stat. § 287.420 (2005)**, "No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice."

When considering this notice provision for occupational diseases, and specifically interpreting the phrase "after the diagnosis of the condition," Courts have held that "a person cannot be diagnosed with an 'occupational disease or repetitive trauma' until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure." *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823 (Mo. App. S.D. 2009). In other words, a mere diagnosis of a condition is not enough. It is only after a diagnosis is made and a medical causal connection between that diagnosis and the work exposure is given, that the 30-day notice time frame begins to run.

Case law has held that the purpose of this section is to give an employer the timely opportunity to investigate the facts surrounding an injury, and if the injury occurred, the chance to provide the employee with medical treatment in order to minimize the disability. *Willis v. Jewish Hospital*, 854 S.W.2d 82 (Mo. App. E.D. 1993) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). However, if the employee failed to give timely written notice of the injury, that failure may be circumvented if the failure to give timely written notice did not prejudice the employer.

In the case at bar, Claimant could not remember when he first talked to Employer about the problems he was having with his knees. Given the information contained in the Court file for this case, I find that the Claim for Compensation was filed by Claimant on August 24, 2009. In the absence of any other evidence in the record of any earlier written or verbal notice from Claimant to Employer about his knee condition, I find that the filing of the Claim on August 24, 2009 is the first notice Employer was provided of this bilateral knee condition injury.

Much like in *Allcorn*, the resolution of this issue in the case at bar turns on when "the diagnosis of the condition" occurred. Having reviewed the medical treatment records and expert

reports in detail, I find that the first “diagnosis of the condition” occurred on November 29, 2011, when Dr. Bruce Schlafly issued his report, in which he both, offered a diagnosis and medically causally connected it to Claimant’s employment for Employer. To the extent that Claimant filed his Claim for Compensation in this matter on August 24, 2009, well before the diagnosis of the condition had occurred in November 2011, I find that Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute.

While it is true that Claimant may have had an idea earlier in this case that his repetitive stair climbing at work was the cause of his bilateral knee issues, I find that Claimant’s layperson belief of what may be causing his bilateral knee complaints is not a sound basis, in and of itself, for making a medical causal connection between a diagnosis and a work activity or exposure. Claimant is not a diagnostician and does not have the medical training or expertise to offer an opinion on medical causation. I find that Claimant’s belief as to medical causation does not start the 30-day notice clock running. It takes a medical professional to offer such an opinion to start that notice clock.

Second, while it is also true that some of the early medical treatment records in this case, such as those from Midwest Health Professionals, P.C. and Dr. Benz, generally discuss Claimant’s work activities and how those activities may be impacting the symptoms he is having in his knees, I found no frank medical causation opinions relating Claimant’s complaints or diagnoses to his work activities for Employer in those records. It is true that there were references to Claimant’s complaints increasing with work, or that the complaints were exacerbated by certain activities, but that does not equate to a diagnostician clearly and specifically medically causally relating the diagnoses to Claimant’s work for Employer.

Having found no such medical causation opinion from a medical diagnostician in the record of evidence prior to Dr. Schlafly offering his opinion on November 29, 2011, and having found that Claimant previously provided written notice to Employer in his Claim for Compensation that he filed in this matter on August 24, 2009, I find that Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute.

***Issue 5: Is Employer responsible for the payment of past medical benefits in an amount to be determined?***

Under **Mo. Rev. Stat. § 287.140.1 (2005)**, “the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.” **Mo. Rev. Stat. § 287.140.3 (2005)** also states, “All fees and charges under this chapter shall be fair and reasonable...” Claimant bears the burden of proving these elements of the claim.

The Missouri Workers’ Compensation Statute is very clear that if the employer is going to be responsible for the payment of the medical bills, then the employer has the right to select the medical providers and direct the medical care. The statute, however, does give Claimant an

option. If Claimant desires to direct his own medical care and choose his own treating physicians, then he has the right to do that, but then he is responsible for the payment of the bills associated with that treatment, not the employer.

