

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

Injury No.: 03-137716

Employee: Wanda Wright
Employer: Palmentere Brothers Cartage Service
Insurer: Commerce & Industry Insurance Co.
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.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) 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 ALJ dated May 24, 2012, as supplemented herein.

Preliminaries

The ALJ found that employee is permanently and totally disabled solely as a result of the primary injury and, therefore, awarded employee permanent total disability benefits against employer. Employer and employee each appealed to the Commission. Employer alleges that the ALJ erred in finding employee permanently and totally disabled solely as a result of the primary injury, and argues that the competent and substantial evidence supports a finding that employee is permanently and totally disabled as a result of the primary injury combining with her preexisting disabilities.

Employee argues on appeal that the ALJ's award should be affirmed and merely seeks clarification as to what date the permanent total disability benefits shall commence.

Discussion

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

We agree with and affirm the ALJ's determination that employee is permanently and totally disabled solely due to the physical and psychological disabilities she suffered as a result of the primary injury. However, we specifically do not affirm the ALJ's criticisms of Dr. Keenan and Mr. Dreiling's testing methods. Dr. Keenan and Mr. Dreiling provided their opinions as experts in their respective fields and while we find that the weight of the evidence contradicts their opinions to the extent that they suggest employee is not permanently and totally disabled as a result of the primary injury, the ALJ is in no

¹ Statutory references are to the Revised Statutes of Missouri 2003 unless otherwise indicated.

Employee: Wanda Wright

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position to criticize the methods they utilized in arriving at their expert opinions. Further, we find that after finding employee permanently and totally disabled as a result of the primary injury alone, the ALJ's findings with respect to employee's alleged preexisting personality disorder and preexisting learning disability are misplaced and irrelevant. Once the ALJ made the determination that employee is permanently and totally disabled solely as a result of the primary injury, the analysis was complete and no further discussion regarding alleged preexisting conditions was necessary.

With respect to employee's request that the Commission clarify the date as to which her permanent total disability benefits shall commence, we find that they shall commence on March 26, 2008, the immediate day following the termination of her temporary total disability benefits.

Award

We affirm the award of the ALJ as supplemented herein.

The award and decision of Administrative Law Judge Mark Siedlik, issued May 24, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ'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 9th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Ms. Wright: Wanda Wright Injury No. 03-137716
Dependents: N/A
Employer: Palmentere Brothers Cartage Service
Insurer: Commerce & Industry Insurance Co.
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Hearing Date: February 7, 2012 Checked by: MSS/pd

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 alleged accident or onset of occupational disease: December 2, 2003
5. State location where accident occurred or occupational disease was contracted:
Franklin County, Ottawa, Kansas
6. Was above Ms. Wright 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 an 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 Ms. Wright was doing and how accident occurred or occupational
disease contracted: Ms. Wright was involved in a motor vehicle accident while
traveling as a passenger in Employer's tractor trailer.
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: Back, neck, left lower extremity and emotional distress
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$47,695.10
16. Value necessary medical aid paid to date by employer/insurer: \$82,906.71.
17. Value necessary medical aid not furnished by employer/insurer: Ms. Wright offered the value of necessary aid not provided by Employer, including \$2,333.00 to Scott Petrie, M.D., \$4,800.00 to Rosenblum Clinic, \$3,800.00 to Greenbrier Hospital and prescriptions provided through CVS Pharmacy. Employer stipulated that related medical care and treatment not provided by Employer will be paid.
18. Ms. Wright's average weekly wages: \$592.13.
19. Weekly compensation rate: \$394.73.
20. Method of wages computation: Agreed upon wage.

COMPENSATION PAYABLE

21. Employer Liability:

130.71 weeks of temporary total disability @ 394.73 per week.....	\$52,403.33
0 weeks of permanent total disability.....	\$0
252 weeks of permanent partial disability @ \$347.05 per week.....	\$87,456.60
Temporary total disability underpayment.....	\$ 3901.75
Permanent Total Disability Benefits weekly	\$ 394.73

22. Second Injury Fund Liability:

No Liability

TOTAL: To be determined

23. Future requirements awarded: Medical treatment.
24. The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mr. Donald Taylor, Employee's attorney, for necessary legal services rendered.

FINDINGS OF FACT AND RULINGS OF LAW

Ms. Wright: Wanda Wright Injury No. 03-137716
Dependents: N/A
Employer: Palmentere Brothers Cartage Service.
Insurer: Commerce & Industry Insurance Co.
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Hearing Date: February 7, 2012 Checked by MSS/pd

On February 7, 2012, the Ms. Wright and employer appeared before the Honorable Mark Siedlik, Administrative Law Judge, to determine the nature and extent of Ms. Wright's disability and the liability of the Second Injury Fund. The Division has jurisdiction to hear this case pursuant to Mo. Rev. Stat. §287.110. The Ms. Wright appeared through his counsel, Don Taylor, the Employer/Insurance Carrier appeared through counsel, Eric Lanham. The Second Injury Fund appeared through counsel, Eric Lowe.

