AWARD

Employee: [redacted] Injury No.: [redacted]

Dependents: n/a

Employer: [redacted]

Additional Party: Second Injury Fund (SIF)

Insurer: [redacted]

Hearing Date: [redacted]

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

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

2. Was the injury or occupational disease compensable under Chapter 287? No

3. Was there an accident or incident of occupational disease under the Law? No

4. Date of accident or onset of occupational disease: [redacted]

5. State location where accident occurred or occupational disease was contracted: City of Rolla, MO

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? No

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:

    Walking to the back of a work truck.

12. Did accident or occupational disease cause death? No Date of death? n/a

13. Part(s) of body injured by accident or occupational disease: left lower extremity at the level of the knee.

14. Nature and extent of any permanent disability:
    Left lower extremity at the level of the knee: 0%;
    SIF liability: None

15. Compensation paid to-date for temporary disability: zero

16. Value necessary medical aid paid to date by employer/insurer? zero

17.	Value necessary medical aid not furnished by employer/insurer?		$0.00
18.	Employee's average weekly wages:	$536.25	
19.	Weekly compensation rate:	$PPD/TTD; $357.50	
20.	Method wages computation:	Stipulation	

COMPENSATION PAYABLE

21.	Amount of compensation payable:	Zero
22.	Second Injury Fund liability:	Zero

Employee: [redacted]

Injury No.: [redacted]

Dependents: n/a

Employer: [redacted]

Additional Party: Second Injury Fund (SIF)

Insurer:

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

Hearing Date: [redacted]

Checked by: [redacted]

FINDINGS OF FACT and RULINGS OF LAW:

A hearing was held on the above-captioned matter on [redacted]. [redacted] (Claimant) was represented by attorney Brian E. Roskin. [redacted] (Employer) and [redacted] (Insurer) were represented by attorney [redacted]. The Second Injury Fund (SIF) was represented by attorney [redacted].

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

1. At the time of his accident, Claimant was an employee of Employer.

2. Employer and Claimant were operating under and subject to the provisions of the Missouri Workers' Compensation Law.

3. Employer's liability was fully insured by [redacted].

4. Employer had notice of Claimant's injury as for the **October 23, 2007** injury date.

5. A claim for compensation was timely filed by Claimant.

6. Claimant's average weekly wage on the date of injury was $536.25, entitling her to a rate of $357.50 for TTD/PPD.

7. Employer has paid no TTD benefits.

8. Employer has paid no medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Whether Claimant suffered an accident arising out of employment on [redacted] or [redacted].

2. Whether Claimant's alleged injuries and disabilities were medically caused by his accident of [redacted] or [redacted].

3. Whether proper notice was given for the [redacted] injury.

4. Liability of the Employer for past medical expenses.

5. Liability of the Employer for TTD.

6. Nature and extent of permanent partial disability being alleged.

7. Liability of the Second Injury Fund.

EXHIBITS

Claimant submitted Exhibits A through J, inclusive, which were admitted without objection.

Employer submitted Exhibits 1, 2 and 3, which were admitted into evidence over objection, subject to all objections made and recorded in each exhibit.

The Second Injury Fund offered no exhibits.

FINDINGS OF FACT and RULINGS OF LAW:

A hearing was held on the above-captioned matter on April 26, 2011. [redacted] (Claimant) was represented by attorney Brian E. Roskin. [redacted] (Employer) and Federated Insurance Company (Insurer) were represented by attorney Susan Turner. The Second Injury Fund (SIF) was represented by attorney [redacted].

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

9. At the time of his accident, Claimant was an employee of Employer.

10. Employer and Claimant were operating under and subject to the provisions of the Missouri Workers' Compensation Law.

11. Employer's liability was fully insured by [redacted].

12. Employer had notice of Claimant's injury as for the [redacted] injury date. .

13. A claim for compensation was timely filed by Claimant.

14. Claimant's average weekly wage on the date of injury was $536.25, entitling her to a rate of $357.50 for TTD/PPD.

15. Employer has paid no TTD benefits.

16. Employer has paid no medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

8. Whether Claimant suffered an accident arising out of employment on [redacted] or [redacted].

9. Whether Claimant's alleged injuries and disabilities were medically caused by his accident of [redacted] or [redacted].

10. Whether proper notice was given for the [redacted] injury.

11. Liability of the Employer for past medical expenses.

12. Liability of the Employer for TTD.

13. Nature and extent of permanent partial disability being alleged.

14. Liability of the Second Injury Fund.

EXHIBITS

Claimant submitted Exhibits A through J, inclusive, which were admitted without objection.