Claimant began treating on his own for his bilateral knee condition, with doctors of his own choosing, since he was apparently, initially unsure if this was really a work-related condition or not. Claimant could not remember when he first talked to Employer about his knee condition and he admitted that he treated on his own for this knee complaints and problems. There is no evidence in the record to suggest that Claimant ever, at any time, asked Employer to provide any medical care or treatment to him for his bilateral knee condition. In fact, in reviewing the Claim for Compensation Claimant filed in this case, I found no demand for medical treatment there either. Instead, I find that Claimant continued to treat on his own with doctors of his own choosing for his bilateral knee condition and submitted the medical bills through his own health insurance.

Since Claimant never requested or demanded medical treatment for this injury at any time from Employer, I find that Employer was never given the opportunity to control the medical care or select the treating physicians as is their statutory right. Since Employer was never given the opportunity to control the medical care or select the treating physicians, and since Claimant continued to treat on his own with doctors of his own choosing, I find that Claimant is responsible for the medical bills referable to this treatment, not Employer. As is noted in the statute above, Claimant has the right to select his own physicians “at his own expense.”

An argument can be made that, although he never requested medical treatment from Employer, since Employer was aware he was seeking treatment, and since Employer was denying the Claim, Employer effectively failed or refused to provide needed medical treatment, thus, necessitating that Claimant obtain it on his own. However, this argument overlooks the fact that Employer never actually failed or refused to provide medical treatment, because Employer was never asked to provide it by Claimant. One could assume that since Employer was disputing the Claim from the beginning, that any request for medical care for Claimant’s bilateral knee condition would have been refused. However, an award of benefits under the statute cannot be based on pure speculation.

Without Claimant having requested that Employer provide medical care for his bilateral knee condition, at some point during the pendency of this Claim, and without Employer actually failing or refusing to provide that requested medical care, I am left to conclude that Claimant decided, which he has the right to do under the statute, to control his own medical care and select his own physicians, thus, making him, not Employer, responsible for the resulting medical charges for this treatment. Claimant’s request for the payment of past medical expenses is denied.

***Issue 6: Is Claimant entitled to future medical care on account of this work injury?***

**Mo. Rev. Stat. § 287.140.1 (2005)** is the applicable statute under which the issue of future medical treatment must be addressed as well. Just as Claimant must prove all of the other

material elements of his claim, the burden is also on him to prove entitlement to future medical treatment. *Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo. App. 1997) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Claimant is entitled to an award of future medical treatment if he shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. *Concepcion v. Lear Corporation*, 173 S.W.3d 368, 372 (Mo. App. 2005).

Drs. Schlafly and Rende each addressed Claimant's need for future medical treatment in both their reports and depositions. Dr. Schlafly wrote in his report, "I have no opinion regarding Mr. Tarpeo's need for any future medical care, other than physical therapy, for the left knee." However, in his deposition, Dr. Schlafly was asked about Claimant's need for future medical treatment, and he responded, "Nothing specific that I can indentify." On the other hand, Dr. Rende, in his report, opined that Claimant reached maximum medical improvement and was not in need of any further care for either knee. However, on direct examination, Dr. Rende opined, "whenever you have knee replacements, you always need yearly follow-up visits with the physician that placed the knee replacements. In the sense that they would require yearly follow-up visits, he would need additional care."

While, for the reasons described above (lack of accurate foundation), I found Dr. Rende less persuasive than Dr. Schlafly on the medical causation issue, in regards to this issue on the need for further medical treatment, based on Dr. Rende's years of expertise in actually performing knee replacement surgeries and knowing the care and treatment an individual would require following such a procedure, I find Dr. Rende's opinion on the need for future treatment more persuasive than Dr. Schlafly. I am also mindful in this analysis, that Dr. Schlafly does not clearly indicate no treatment is necessary, just perhaps physical therapy, but, then, "nothing specific that I can identify." Dr. Rende's clear articulation of the type of care needed following a knee replacement surgery, is bolstered by his years of actually caring for patients following such procedures.

Accordingly, I find Claimant is entitled to future medical care in this case, including but not limited to, yearly follow-up visits with a physician that performs knee replacement surgeries, as well as any other care and treatment that physician, or any other authorized referral physician, would determine is needed for Claimant's bilateral knees to cure and relieve Claimant of the effects of his bilateral knee occupational disease injury. Pursuant to statute, Employer retains the right to direct care and chose a treating physician for this purpose. However, since Claimant had clearly elected throughout this case to direct his own medical care at his own expense, if he once again chooses to treat with his own physician and not the authorized treating physician chosen by Employer, then Claimant shall do so at his own expense.