STIPULATIONS

The parties stipulated that:

1. Employer and Ms. Wright were operating under an subject to the provisions of the Missouri Workers' Compensation law at all relevant times.
2. Venue is proper.
3. Employer's liability under said law was fully insured by Commerce & Industry Insurance Company.
4. An employer/Ms. Wright relationship existed on or about December 2, 2003.
5. Ms. Wright sustained accidental injury on December 2, 2003.
6. Ms. Wright's injury arose out of an in the course of employment with Employer.
7. Ms. Wright provided timely notice of his accident as required by Missouri law.
8. A claim for compensation was filed within the time prescribed by law.
9. Ms. Wright's average weekly wage was \$592.13, resulting in a TTD rate of \$394.73 a PPD rate of \$347.05 and a PT rate of \$394.73.

10. Temporary total disability benefits have been paid by the employer/insurer as a result of the December 2, 2003 injury in the amount of \$51,595.16. There is an underpayment of \$3,901.75;
11. Employer/insurer paid medical expenses in the amount of \$82,906.71.
12. Employer/insurer will be responsible for all medical bills incurred in connection with the treatment of Ms. Wright's injuries related to the December 2, 2003 accident. Employer will also pay for Ms. Wright's future medical care related to that injury.

ISSUES

The parties requested the Division determine:

- I. The nature and extent of Ms. Wright's disability
- II. Second Injury Fund liability

EXHIBITS

The Ms. Wright testified in person at the hearing. In addition, the following exhibits were offered and admitted into evidence:

1. Exhibit A: Photographs of accident.
2. Exhibit B: Wage information.
3. Exhibit C: Deposition of Dr. Keenan, report and curriculum vitae.
4. Exhibit D: Deposition of Michael Dreiling, report and curriculum vitae.
5. Exhibit E: Deposition of Dr. Lowry Jones, report and curriculum vitae.
6. Exhibit F: Medical records.

FINDINGS OF FACT

Ms. Wright is a fifty-one year old female who was hired as a truck driver by Palmentere Brothers Cartage Service in Kansas City, Missouri. On December 2, 2003, Ms. Wright was traveling as a passenger in a tractor trailer driven by a fellow Palmentere Brothers' driver. While in route from Kansas City to Dallas, Texas, the tractor trailer went off the road in Franklin County, Kansas, resulting in an accident and causing injuries to Ms. Wright. This matter has been litigated in the State of Kansas where the

Employee was determined to be permanently totally disabled as to the Employer/Insurer with medical treatment left open.

As a result of the accident, Ms. Wright sustained physical injuries to her back, neck and left lower extremity. Ms. Wright underwent two knee arthroscopies performed by Dr. MacMasters following the accident, including debridement and a partial resection of her meniscus. (Jones Depo, p. 6). In 2005, an anterior cruciate ligament reconstruction was performed on Ms. Wright's left knee. (Jones Depo, p. 6). Because Ms. Wright continued to suffer from significant pain, swelling and "popping out" of her left knee, Dr. Richard Robichaux ultimately performed a partial knee replacement on Ms. Wright in 2008. (Jones, Depo, pp. 6-7). Ms. Wright contends that the condition of her knee worsened following the partial knee replacement surgery and now gives out more frequently, causing her to fall. As a result of these falls Ms. Wright has sustained additional injuries.

In May 2010, Judge Hursh, ALJ in the Kansas proceedings, court ordered that an independent medical examination be performed by orthopedic surgeon Dr. Lowry Jones. (Jones Depo, pp. 4-5). According to Dr. Jones, at the time of his evaluation, Ms. Wright continued to complain of midthoracic/upper back pain, lower back pain, some pain into her buttocks and upper hips and pain in her knee. (Depo, pp. 7-8). Dr. Jones observed Ms. Wright's use of a cane, weakness in her leg muscles and abnormal gait. (Jones depo, p. 7). Dr. Jones reported that although Ms. Wright had normal motion in her knee, she did not walk with normal motion, but instead walking as if she had a "stiff leg." (Jones Depo, p. 15-16). He observed that the pain in her neck and upper back was not structural and not indicative of neurologic deficits. (Jones Depo, p. 8). Dr. Jones attributed Ms. Wright's lower back pain to her severe gait, however noting that it was not radicular. (Jones Depo, p. 8, 17). It was his opinion that Ms. Wright's knee had been repaired as well as possible, that she sustained some permanent soft tissue injury to her upper back and that her low back pain was likely a musculoskeletal strain, aggravated by her poor gait. (Jones Depo, p. 9).

For purposes of Ms. Wright's Kansas Worker's Compensation claim, Dr. Jones ultimately rendered the following impairment ratings: 1) 20% whole body impairment of the left knee; 2) 5% impairment of the upper back cervical and thoracic area; and 3) 5% impairment of the low back. (Jones Depo, pp. 9-10). He deemed her to have sustained a 28% whole body permanent partial impairment based on the 4th Edition of the AMA Guides. (Exhibit E). Although Dr. Jones did not previously render opinions regarding the *disability* that Ms. Wright sustained following her injury, he estimated that this value for the lower extremity would be somewhat higher than reflected in the impairment rating he originally assigned. (Jones Depo, p. 28) Dr. Jones recommended limiting Ms. Wright's

work to sedentary activity, specifically restricting repetitive bending or lifting activities. (Jones Depo, p. 12-13). According to Dr. Jones, his opinion that Ms. Wright could perform sedentary work took into consideration the medications she takes on a daily basis. (Jones Depo, p. 32). Dr. Jones was of the opinion that Ms. Wright was employable

despite these restrictions, albeit noting that she would not be able to return to her job as a truck driver. (Jones Depo, p. 21).