Employer submitted Exhibits 1, 2 and 3, which were admitted into evidence over objection, subject to all objections made and recorded in each exhibit.

The Second Injury Fund offered no exhibits.

FINDINGS OF FACT

Based upon the competent and substantial evidence, my observations of Claimant at trial, and all the reasonable inferences to be derived there from, I find:

1. Claimant is a [redacted] year-old male who had been employed by Employer as a worker on [redacted], and for many years prior.

2. On [redacted], Claimant stepped out of a truck while carrying a 100 to 150 pound coil, slipped causing his body to turn, twisting and hyper-extending his left knee. ("the Accident"). He was attempting to clear the back of the work truck so that he could proceed to his next assigned job. This was a task that was required of Claimant, and performed on many occasions prior.

3. At the time of the Accident, Claimant testified that he felt immediate, acute and severe pain in his left knee, which was much more intense than prior to the Accident.

4. Claimant testified that he immediately notified the proper person, [redacted], and she began to fill out an accident report for him on the computer. At that time, Claimant was called to another job and went to perform his duties. The employer, [redacted] testified that he had notice of this [redacted] injury less than a week later. At this time, however, Employer did not make an accident report nor did he notify the state of Missouri of Claimant's injury.

5. After the accident, Claimant continued to work for Employer and experienced symptoms in his left knee. During the next month Claimant would experience shooting pain, swelling, discomfort, and weakness all coming from his left knee. He was forced to ice it at night and take over the counter medicine to treat the pain. He did not seek medical treatment right away because he didn't want to take time off from work.

6. On [redacted], Claimant injured himself again while stepping out of the same work truck and walking to the back. He was on the clock and performing duties for the company. He experienced the

same shooting pain and discomfort that he had been experiencing the previous month. Again, he reported this injury to [redacted] and asked for medical treatment.

7. Claimant reported to [redacted] Clinic for evaluation and treatment. At that time he reported that he had an initial episode with his left knee about a month prior. He also stated that he had injured it again on that day, [redacted]. An MRI scan was performed and it revealed a tear of the body and posterior junction of the medial meniscus.

8. Claimant testified that while waiting for his surgery he asked that The Employer let him continue to work. This was allowed for some time and Claimant testified that during this time he experienced the same kinds of symptoms that he had experienced after the [redacted] injury, shooting pain, swelling, and tenderness. The Employer then took him off of work for the month prior to the surgery. Employer, however, did not provide Claimant with any TTD during this time or any subsequent time.

9. Claimant was referred to [redacted], an orthopedic surgeon at the [redacted] Clinic in [redacted]. Claimant testified that he described the origin of the injury, telling Dr. [redacted] about the injury on [redacted]. Arthroscopic surgery was performed which included a medial meniscectomy, limited synovectomy and removal of the loose bodies in his left knee.

10. After surgery Claimant requested that he be returned to work at a light duty status, but was told that there was no work for him. Employer testified that he was told not to let Claimant work by the insurance company. No TTD was paid for the 3 months Claimant was on no duty or light duty following the surgery.

11. Following the surgery Claimant was noted to have grade I laxity and complained of signs and symptoms of instability. He was furnished with a knee brace and was instructed to return in 6 weeks. He went to physical therapy to try and improve his condition as the direction of his physician. He was released back to work on [redacted] at full duty as long as he was wearing his knee brace. The bills from that physical therapy contained in exhibit C remain unpaid and outstanding.

12. Since then, Claimant testified that he rarely removes his knee brace during the day. The only time it is off is if he is sleeping or lounging on the couch. He complained of pain and swelling in his left knee that is aggravated by squatting, kneeling and walking up stairs. He takes over the counter medicine to help with the pain, and is no longer able to participate in basketball or flag football games.

13. Employer did not provide any of the medical aid and did not provide any TTD for the 4 months that Claimant was off of work.

14. At the request of his attorney, Claimant was evaluated by Dr. [redacted] on [redacted]. Dr. [redacted] examined him, reviewed medical records and diagnostic testing, prepared a report, and testified by deposition. He has evaluated patients in regard to their work restrictions for 25 years for the Missouri Department of [redacted].

15. Dr. [redacted] is reasonably certain that the [redacted] Accident was a substantial factor in causing Claimant to sustain a tear of the medial meniscus in his left knee, with associated permanent disabilities of 35% of the left lower extremity at the level of the knee. He testified that the tear of the meniscus in Claimant's left knee as a result of the [redacted] Accident was in a different location than the meniscus tear surgically repaired in [redacted]. He believes that his treatment prior to his evaluation was reasonable and was a result of the Accident, and that the bills described in Exhibit C associated with the treatment are fair and reasonable. The only medical treatment he recommended was the use of non-steroidal anti-inflammatory medication.