***Issue 7: Is Claimant entitled to the payment of temporary total disability benefits for a period of time to be determined?***

Employer is responsible under the statute for the payment of temporary total disability benefits pursuant to **Mo. Rev. Stat. § 287.170 (2005)** during the continuance of such disability at the appropriate weekly rate of compensation. The statute also defines "total disability" under

**Mo. Rev. Stat. § 287.020.6 (2005)** as the “inability to return to any employment and not merely... (the) inability to return to the employment in which the employee was engaged at the time of the accident.” Claimant bears the burden of proof on this element of his claim just as on any other element.

In this case, Claimant continued to work for Employer until March 24, 2009. In reviewing the medical records in evidence in this case, I find that from March 25, 2009 through at least May 26, 2009, Claimant was treating for his left distal tibia stress fracture, which is the subject of the companion 2009 claim and not specifically a part of this case. Starting, then, on June 3, 2009, Claimant treated with Dr. Benz for his bilateral knee complaints, who took him off work from June 3, 2009 “until further notice.” Dr. Solman continued his off-work status starting in August 2009, including the periods he performed knee replacement surgeries on each knee and Claimant recovered from same. The last visit with Dr. Solman documented in the medical treatment records in evidence was on February 13, 2012. Although Claimant saw Dr. Mudd after that and apparently had another knee surgery, I have no clear medical opinion in the record of evidence taking Claimant off work after his last visit with Dr. Solman on February 13, 2012.

I should note that in terms of trying to clearly delineate what periods of time Claimant may be entitled to temporary total disability in this case, Dr. Schlafly did not offer a particularly helpful opinion, since he only opined that Claimant was limited to sedentary work since his stress fracture in early 2009. That generalized opinion was not particularly helpful, since it was clear that there were at least some times when Claimant was recovering from each of his knee surgeries that he was completely unable to work, based on what I found in the medical treatment records in this case.

Since the parties were unable to agree on what period of time for temporary total disability would be in dispute if I found this matter compensable, it was left to me, based on the records and evidence, to determine the appropriate period. I find that Claimant was taken off work by the doctors, on account of his knees, from June 3, 2009 through February 13, 2012. I find that this period covers the extensive time Claimant was treating for and recovering from his two right knee surgeries and his three left knee surgeries and left knee closed manipulation, during which the doctors either had Claimant completely off work, or under restrictions that did not allow him to return to employment.

Given my findings above that Claimant sustained a compensable occupational disease at work, and based on the medical evidence referenced above and Claimant’s testimony, I find that Claimant was temporarily and totally disabled during this period and entitled to the payment of that benefit by Employer.

Therefore, I find Claimant has met his burden of proving that he is entitled to TTD benefits from June 3, 2009 through February 13, 2012, at the stipulated rate of \$553.47 per week. Accordingly, Claimant is awarded 140 5/7 weeks of TTD benefits from Employer.

Given that the last two issues are so inter-related in this case, both issues will be addressed and decided in the same section of the Award.

***Issue 8: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?***

***Issue 9: What is the liability, if any, of the Second Injury Fund?***

Given a discussion that occurred at the time of trial on whether this should properly be a temporary or final award, since Claimant was still apparently receiving treatment for the left knee, I need to address that topic before making findings on permanency in this case. Admittedly, I raised the issue at the time of hearing when I discovered that Claimant had recently had another surgery on the left knee only a couple months prior to trial. Even though the parties were present and asking for a final award in this case, I was concerned about issuing such an award if treatment was still potentially ongoing. In reviewing the briefs/proposed awards submitted by the parties following the hearing, I note that neither Claimant nor Employer really addressed the issue of whether this should properly be a temporary or final award. Both of them discussed the findings they believe should be made and issued in a final award in this case. The Second Injury Fund did address the issue and also advocated that this should be a final award, since there was basically no evidence in the record as to the final surgery that was conducted shortly before the trial and because all the parties were seeking this to be a final award, not a temporary award. Given the parties' unanimous request that this be issued as a final, and not a temporary, award, I will move forward with findings on permanency and issue this as a final award.