On cross-examination, Dr. Jones admitted that Ms. Wright had no prior history of left knee problems and was not utilizing a cane for ambulation prior to this injury. (Jones Depo, p. 14). Dr. Jones testified that he believed continued use of the cane was necessary for ambulation because it helps take the weight off the leg and she had complaints of the leg giving way. (Jones Depo, p.15). Dr. Jones admitted that he was able to objectively verify the current complaints of Ms. Wright. (Jones Depo, p. 24). Dr. Jones opined that as a result of her injury December 2, 2003, Ms. Wright suffered a strain of the thoracic spine and lumbar spine, the lower lumbar spine was aggravated by her persistent antalgic gait. (Dr. Jones Report p. 3).

Ms. Wright's testimony that her knee giving out has caused further injury since the date of December 2, 2003, is detailed in the treatment records of Scott Petrie, M.D of Orthopaedic and Sports Clinic. Dr. Petrie's records detail falls on July 25, 2009 resulting in left shoulder contusion/strain/impingement and a fall on November 6, 2009 resulting in right elbow and forearm contusion/strain/ligament injury/lateral epicondylitis. When last seen by Dr. Petrie on January 12, 2010 claimant stated that her right elbow pain continued despite two injections. During her course of treatment with Dr. Petrie, Ms. Wright had continued complaints of left knee pain and tenderness. Ms. Wright also testified that she suffered a broken wrist as a result of a fall due to the left knee instability.

Dr. Mark Doyne performed an independent medical evaluation at the request of the employer on November 15, 2004. At that time prior to the two knee operations, Dr. Doyne noted that she was not utilizing any ambulatory aids. She also testified that she had no pre-existing left knee dysfunction and had never utilized a cane for ambulation.

Dr. Richard Robichaux, Jr. of Baton Rouge Orthopaedic clinic treated Ms. Wright after left knee ACL reconstruction in 2005 failed to provide Ms. Wright significant improvement. Ms. Wright testified that after the ACL reconstruction her knee would pop out of the socket and she would have to force it back into place. This history was provided to Dr. Benzel MacMaster on May 2, 2006, when he presented with a complaint of ongoing knee pain for the past two years. Dr. MacMaster's notes from that visit detail that an X-ray of the left knee revealed that the medial joint space and osteochondral fragmentation of medial femoral condyle looked worse than on her last films. Due to continued problems with the left knee Ms. Wright sought treatment with Dr. Robichaux beginning in November 2006.

Dr. Robichaux was the first doctor to comment about anxiety and depression affecting Ms. Wright following the primary injury. Dr. Robichaux prescribed medications to treat these conditions beginning on October 30, 2007. Dr. Robichaux commented "I hope I am not getting too optimistic with Wanda, but the patient was not crying when she came in to see me today." Dr. Robichaux went on to comment that she was crying the last visit she came too. He prescribed Xanax to help her with anxiety that he believed she was

experiencing. At that time he prescribed the lowest level Xanax possible and told her to take one pill two or three times a day as needed. On November 13, 2007, Dr. Robichaux authored a letter following the Oxford unicondylar replacement on the left knee. Dr. Robichaux notes that he wasn't sure if Ms. Wright would ever be able to return to work, but that she did seem to have a great deal of psychological overlay. Dr. Robichaux changed the medication for anxiety and depression to a combination of Paxil and Xanax noted in his January 15, 2008, office notes. At that time, Dr. Robichaux believed that although she was doing well following surgery he noted a great deal of emotional overlay and felt she appeared to have some symptom magnification. This was the first notation by any treating physician that they believed emotional overlay played a role in Ms. Wright's presentation.

On January 15, 2008, Dr. Robichaux notes that Ms. Wright is taking 20 mg of Paxil and Xanax during the day. At that time she told Dr. Robichaux that if she missed her medicine or does not take it that she cries and shakes. On that treatment date she was utilizing her cane for ambulation but was not crying and was smiling for the first time in a long time. He continued her on the course of treatment utilizing Paxil and Xanax as prescribed.

Dr. Robichaux's treatment note of March 18, 2008, states that Ms. Wright was considering getting a job. She tried to get a cashiering job, but she couldn't stand all day. Ms. Wright was stuck because she could not stand on her feet for an extended period. Dr. Robichaux continued to prescribe medication for anxiety and depression. He recommended that Ms. Wright see someone who is more specialized in the field of psychiatry in regard to fine tuning her medications because he thought that could help to make her feel a little bit better. Finally, Dr. Robichaux noted that while Ms. Wright did not cry at that visit, she almost felt like she could tear up and he felt she looked that was as well.

Also on March 18, 2008, Dr. Robichaux authored a letter noting that he had been treating Ms. Wright for almost two years. During much of that period, he felt it was obvious that Ms. Wright had suffered from anxiety and depression. Dr. Robichaux was of the opinions that if Ms. Wright was not taking medication, it will be impossible to get her back to work or even consider doing anything else other than staying inside and doing nothing. He was of the opinion that the Paxil and Xanax were necessary medications that should be continued.

Dr. Robichaux saw Ms. Wright in follow-up on April 24, 2008. She presented for evaluation that day in a poor state of mind. She stated that she tripped and fell onto her left knee and she hurt her right wrist. She felt like the knee popped out at that time and presented to the doctor's office utilizing a cane for ambulation. Dr. Robichaux stated that she looked as if she had not slept in a couple of days. He stated again that Ms. Wright looked terribly unhappy and that she looked like she needed help. He wished that she could get in to see a psychiatrist for her medications to be adjusted. At that visit he felt Ms. Wright was as good as she was going to get regarding her left knee. Dr. Robichaux

stated that her knee certainly is not perfect, but he felt it was better than what she had before.