16. Dr. [redacted] is also reasonably certain that, at the time of the Accident, claimant suffered from pre-existing permanent disabilities of his left lower extremity at the level of the knee (25%) and right lower extremity at the level of the knee (45%) and that the combination of his pre-existing disabilities with his disabilities caused by the Accident creates a significantly greater disability than the sum of his individual disabilities and that a loading factor should be applied.

17. Prior to the Accident of [redacted], Claimant injured his right knee in [redacted] while playing basketball in gym class. A student rolled onto his leg causing pain and tenderness. He had a torn meniscus and had it surgically repaired. When treatment was concluded, Claimant testified that his knee was not as good as it use to be. He could no longer perform activities as he did before. Although he could still get around just fine, he would experience pain and swelling in his right knee. He continued to experience problems leading up to his [redacted] Accident.

18. In [redacted] Claimant again injured his right knee when it was crushed between two barrels. He received treatment from Dr. [redacted] in [redacted], IL. Again, Claimant suffered a torn ligament in his right knee and surgery had to be performed. As a result of this injury, Claimant testified that he still has pain and swelling that occurs in his right knee. He has to take over the counter pain medication to help, and will ice when necessary. He reported to Dr. [redacted] that his right knee pops and cracks, is tight and stiff, and that weather changes affects his pain as well.

19. In [redacted] Claimant testified that he injured his left knee when he fell on ice. As a result of this he suffered a posterior tear of the medial meniscus and surgery had to be performed at [redacted] Hospital. As a result of this injury Claimant again experienced difficulties to his left knee. He now had pain and tenderness, loss of strength, and would have to take over the counter medicines to relieve his discomfort. He was still able to perform his job duties, but experienced these difficulties along the way.

20. Claimant was credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant suffered an accident that arose out of employment with [redacted] on [redacted].

For all claims arising after August 27, 2005 The Workers' Compensation Law defines an accident to be an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. V.A.M.S. §287.020.3(1). An employee's injury or death resulting from an accident is only compensable if the accident was the prevailing factor in causing the injury or death. V.A.M.S. §§287.020.3(2)(a), 287.020.10. The accident must be the prevailing factor in causing both the resulting medical condition and disability. *Johnson v. Indiana Western exp., Inc.*, 281 S.W.3d 885 (Mo Ct. App. S.D. 2009). The prevailing factor in the causation of an employee's medical condition and disability is the factor which is primary in relation to any other causative factor. V.A.M.S. §§ 287.020.3(2)(a), 287.067.1, 287.067.3.

In *Mary Perdue*, Injury No. 06-001088 (Missouri Labor Commission, April 14, 2010), the court found that an accident had occurred when the employee was "engaged in the specific act of unloading pallets that included bending, stooping, lifting and removing plastic wrappings on those pallets." As the employee in that case was cutting the wrapping, she "experienced an objective symptom of an injury; her back locked up" *Id*. The court found that the act of unloading the pallets was the "unexpected traumatic event and the specific event giving rise to employee's objective symptoms of an injury." and it was therefore proper to find that the employee had suffered an accident. *Id*. Having found that an accident had occurred, the court then moved to the next part of the analysis; whether or not the accident arose out of employment. In order to resolve this, the court must decide if the employee's injury came from an activity that "is integral to the performance of a worker's job." *Id*. If this question is answered in the affirmative, then there is a "clear nexus between the work and the injury." *Id*. "When the work nexus is

clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life." *Id*. The employee was asked to unload the pallets as part of her job and as a task to help the company. In order to move on to her next task, she had to complete that one. In that case the court found that since unloading the pallets was an integral part of the job, there is a clear nexus between the injury and her work. *Id*. No further analysis was needed; however, the court in dictum used the example of a worker falling on a spill on the floor. That spill created the risk of falling. *Id*. In that example, a worker engaged in the incidental activity of walking to her workstation, slipping and falling on the spill and sustaining an injury, the court reasoned that "the spill on the premises provides the nexus between the work and the accident." *Id*.