Under **Mo. Rev. Stat. § 287.020.6 (2005)**, "total disability" is defined as the "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 test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2005)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability existed at the time of the primary injury. Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2005)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked, and they must have been of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on*

*other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).* The pre-existing disability must result in a minimum of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

Where the Second Injury Fund is involved and there is an allegation of permanent total disability, the analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer's liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, I will follow this three-step approach to award all appropriate benefits under the Statute.

Considering the competent and substantial evidence listed above, I find that Claimant is permanently and totally disabled. Claimant credibly described the continuing pain and problems he has attributable to his knees that keep him from functioning fully and normally on a daily basis. While it is true that no medical doctor in this case opined that Claimant is permanently and totally disabled, I find that doctors have placed significant restrictions on Claimant's ability to function in the workplace on account of his knees. Mr. England, the only vocational rehabilitation counselor to offer an opinion and testify in this case, did conclude that Claimant is permanently and totally disabled, based on the combination of Claimant's knee problems, his limited education, and his inability to effectively communicate in English, or to read and understand in English. I find Mr. England's opinion in this regard, competent, credible and persuasive. I also find that it is consistent with Claimant's presentation and testimony at hearing, as well as the balance of the medical treatment records in evidence.

Since Claimant is found to be permanently and totally disabled, the next step of the inquiry then is to determine the extent of Employer's liability for the primary injury alone, and specifically to determine if Employer is solely responsible for that permanent total disability.

Based on my review of the competent and substantial evidence, I do not believe the primary injury alone caused Claimant to be permanently and totally disabled. I do not find any credible evidence to suggest that Claimant's permanent total disability is the result of only the injury on May 27, 2008 alone. None of the experts, who provided opinions on disability, or on his ability to work, including Dr. Schlafly, Dr. Rende or Mr. England, indicated that just the primary injury alone was responsible for Claimant's permanent total disability. Both Drs. Schlafly and Rende provided restrictions that basically left Claimant able to physically perform work in at least the sedentary level of employment on account of his knees. It was only when Mr. England combined those physical restrictions from the knees with his lack of education and inability to communicate in English, that he reached the conclusion that Claimant was permanently and totally disabled.

Under **Mo. Rev. Stat. § 287.190.6 (1) (2005)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v.*

*Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Additionally, under the 2005 amendments to the Workers' Compensation Law, the Legislature added further provisions that have an impact on the determination of the nature and extent of permanent partial disability. **Mo. Rev. Stat. § 287.190.6 (2) (2005)** states,

Permanent partial disability... shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

Therefore, according to the terms of this statute, it is incumbent upon the claimant to have a medical opinion from a physician that demonstrates and certifies claimant's permanent partial disability within a reasonable degree of medical certainty. Further, if there are conflicting opinions from physicians in a given case, then objective medical findings must prevail over subjective findings.

In awarding permanent partial disability for this injury under these statutory provisions, it is, thus, necessary to deal with each of these sections. Considering the competent and substantial evidence listed above, I find that the medical opinion from Dr. Schlafly demonstrates and certifies, within a reasonable degree of medical certainty, that Claimant sustained permanent partial disability as a result of his work-related injury on May 27, 2008. I further find, that despite Claimant's allegation that he had pre-existing depression as a disabling condition in this case, there are no medical opinions in the record of evidence from any doctor to demonstrate and certify Claimant's pre-existing disability on account of his depression.

In trying to assess the percentage of permanent partial disability related to this injury for which Employer would have responsibility, I must take into account the medical treatment records showing the diagnoses and treatment/surgical procedures performed on each of Claimant's knees, as well as Claimant's credible testimony and his statements in the records regarding his continuing complaints and problems with his knees. I am also mindful of the fact that, while Dr. Schlafly was able to perform a full examination of Claimant's right knee, he was unable to do that with the left knee and rated Claimant's permanent partial disability on the left knee while he was still recovering from a surgical procedure that had been performed on the left knee only two weeks earlier. Nonetheless, Dr. Schlafly did provide ratings of disability on both knees, based on his findings and medical expertise. I should also note that I found no competing

or contrary ratings of disability in the record of evidence from any other physician, so, therefore, Dr. Schlafly's ratings are the only such ratings of disability in evidence in this case.