On June 17, 2008, Ms. Wright had a follow-up visit with Dr. Robichaux. At that visit, Ms. Wright was despondent, crying, and stating that she felt like she wanted to "end it all". She told Dr. Robichaux that she sometimes feels like she wants to kill herself. Additionally, Ms. Wright told Dr. Robichaux that she regrets having had the surgery at all. She reported that the knee pops, swells, she cannot straighten it out all the way, and that it just hurts all day every day. Dr. Robichaux believed that if Ms. Wright got her quad strength back he believed her knee symptoms would resolve. He commented again that Ms. Wright continued to suffer from anxiety and depression.

Dr. Robichaux's last visit with Ms. Wright was on October, 30, 2008. At that time Dr. Robichaux noted that she says that the leg feels dead and numb and like there is no feeling in it and there is no muscle power. At that time she told Dr. Robichaux that she was feeling a little better emotionally because she is seeing a psychiatrist. Ms. Wright told Dr. Robichaux at that time that she had been to a few job fairs, but that no one wanted to hire her because she is a job risk. Dr. Robichaux commented that he did not believe that Ms. Wright understood that since she was presenting utilizing a cane and crying that she won't be hired because of her underlying emotional state. As Ms. Wright testified at hearing she has to utilize the cane with all ambulation, and therefore did present for job interviews utilizing the cane for support.

Beyond her physical injuries, Ms. Wright received care and treatment for emotional and psychological conditions following the accident, including feelings of anxiousness and depression. This included treatment at the Rosenblum Mental Health Center, treatment by Dr. Allen J. Coe at Greenbrier Behavioral Health and treatment with Dr. Ann Arretteig. Dr. Jones also acknowledged Ms. Wright's psychological background and expressed concerns about performing additional surgery for that reason. (Jones Depo, p. 7-9). Ms. Wright takes mediations for these psychological injuries and attributes them solely to her accident on December 2, 2003. Various records from throughout Ms. Wright's course of treatment show that there was no history of psychological problems noted. There was no evidence provided to substantiate any pre-existing mental condition by way of testimony from the claimant or pre-existing medical records.

Ms. Wright stated to Dr. Robichaux that she was seeing a psychiatrist in the last visit dated October 30, 2008. The medical evidence suggests that Ms. Wright began treating with Dr. Ann Arretteig, psychiatrist, on September 29, 2008 at Rosenblum Mental Health Center as a walk-in because of depression and thoughts of suicide. Dr. Arretteig's notes state that Ms. Wright had been thinking of killing herself because of what appeared to be a hopeless situation. Ms. Wright was in constant pain because of injuries from the car wreck and her unstable knee joint in the left leg. Ms. Wright stated that she felt angry much of the time, ruminates about the past and what she perceives as a bleak future, takes hours to go to sleep, wakes easily, has nightmares and flashbacks about the wreck. Ms. Wright admitted to overdosing about one month prior to the visit and had continued to feel hopeless and useless. Dr. Arretteig stated that Ms. Wright

fantasized about cutting off her leg because she felt it would be easier to walk with a prosthetic leg. The doctor also noted that Ms. Wright became visibly angry when talking about the unsuccessful knee replacement and was angry at the doctor for recommending it and at herself for agreeing to it. Dr. Arretteig diagnosed Major Depression, Single Episode, Psychotic and had no Axis II diagnosis regarding potential personality disorders.

Dr. Arretteig wrote a letter to Don Taylor dated December 4, 2008. In that letter Dr. Arretteig notes that her initial evaluation was conducted on September 29, 2008 and that prior to that date she had no contact with Ms. Wright. According to Ms. Wright, she stated that she was a different person before her injury, and is still mourning the loss of her physical abilities. She has shown some very modest improvement, was thinking less about suicide, but continued to have significant depression/anger over her situation. Dr. Arretteig also provided commentary that Ms. Wright had a history of what appears to be a learning disability, and continued to walk with pain when she attempted to walk. Dr. Arretteig did not expect Ms. Wright to be a good candidate for re-training in a less physically demanding job. Dr. Arretteig felt that Ms. Wright was unable to function in competitive employment. Although, Dr. Arretteig offers an opinion that Ms. Wright suffered from a learning disability there was no evidence in the medical records provided from her office to substantiate that medical opinion.

Dr. Alan Coe treated Ms. Wright at Greenbrier Behavioral Health on September 11, 2009. The history of present illness was that Ms. Wright was quite flat, depressed, and barely answered questions. She insisted that she was suicidal and her thought was to buy a 38 caliber pistol and shoot herself in the head. She denied any prior suicide attempt and any significant prior suicidal ideation; although at one point it had crossed her mind. Ms. Wright related all of these issues back to a motor vehicle accident that occurred in 2003. She was training someone to drive an 18-wheeler and apparently that person fell asleep, although she had no recollection of the event. Ms. Wright insisted that prior to the motor vehicle accident, she had absolutely no psychiatric history, and no issue with anxiety, no issues with depression, mania, or psychosis.