In this case, Claimant testified that on [redacted] he was working for the employer, performing a task that he had done on numerous occasions before. It was his job to unload the back of his work truck, in order to get it prepared for the next job. On this particular day he was to carry a 100 – 150 pound coil from the back of the truck to the dumping location. As he stepped out of the truck he slipped causing his foot to plant and his body and knee to twist which resulted in pain to his left knee. At this point the Claimant experienced objective symptoms of an injury. He experienced immediate pain and tenderness to the injured area, and felt shooting pain when he put pressure on it. Prior to this injury he had not been experiencing these problems. He continued to try and work after this injury for about a month, but nevertheless would still have symptoms of swelling, shooting pain and weakness. Therefore, I find that an accident occurred on [redacted].

The event that occurred on [redacted] was not the prevailing factor for the injury to the left knee. Claimant was not suffering a new symptom and there was no unexpected traumatic event. I therefore find that no accident occurred on [redacted].

As for the [redacted] accident, it is necessary to move on to the next phase of the analysis; did the accident arise out of the course of employment? In this case, Claimant was performing a task that he was asked to do nearly every day he worked there. His boss knew that he was performing this duty, it was for the good of the company and he would be unable to perform his next job duties if he did not unload the work truck. Since this action was necessary and integral to his job duties, I find that there is a clear nexus between the work and the injury. Just as the spill on the floor and the resulting fall and injury provides the necessary nexus, so does a slip while stepping out of a truck while carrying a heavy coil provide the necessary nexus. The heavy coil in this case is analogous to the spill on the floor. Additionally, the step off of the truck could provide the same nexus if further analysis were needed. Since this is the case there is no need to examine whether the Claimant would have been equally exposed to the risk in normal non-employment life. Therefore, I find that the accident arose out of the course of employment.

2. Claimant's injuries and disabilities were medically caused by her accident.

There is uncontroverted evidence from Dr. [redacted] that the injuries and disabilities of the Claimant were medically caused by his accident on [redacted]. He stated that the industrial accident that occurred on [redacted] was the prevailing factor in causing Claimant to suffer a left knee strain with reactive synovitis and tear of the medial meniscus associated with articular loose bodies. Dr. [redacted] testified that the tear of the meniscus was on a different location of the tendon than where the [redacted] repair was performed.

Claimant suffered from knee problems in the past, but the persistent symptoms of shooting pain, swelling and weakness were not present prior to this Accident, and did not go away with time after the Accident. After the symptoms came back on [redacted] he sought out immediate medical attention to try and get relief from the injury.

Thus, I find that the Accident was the prevailing factor in causing a left knee strain with reactive synovitis and tear of the medial meniscus associated with articular loose bodies.

3. Proper notice was given to the Employer

Neither The Workers' Compensation Law nor Missouri courts construing The Law require an employee to strictly comply with its requirements set forth in V.A.M.S. § 287.420 regarding the notification of the occurrence of work-related accidents in every circumstance as an absolute unconditional prerequisite to maintaining a claim for workers' compensation benefits: *Smith v. Plaster*, 518 S.W.2d 692 (App. 1975); *Snow v. Hicks Bros. Chevrolet, Inc.*, 480 S.W.2d 97 (App. 1972). Failure to comply with The Law's requirements may be excused either for good cause or if the employer was not prejudiced by its failure to receive the notice. Notice or knowledge of its employee's potentially compensable injury that is given to or acquired by an employer's supervisory employee is imputed to the employer, even if the person to whom the notification is furnished is not the injured employee's direct supervisor: *Gillam v. General Motors Corp.*, 913 S.W.2d 81 (App. 1995); *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652 (App. 1994); *Ford v. Bi-State Development Agency*, 677 S.W.2d 899 (App. 1984)*; Malcom v. La-Z-Boy Midwest Chair Co.*, 618 S.W.2d 725 (App. 1981); *Lawson v. Emerson Elec. Co., supra*.

In this case, Claimant testified that on the date of the first injury, [redacted] he immediately reported the accident to the proper office personnel and watched as she began to prepare an accident report. He was then called to the next job and had to leave prior to its completion. The Employer testified that he had knowledge of the accident less than a week after the occurrence. Additionally, there was no testimony from the Employer that any delay in notice caused him or his company any sort of prejudice. Therefore, I find that proper notice was given to the Employer for Claimant's [redacted] accident.

4. Employer is liable for past medical expenses.

Employer is responsible to provide medical care to cure and relieve Claimant after a compensable injury. V.A.M.S. §287.140.1. In this case, the only medical bills that are outstanding and still need to be paid were those contained in exhibit C and are for physical therapy undergone by Claimant following his left knee surgery. Dr. [redacted] testified without contradiction, contravention or impeachment that physical therapy was a reasonable course of treatment for claimant following this surgery. He also testified that the bills were of a reasonable amount for the type of treatment undergone by Claimant. Employer offered no testimony in opposition to Dr. [redacted] testimony. Therefore, I find that the Employer is liable to the Claimant for the medical bills contained in Exhibit C.