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has 50% permanent partial disability of the right knee and 55% permanent partial disability of the left knee. While I might have otherwise believed that Claimant might actually have a greater amount of permanent partial disability in the left knee, given the number of procedures he has had on the knee to bring relief to his complaints, I was uncomfortable assessing any higher level of disability in this case for the left knee, because of the timing of Dr. Schlafly's examination (without a full examination of the left knee since he was still recovering from surgery), and because Claimant even continued to treat after Dr. Schlafly's examination with another surgery in 2014 that was not even contemplated by the doctor when he did offer his opinion in this regard. Therefore, while I certainly believe that Claimant has more disability in the left knee than the right knee, I did not think it appropriate to try to quantify the disability much higher than I did for these reasons.

Additionally, consistent with Dr. Schlafly's opinion, I find that since Claimant has disability in each knee, a condition of multiplicity exists, which should be compensated by a loading factor applied to these knee disabilities. Accordingly, in addition to the disabilities referenced above, I find that Claimant is entitled to receive a 15% load factor to compensate him for the multiplicity he has, attributable to the May 27, 2008 work injury.

Accordingly, I find that Employer is responsible for the payment of a total of 193.2 weeks of permanent partial disability related to the May 27, 2008 injury, based on 50% permanent partial disability of the right knee (80 weeks) and 55% permanent partial disability of the left knee (88 weeks), plus a 15% load factor for multiplicity (25.2 weeks).

The final step of the inquiry then is whether the permanent total disability is the result of the combination of the primary injury and pre-existing disabilities so that the Second Injury Fund would have liability for the permanent total disability. Claimant alleges that he is permanently and totally disabled based on the combination of his bilateral knee disabilities from the primary injury and his pre-existing depression, along with his pre-existing inability to effectively communicate in English (speaking, reading or writing). For the reasons described in more detail below, I find that Claimant has failed to meet his burden of proving that the Second Injury Fund has any liability for either permanent total, or, even, permanent partial disability benefits in this case.

Of the doctors and/or experts who examined and treated Claimant, Mr. England, Claimant's vocational rehabilitation expert, is only one that finds Claimant is permanently and totally disabled and unable to compete for employment in the open labor market. When asked at deposition about the reasons Claimant is unable to compete in the open labor market, Mr. England replied that, "it would be due to the combination of the effects of the knee problems, in combination with his limited education, his inability to effectively communicate in English, or to read and understand in English. It's the combination of those things, I think, with the physical problems, that would totally disable him." He testified that the depression he found references to in Claimant's medical records "wasn't something that I considered as a limiting factor."

Therefore, it was not a factor Mr. England included in determining that Claimant was unemployable.

On the other hand, none of the doctors reach the ultimate conclusion that Claimant is permanently and totally disabled. Dr. Rende opined that Claimant could return to work with appropriate restrictions based on the fact that he has had total arthroplasties of each knee. Even Claimant's own rating physician, Dr. Schlafly, did not provide an opinion that Claimant was permanently and totally disabled, despite placing a number of functional restrictions on him because of his complaints/problems.

It is appropriate at this point to address the fact that Claimant did make a claim for a subsequent injury in March 2009 and to explain why that really has no bearing on the ultimate findings I am making in this case. I would acknowledge that normally, an evaluation of whether an individual is permanently and totally disabled would start with the final claimed injury and work backwards in time to account for the pre-existing disabilities to see if there is Second Injury Fund liability for that disability. However, in this case, because the March 2009 and May 2008 injuries are so intermingled, both in terms of the mechanism of injury and the treatment for same, and most importantly, because no physician has opined that Claimant suffered any amount of permanent partial disability on account of that March 2009 injury, I find that it is appropriate to begin the evaluation of Claimant's overall disability with the May 2008 injury and work backwards from there to account for whether there is any Second Injury Fund liability in this case. As is noted in the separate Award that has been issued to bring closure to Injury Number 09-063651, without Claimant having any amount of permanent partial disability attributable to that 2009 injury, it is impossible, then, for Claimant to have any combination of disabilities with any alleged pre-existing disabilities, because there is no primary disability with which they can combine.