Ms. Wright described being helpless, hopeless, and worthless. She also stated that she did little or nothing during the day but sit inside. Ms. Wright has no enjoyment and described the suicidal ideation as ongoing. Ms. Wright was not sleeping well at night and then tended to sleep throughout the day. Dr. Alan Coe, evaluator, believed that Ms. Wright was minimizing excessive anxiety symptoms, although he wondered if she had more severe anxiety than she was admitting as she was overtaking Xanax prior to admission. Past psychiatric history was negative other than following at Rosenblum Mental Health Clinic for the last year. Dr. Coe diagnosed Major Depression, Recurrent, Severe without psychotic features, Anxiety Disorder, NOS. There was no Axis II diagnosis of any form of personality disorder. The justification for admission at that time was that Ms. Wright was suicidal ideation.

In a therapy note of September 13, 2009, Ms. Wright stated that she went nuts and burned her arm to get the devil out of her head because he wanted her to commit suicide.

She had burned her arm repeatedly to prevent herself from committing suicide. She had increased her medicines on her own in prior week. At that time Ms. Wright was not eating and had decreased sleep. At that time, Ms. Wright was determined to be a danger to herself. The records noted a history of depression that followed a left knee injury that ended Ms. Wright's career as a trucker. Ms. Wright felt that the knee surgery was unsuccessful, but she had been told that no more can be done surgically for her knee.

Ms. Wright was initially seen for psychiatric evaluation on September 11, 2009. Her chief complaint at that time was "I just broke down." She presented to Rosenblum complaining of suicidal ideation. Ms. Wright had started to burn herself on the arms to drive these suicidal thoughts from her head. She presented quite tearful and stated that she had essentially give up. Ms. Wright had made several attempts to try to get back in the workforce and now was feeling completely helpless and bitterly complaining of pain.

Dr. Kathleen Keenan, a licensed psychologist, evaluated Ms. Wright on May 13, 2010 at the direction of the Kansas Division of Workers' Compensation. Dr. Keenan diagnosed several conditions including major depressive order, pain disorder, borderline personality disorder. (Exhibit C: Keenan Report). Dr. Keenan specifically noted that Ms. Wright's clinical presentation, history and psychological test results were indicative of a borderline personality disorder, which pre-existed her other psychiatric diagnoses and formed the foundation of many of her psychosocial problems. *Id.* Dr. Keenan cited to a number of factors, including the anger Ms. Wright has for her mother, the break-up with her boyfriend, several failed marriages, an estranged relationship with her daughter and Ms. Wright's tendency to blame others for her injury as pieces of data in Ms. Wright's history of borderline personality disorder. (Keenan Depo, p. 23, 36.) It was Dr. Keenan's opinion that she could have diagnosed Ms. Wright's borderline personality disorder prior to the date of her accident on December 2, 2003. (Keenan Depo, p. 35-36).

Dr. Keenan ultimately rendered Ms. Wright an overall psychological impairment of 65%, 35% of which she attributed to Ms. Wright's worker's compensation injury and 30% of which she considered pre-existing. (Keenan Depo, p. 29). It was Dr. Keenan's opinion that the impairment Ms. Wright currently suffers was brought upon by the combination of her injury, her pre-existing personality, and her pre-existing intellectual and educational limitations. (Keenan Depo, p. 32). She found that these impairments or disabilities result in Ms. Wright's total disability from being able to find work in the open labor market. (Keenan p. 32).

Dr. Keenan testified that the etiology of a personality disorder deals with early childhood conditioning, and that often physical and/or sexual abuse is involved. (Keenan Depo, p. 33-34). On cross-examination Dr. Keenan testified that she was born and raised in an intact family and reported no history of sexual abuse, hatred between her brothers and sisters that she loved her parents, and Ms. Wright stated "she had a beautiful childhood". (Keenan Depo, p. 49). Dr. Keenan also admitted on cross-examination that no other doctors provided an Axis II diagnosis of borderline personality disorder. (Keenan Depo. p. 47-48).

Dr. Keenan testified that she had not conducted any learning disability testing and had not reviewed old school records. (Keenan Depo. p. 40). Dr. Keenan testified that despite the reports of a learning disability, Ms. Wright was able to read the questions in the tests she conducted and answer the questions as required. (Keenan Depo. p. 41-42). The documentation provided by parties at trial shows that while people have speculated as to Ms. Wright having a learning disability, no trained professional has ever conducted any testing that was relied on to show that Ms. Wright does in fact have a diagnosed learning disability based on evidence and not pure speculation.

Dr. Keenan admitted that Ms. Wright had no prior psychological treatment before the 2003 accident and only began receiving psychological treatment following the total knee replacement and her sister's death. (Keenan Depo. p. 42-43). Ms. Wright doesn't receive any medication for depression or complain of suicidal thinking until after the total knee replacement. (Keenan Depo. p. 43). Dr. Keenan testified that Ms. Wright didn't report any loss of employment prior to 2003 due to interpersonal relationships with co-workers or supervisors. (Keenan Depo. p. 44). On cross-examination, Dr. Keenan admitted that Ms. Wright had not been diagnosed with a pre-existing personality disorder. (Keenan Depo. p. 47-48).