5. Employer is liable to Claimant for TTD.

If an employee's employer refuses to give work to an employee when it has work available for the employee to perform, the employee may be deemed to be unable to find reasonable employment, and, thus temporarily totally disabled, if the employee cannot compete on the open labor market for employment. *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816 (Mo.App. W.D.1995). Factors that may be relevant to an employee's employability on the open labor market include, but are not limited to:

1. the anticipated length of time until the employee's condition will reach the point of maximum medical progress.
2. the nature of the employee's continuing course of medical treatment; and
3. whether there is a reasonable expectation that the employee will return to the employee's former employment with the employer.

Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo.App W.D. 1997). If the anticipated length of time that remains until an employee's condition will reach the point of maximum medical progress is very short, it will always be reasonable to infer that the employee cannot compete for employment in the open labor market. *Id*. The ability or inability of an employee to return to employment refers to an employee's ability to perform the usual duties of the employee's regular employment in the manner that such duties are customarily performed by the average person engaged in those duties. *Caldwell v. Melbourne Hotel*, 116 S.W.2d 232 (Mo.App1938).

Claimant testified that there was a total of 4 months (16 weeks) when he was unable to work at all, either because the Employer refused to offer him a light duty job, or because he was on "no-duty" status following his surgery. It is now Employer's position that no TTD is to be paid since Claimant could have found work elsewhere. That argument however would allow Employer to speak out of both sides of its mouth. On one hand, Employer doesn't want to take a risk of having the injured Claimant work for his company and deal with him missing time for medical treatment, while on the other hand it now asserts that someone else should be willing to take that risk. I disagree. Claimant had continued medical treatment from the time of his first doctor's visit in [redacted] until he was released in [redacted]. Surgery dates, physical therapy and check ups were all part of Claimant's medical treatment plan. It is unreasonable to say that another employer would be willing to handle that burden when Employer in this case was not. Additionally, the amount of time missed by Claimant was not enough for him to look for work in the open labor market, especially since he was allowed to continue working for Employer for

some of it. Lastly, Claimant had a reasonable expectation that he would return to work for the Employer once he was released to full duty, which did eventually happen. For those reasons I find that Claimant is owed TTD for a total of 16 weeks at the stipulated rate of $357.50 or $5,720.00.

6. Employer is liable to Claimant for PPD.

Where an expert's testimony is neither impeached nor expressly contradicted by any other expert, a denial of benefits is contrary to the overwhelming weight of the evidence: *Kuykendall v. Gates Rubber Co.*, 207 S.W.3d 694 (Mo.App. S.D. 2006). Uncontradicted and unimpeached expert testimony cannot be disregarded: *Highley v. Von Weise Gear*, 247 S.W.3d 52 (Mo.App. E.D. 2008).

Dr. [redacted] provides the only medical evidence in this case as to the disability of Claimant as a result of his Accident on [redacted]. He states in his report and testifies to the fact that Claimant has a permanent partial disability of 35% of the left lower extremity at the level of the knee. Claimant testified that he is unable to participate in the same activities he once did; basketball and flag football. He has trouble squatting, climbing ladders and stairs and wears a knee brace at all times during the day. Therefore, I find that Claimant suffered a PPD of 25% of the left lower extremity at the level of the knee.

I find no PPD to Claimant's left knee as a result of the [redacted] accident.

7. The Second Injury Fund is liable to Claimant for PTD.

A claimant in a workers' compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 W.W.3d 902, 911 (Mo.App. E.D. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 R.S.Mo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Dr. [redacted] stated in his deposition as well as in his report that Claimant suffered from a 25% disability to his left lower extremity at the level of the knee as a result of a prior

injury in [redacted] and 45% of his right lower extremity at the level of the knee for injuries sustained in [redacted] and [redacted]. Claimant testified that all three of those prior injuries caused him pain, swelling and limited his activities from what he could do before them. I find that Claimant has met his burden to recover against the Second Injury Fund for his prior injuries and award him 15% of the left lower extremity at the level of the knee and 35% of the right lower extremity at the level of the knee for his prior injuries. I also find that the disabilities created an obstacle or hindrance to employment and a 15% loading factor should be applied. Thus, the total amount payable by Second Injury Fund to date is $6,435.00.

Date: _____ Made by: _____
[redacted]
Division of Workers' Compensation

A true copy: Attest:

_____
[redacted]
Director
Division of Workers' Compensation