The other difficulty that I encountered in trying to reach my conclusions in this case, is that, despite Claimant alleging that he had pre-existing depression that he believed combined with his primary bilateral knee disability in this case to make him more disabled, Claimant offered no medical or vocational evidence to support that assertion. While I found some medical treatment records in evidence that dealt with treatment Claimant received for depression, Dr. Schlafly flatly refused to provide any rating of disability for Claimant's alleged depression. He opined in his report, "I have no opinion regarding pre-existing disability due to depression." Claimant offered no other medical evidence or testimony to provide such an assessment of what, if any, permanent partial disability Claimant may have had for his alleged pre-existing depression. Further, Claimant's vocational expert also opined that the depression he found references to in Claimant's medical records "wasn't something that I considered as a limiting factor." He said that it was not a factor he included in determining that Claimant was unemployable. Given this opinion, I even have to question if it was a hindrance or obstacle to employment since the vocational expert did not think it was a limiting factor for Claimant. Therefore, aside from Claimant's allegations to that effect, there was not one doctor or vocational expert who provided any opinion on whether there was disability attributable to the depression or whether it was even really a hindrance or obstacle to employment. That being the case, I find that I cannot include the alleged pre-existing depression in any assessment of Second Injury Fund liability in this matter.

Having excluded the depression from consideration and having already assessed disability with regard to the primary bilateral knee condition, I am left to consider if Claimant is properly found to be permanently and totally disabled against the Second Injury Fund on account of his pre-existing lack of education and inability to effectively communicate in English in combination with his primary bilateral knee disability. After observing Claimant at hearing, noting that he could not communicate in English without an interpreter, and after thoroughly reviewing the medical treatment records and opinions, I agree with Mr. England and find that the major reason he is unable to obtain employment in the open labor market is his inability to communicate in English in combination with his physical complaints or functional limitations from his knee injury. However, for the reasons described in more detail below, since it is inappropriate here to factor in his deficient English skills as a component of any permanent total disability finding, Claimant has failed to prove that he is permanently and totally disabled against the Second Injury Fund.

It is clear upon review of his opinions and testimony in this case, that Mr. England factored in Claimant's inability to communicate in English and the effect that has on his employability, when reaching his conclusion that Claimant was unemployable in the open labor market. However, nowhere in his report or testimony was there any opinion, or even suggestion, that Claimant was unable to learn English or get a GED because of some mental defect or disability, just that it would be difficult given his age and failure to learn English already. Therefore, I find that it is also equally clear that Claimant failed to prove that there was any permanent functional or mental reason why he cannot learn English, and so it is inappropriate to consider his English skills, or lack thereof, when determining his employability and the liability of the Second Injury Fund.

Courts have previously dealt with the issue of whether a pre-existing deficiency in English skills should properly be considered as a component in a finding of permanent total disability. *Karoutzos v. Treasurer of the State of Missouri*, 55 S.W.3d 493 (Mo. App. W.D. 2001) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). In *Karoutzos*, the Commission considered Claimant's deficient English skills as a component of finding him permanently and totally disabled. The Court of Appeals ruled that he was still permanently and totally disabled just considering the combination of the rest of his disabilities, but noted that, "the Commission's consideration of Karoutzos' deficient English skills as a component of finding permanent total disability was improper." *Id.* at 499. In arriving at that conclusion, the Court relied on *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo. App. S.D. 1997). In *Tiller*, Claimant alleged illiteracy as a pre-existing permanent partial disability that he claimed combined with his primary injury to make him permanently and totally disabled. The Court in that case ruled that, "Where illiteracy is not due to inability to learn, but to lack of education, it is not a permanent partial disability for Second Injury Fund purposes." *Id.* at 866.

Essentially then, in order for conditions like illiteracy and deficient English skills, to be considered permanent partial disabilities for Second Injury Fund purposes, there must be a finding that those conditions come from a mental or physical inability to learn, instead of merely a lack of education. If those conditions merely come from a lack of education, then they are not permanent, since acquiring the additional education would correct the deficiency.

In this case, there is no doubt that Claimant has deficient English skills, and that those deficient English skills negatively impact his ability to find a job in the open labor market. However, there is no physician opining that his deficient English skills come from a permanent functional or mental inability to learn the language. Instead, I find that it comes from a lack of education, and a lack of a desire to obtain such an education. Given the Courts' findings in *Karoutzos* and *Tiller*, I find it is improper in this case to consider his deficient English skills as a component of finding him permanently and totally disabled against the Second Injury Fund. To the extent that Mr. England factored in his deficient English skills in his opinion that Claimant was unemployable in the open labor market, I find that I cannot use his opinion in this regard as a basis for an award of compensation against the Second Injury Fund in this case.