Dr. Keenan offered testimony on cross-examination that personality disorders have an etiology in early childhood and often involve physical and/or sexual abuse. (Keenan Depo. p. 33). Dr. Keenan also admitted that Ms. Wright was born and raised in an intact family, reported no sexual abuse growing up, didn't report hatred between her brothers and sisters, and that characterized her childhood as beautiful and loved both of her parents. (Keenan Depo. p. 49). Dr. Keenan admitted that while borderline personality disorder may or may not be a disability in a person's employment she had not reviewed any evidence that Ms. Wright was disabled because of a personality disorder prior to 2003. (Keenan Depo. p. 65-66). Ms. Wright was on medications for her psychological diagnoses, but Dr. Keenan testified that she was not on any of those drugs prior to 2003, based on the medical records. (Keenan Depo. p. 50). Dr. Keenan admitted that based on the psychological complaints of the depressed mood, irritable mood, tearfulness, disturbed sleep, lethargy and other complaints that she responded to in May 2010, when the evaluation was conducted, it was unlikely that anyone would want to hire her based on her presentation and interaction. (Keenan Depo. p. 55). Dr. Keenan testified that based on what Ms. Wright told her that the work injury caused her to go from an active lifestyle to a sedentary lifestyle. (Keenan Depo. p. 59).

Ms. Wright has not worked in the open labor market since 2006. (Dreiling Depo, p. 19). Vocational expert Michael Dreiling determined that Ms. Wright would be significantly limited in obtaining work in the open labor and was essentially and realistically unemployable given her academic issues, limited education, psychological problems and orthopedic conditions. (Dreiling Depo, pp. 14-15). Specifically, Mr. Dreiling testified that although Ms. Wright had been able to overcome her limited educational background by performing physically oriented work in the past, "her limited educational background becomes a very significant issue for her vocationally," since physical work is no longer an option. (Dreiling Depo, p. 15). Despite Dr. Jones' opinion

that Ms. Wright could perform sedentary work, Mr. Dreiling found that factoring in the emotional conditions and limitations significantly impacted her ability to do so.

Mr. Dreiling further opined that that the learning disability observed by Dr. Keenan is a hindrance or obstacle to Ms. Wright's ability to obtain employment. (Dreiling Depo, p. 26). It was Mr. Dreiling's opinion that Ms. Wright's pre-existing emotional disability, which included Dr. Keenan's diagnosis of borderline personality disorder, as well as Ms. Wright's special education and learning disability, were all factors in his opinion that she is no longer able to access the open labor market. (Dreiling Depo, p. 27). According to Mr. Dreiling, absent the learning disability and psychological impairment, Dr. Jones' medical restrictions alone would not take Ms. Wright out of the open labor market. (Dreiling Depo, p. 27).

On cross-examination, Mr. Dreiling admitted that the only contact he had with Ms. Wright was the interview he conducted over the phone. (Dreiling Depo. p. 32). Mr. Dreiling admitted that his determination of Ms. Wright's unemployability hinged upon her lack of a high school degree and the fact that she told him she was in special education. (Dreiling Depo. p. 32). Mr. Dreiling testified that he never reviewed any records from any school district that Ms. Wright attended. (Dreiling Depo. p. 32). Mr. Dreiling testified that he did not perform any vocational testing and that he saw no evidence that anyone else conducting any testing of Ms. Wright to determine that she suffered from a learning disability. (Dreiling Depo. p. 32-33). Mr. Dreiling testified that prior to the accident Ms. Wright was in good physical health, had gone through CNA training previously, was able to ambulate without the use of a cane and perform constant standing, walking, heavy lifting, bending and other physical activities. (Dreiling Depo. p. 36-37).

Mr. Dreiling also testified that Ms. Wright didn't describe any emotional conditions that prevented her from obtaining or maintaining employment or that any emotional conditions had led to her termination from any employment. (Dreiling Depo. p. 37). Mr. Dreiling testified that Ms. Wright did not relate problems with concentration, pace or persistence in her employments throughout the years. (Dreiling Depo. p. 49-50). Ms. Wright, according to Mr. Dreiling, would be able to perform manufacturing jobs at the Sedentary level that would fall within the restrictions provided by Dr. Lowry Jones. (Dreiling Depo. p. 44).

Following her accident in December 2003, Ms. Wright began working for W.W. Rowland as a truck driver where she was employed for eight to eleven months. Ms. Wright has been unsuccessful in attempts to find employment since her partial knee replacement surgery in 2008. Ms. Wright attributes the psychological stress and anguish she suffers to her inability to find gainful employment.

No future course of treatment for Ms. Wright's left knee was recommended by Dr. Jones, as he testified that he didn't know if her pain complaints could be cured and believed some of her complaints to be psychological. (Jones Depo, pp. 25-26). Ms. Wright does, however, take a number of medications on an ongoing basis to treat the

conditions she alleges she suffers as a result of her accident on December 2, 2003. Ms. Wright requests that the court authorize treatment for the pain she continues to suffer in her neck and back as a result of her December 2, 2003 accident and injury. Ms. Wright also requests that the court deem her permanently and totally disabled as a result of her accident on December 2, 2003 and award her benefits accordingly.