Therefore, since it is inappropriate here to factor in his deficient English skills as a component of any permanent total disability finding, and since Claimant has not produced any other medical or vocational evidence to support a finding of any other pre-existing permanent partial disabilities that combine with the knees to result in his permanent total disability, Claimant has failed to meet his burden of proof that he is permanently and totally disabled against the Second Injury Fund.

The last issue then is whether Claimant is entitled to some amount of permanent partial disability from the Second Injury Fund based on the combination of his primary (May 27, 2008) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant has also failed to prove an entitlement to any permanent partial disability award against the Second Injury Fund.

As noted above, for Claimant to qualify for permanent partial disability from the Second Injury Fund, he must prove that he had pre-existing disabilities that were permanent, were a hindrance or obstacle to employment or re-employment, and met the appropriate thresholds. If the pre-existing disabilities fail to meet any of these three criteria, then they cannot be considered for Second Injury Fund purposes. Claimant has alleged, and/or the medical or vocational evidence has noted, alleged pre-existing disabilities of deficient English skills and depression. However, as described above, there is no evidence from a physician rating any amount of permanent partial disability for either of those conditions, no evidence that the deficient English skills are a permanent condition, and vocational evidence that the depression was not a hindrance or obstacle to employment or re-employment.

Since each of these pre-existing conditions fails to meet at least one of the criteria necessary for Second Injury Fund permanent partial disability liability, I find Claimant has also failed to meet his burden of proof for his Second Injury Fund claim for permanent partial disability. Accordingly, the Second Injury Fund claims for permanent total and/or permanent partial disability are denied pursuant to this award.

## **CONCLUSION:**

Claimant sustained a compensable occupational disease injury of severe osteoarthritis to his right and left knees arising out of and in the course of his employment for Employer leading up to May 27, 2008, and which was medically causally connected to it. Claimant's extensive,

repetitive stair climbing for Employer over the 35 years that he worked there as a pressman was the prevailing factor in causing this medical condition and any disability Claimant currently has in his knees as a result of it. His work for Employer was the primary factor, in relation to any other factor, in causing both the medical condition and disability in the knees. Having found no medical causation opinion from a medical diagnostician in the record of evidence prior to Dr. Schlafly offering his opinion on November 29, 2011, and having found that Claimant previously provided written notice to Employer in his Claim for Compensation that he filed in this matter on August 24, 2009, Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute.

Claimant has met his burden of proving that he is entitled to TTD benefits from June 3, 2009 through February 13, 2012, at the stipulated rate of \$553.47 per week. Accordingly, Claimant is awarded 140 5/7 weeks of TTD benefits from Employer. Employer is also responsible for the payment of a total of 193.2 weeks of permanent partial disability related to the May 27, 2008 injury, based on 50% permanent partial disability of the right knee (80 weeks) and 55% permanent partial disability of the left knee (88 weeks), plus a 15% load factor for multiplicity (25.2 weeks).

Having never requested that Employer provide medical care for his bilateral knee condition at some point during the pendency of this Claim, Claimant decided, which he has the right to do under the statute, to control his own medical care and select his own physicians, thus, making him, not Employer, responsible for the resulting medical charges for this treatment. Claimant's request for the payment of past medical expenses is denied. Claimant is entitled to future medical care in this case, including but not limited to, yearly follow-up visits with a physician that performs knee replacement surgeries, as well as any other care and treatment that physician, or any other authorized referral physician, would determine is needed for Claimant's bilateral knees to cure and relieve Claimant of the effects of his bilateral knee occupational disease injury.

While Claimant is found to be permanently and totally disabled, that permanent total disability is not on account of the primary injury (May 27, 2008) alone, so Employer bears no responsibility for that disability. Similarly, the Second Injury Fund Claim for permanent total and/or permanent partial disability benefits is denied since Claimant has not met his burden of proof for those claims.

Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Kurt C. Hoener, for necessary legal services.

Made by: \_\_\_\_\_  
 JOHN K. OTTENAD  
*Administrative Law Judge*  
*Division of Workers' Compensation*