FINDINGS OF LAW

I. Nature and Extent of Disability

Based on the evidence presented I find:

Ms. Wright has alleged she is permanently and totally disabled. In order to determine whether an employee is deemed totally disabled under the Missouri Workers' Compensation Law, it must be found that the Claimant is unable to return to any employment. § 287.020(7) RSMo (1986) defines total disability as "an inability to return to any employment and not merely . . . inability to return to the employment which the employee was engaged at the time of the accident." The terms "any employment" mean any reasonable or normal employment or occupation. Reese v. Gary & Roger Link, Inc., 5 S.W. 3d 522 (Mo. App. 1999); Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo. App. 1996); Kowalski v. M-G Metal and Sales, Inc., 631 S.W. 2e 919, 921 (Mo. App. 1982); Groce v. Pyle, 315 S.W. 2d 482, 490 (Mo. App. 1958). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that they be unable to compete in the open labor market. *See* Reese v. Gary & Roger Link, Inc., 5 S.W. 3d 522 (Mo. App. 1958); Carlson v. Plant Farm, 952 S.W. 2d 369, 373 (Mo. App. 1997); Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft, 894 S.W. 2d 173 (MO. App. 1995); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo. App. 1992); Brown v. Treasurer, 795 S.W. 2d 478 (Mo. App. 1990).

Missouri courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the Employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition. *See* Garcia v. St. Louis County, 916 S.W. 2d 263 (Mo. App. 1995); Lawrence v. R-VIII School District, 834 S.W. 2d 789 (Mo. App. 1992); Carron v. St. Genevieve School District, 800 S.W. 2d 6 (Mo. App. 1991); Fischer v. Arch Diocese of St. Louis, 793 S.W. 2d 195 (Mo. App. 1990). In other words, a determination of permanent total disability should focus on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employments. Gordon v. Tri-State Motor Transit, 908 S.W. 2d 849 (Mo. App. 1995). The courts of this state have held that various factors may be considered, including a claimant's physical and mental condition, age, education, job experience and skills in making the determination as to whether a claimant is permanently and totally disabled. *See e.g.*, Tiller v. 166 Auto Auction, 941 S.W. 2d 863 (Mo. App. 1997); Olds v. Treasurer, 864 S.W. 2d 406 (Mo. App. 1993); Brown v. Treasurer, 795 S.W. 2d 439 (Mo.

App. 1990); *Patchin v. National Supermarkets, Inc.*, 738 S.W. 2d 166 (Mo. App. 1987); *Laturno v. Carnahan*, 640 S.W. 2d 470 (Mo. App. 1982); *Vogel v. Hall Implement Company*, 551 S.W. 2d 922 (Mo. App. 1977). The commission is the sole judge of witness credibility and is free to disbelieve the testimony of any witness even if there is no contrary or impeaching evidence. *Anderson v. Emerson Elec. Co.*, 698 S.W. 2d 574, 576 (Mo. App. 1985).

Most of the cases involving a determination of whether a claimant is permanently and totally disabled contain language only about the employee's ability to compete on the open labor market. Some of these cases, however, also contain language about whether an employer can reasonably expect an employee to successfully perform the work. The inquiry into permanent total disability is a factual one: whether Claimant is employable. *Messex v. Sachs Electric Co.*, 989 S.W. 2d 206, 210 (Mo. App. 1999).

I find that Ms. Wright is unemployable on the open labor market as a result of the injury she suffered on December 2, 2003, while employed for Palmentere Brothers Cartage Service. Ms. Wright was employed full time without significant hindrance prior to her accident on December 2, 2003. The evidence reflects that while Ms. Wright worked after the primary injury, that work took place prior to the failed knee replacement operation to address the ongoing dysfunction she was having in the knee while employed at W.W. Roland.

I find the opinions of Dr. Keenan lack credibility. Dr. Keenan diagnoses a personality disorder that pre-existed Ms. Wright's primary injury. In addition to the claimant's testimony disputing this fact, there was no medical evidence provided to support the claim. There was no evidence of any treatment by Ms. Wright for any psychological condition prior to the primary injury. Additionally, there was no evidence upon review of the medical records provided that any other examiner shared a similar diagnosis that Ms. Wright had a personality disorder. Dr. Keenan diagnosed a learning disability, but failed to conduct any testing to identify a learning disability. Dr. Keenan's expertise as a psychologist qualified her to conduct testing and provide a proper opinion on this issue. Dr. Keenan's failure to conduct that testing is evidence that there is not reasonable foundation for her opinion regarding the alleged learning disability. I find that Dr. Keenan's testimony regarding Ms. Wright to lack credibility. On that basis I have not relied on her opinions regarding Ms. Wright's pre-existing disability or alleged learning disability.

Similarly, I find the opinions of Michael Dreiling to lack credibility. Mr. Dreiling was of the opinion that Ms. Wright was unemployable in the open labor market as a result of the primary injury and the pre-existing borderline personality disorder and alleged learning disability. I find that Mr. Dreiling's opinion lacks credibility for several reasons. Mr. Dreiling never met with Ms. Wright in person and felt that Ms. Wright was employable despite the fact that as a result of the primary injury the claimant walks with a cane on a permanent basis. Mr. Dreiling opined that the alleged learning disability contributed to Ms. Wright's unemployability, but testified that he reviewed no evidence of any testing that was conducted to serve as evidence of a learning disability. I find that

Ms. Wright's testimony that she utilizes a cane for ambulation to be consistent with the medical evidence and Ms. Wright's testimony and complaints. I find that Mr. Dreiling's opinions lack credibility when examined in light of the substantial problems Ms. Wright has in functioning on a daily basis as a result of the knee injury she suffered while working for Palmentere Brothers Cartage Service.

Ms. Wright testified at hearing that prior to the accident of December 2, 2003, she was not suffering from any condition that caused an inability to work and maintain substantial gainful employment. Ms. Wright testified that she never had any problems with her knee or used a cane for ambulation prior to the primary injury of December 2, 2003. Since the operations on Ms. Wright's knee she is unable to ambulate without the use of a cane. This fact has been commented on by treating physicians and evaluators alike. Ms. Wright testified that as a result of knee instability she has sustained several falls since the knee replacement causing injury to several body parts including the right shoulder, left elbow, left foot, and a broken wrist.

Additionally, the testimony of Ms. Wright and the accompanying medical records make clear that prior to the workers' compensation injury of December 2, 2003, there was no treatment for any psychological condition. Ms. Wright testified additionally that she never missed work due to any psychological condition and was not accommodated by any employer based on any psychological condition prior to the injury on December 2, 2003. Ms. Wright testified that after she was told that there was nothing more they could do for her knee problems that she began to have feelings of sadness and depression, because she could no longer work and her knee was no better.

Ms. Wright testified that she had no pre-existing injuries, functioned normally, and lived an active lifestyle prior to the knee injury she suffered on December 2, 2003. This testimony is corroborated by the records, reports, and testimony offered at trial. Ms. Wright testified that she looked for work after the partial knee replacement performed by Dr. Robichaux. Despite taking part in several job fairs and actively searching for employment, Ms. Wright has been unable to find employment in the open labor market. The testimony of Dr. Robichaux and Dr. Keenan evidences that her employment presentation is being negatively affected by her general presentation.

Dr. Keenan admitted that based on the psychological complaints of the depressed mood, irritable mood, tearfulness, disturbed sleep, lethargy and other complaints that Ms. Wright provided it was unlikely that any employer would want to hire her based on her presentation and interaction. Similarly, Dr. Robichaux commented that he didn't believe Ms. Wright understood that employers would not hire her because of her use of a cane and her underlying emotional state. I find that based upon Ms. Wright's presentation and the psychological treatment following the primary injury Ms. Wright is unemployable in the open labor market based on the accident of December 2, 2003 in isolation.

The standard for determining permanent total disability benefits is whether the individual is able to compete in the open labor market and whether an employer in the usual course of business would reasonably be expected to employ the Ms. Wright in his

present physical condition. Based on the testimony of Dr. Keenan and Dr. Robichaux it is clear that Ms. Wright's presentation post work injury of December 2, 2003, is significantly affected by the injury she suffered. Ms. Wright presents for employment utilizing a cane for ambulation and has a depressed emotional state that these providers believed had a negative effect on her ability to compete in the open labor market.

While Mr. Dreiling never met Ms. Wright, Mr. Dreiling's report reflects her statements to him that she has problems with any prolonged sitting, standing, or walking and uses a cane for ambulation. In addition to Ms. Wright's problems with ambulation, Dr. Robichaux's records reflect that Ms. Wright was severely depressed and suffered from anxiety. It was at the time he was treating her as a result of the knee replacement that Ms. Wright was placed on psychological medication for the first time. After treatment from Dr. Robichaux with Paxil and Xanax, Ms. Wright eventually was treated inpatient related to her psychological issues.

The records of Rosenblum Mental Health Center make clear that Ms. Wright's suicidal ideation was based in her feelings of hopelessness due to the constant pain she was suffering as a result of the accident at Palmentere and continued dysfunction in the knee. Ms. Wright reported that was angry much of the time and ruminated about the past and what she perceived as a bleak future. The report dated September 29, 2008 states that one month prior Ms. Wright overdosed and continued to feel hopeless and useless. Ms. Wright had severe pain in the leg and fantasized about cutting it off because she believed she could walk easier with a prosthetic leg. The provider also noted Ms. Wright became visibly upset about the unsuccessful partial knee replacement surgery, both at the doctor for recommending it and herself for agreeing to it.

I find that the medical evidence makes clear that Ms. Wright's psychological difficulties are based on the ongoing left knee dysfunction. The records make clear that Ms. Wright received no treatment for any psychological conditions before the knee injury of December 2, 2003, and the subsequent failed surgical intervention. All evidence of depression and anxiety are subsequent to the injury of December 2, 2003, and Ms. Wright's testimony has consistently been that the basis of her psychological problems is the loss of her career and active lifestyle that she enjoyed prior to her work related injury. I find that there is no basis for the opinion that Ms. Wright suffered from a pre-existing psychological disorder. The medical records and Ms. Wright's testimony make it clear that she had no pre-existing psychological diagnosis or condition that affected her ability to be employed in the open labor market prior to the injury on December 2, 2003.

CONCLUSION

Based on the findings of fact and rulings of law discussed above, I find that Ms. Wright is permanently and totally disabled as a result of the December 2, 2003 accident. I find that employer is responsible for continuing to provide psychological and pain medications related to the accident of December 2, 2003 and Ms. Wright's subsequent treatment.

Employer and Insurer shall pay Ms. Wright permanent total disability benefits of \$394.73 per week for the remainder of Ms. Wright's life. I find that Palmentere Brothers Cartage Service will be given credit for the Permanent Total Disability benefits they paid as a result of the Kansas Workers' Compensation decision.

Finally, this Court awards to Employee's attorney, Mr. Donald Taylor, a fee of 25 percent of all benefits awarded herein.

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Worker's Compensation