

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

Injury No.: 08-122036

Employee: Patsy J. Allgier
Employer: Claru DeVille Healthcare
a/k/a Claru DeVille Nursing Center
Insurer: Missouri Nursing Home Insurance Trust

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Employee's failure to provide a curriculum vitae for Dr. Volarich

Employee's Exhibits A and B contain the written reports from Dr. Volarich setting forth the doctor's opinions and disability ratings. Employee failed to provide a curriculum vitae for Dr. Volarich. Employer argues that, absent a curriculum vitae, Dr. Volarich's opinions lack sufficient foundation and employee's Exhibits A and B do not constitute "complete medical reports" pursuant to § 287.210 RSMo.

Section 287.210.7 RSMo sets forth the procedure whereby a party may object to an opposing party's proffer of the testimony of an examining physician by a complete medical report, and provides, in relevant part, as follows:

[A] party shall dispute whether a report meets the requirements of a complete medical report by providing written objections to the offering party stating the grounds for the dispute, and at the request of any party, the administrative law judge shall rule upon such objections upon pretrial hearing whether the report meets the requirements of a complete medical report and upon the admissibility of the report or portions thereof. If no objections are filed the report is admissible, and any objections thereto are deemed waived. Nothing herein shall prevent the parties from agreeing to admit medical reports or records by consent.

Employer, in its brief, fails to direct us to any written objections that it provided to employee, or to any pretrial ruling from an administrative law judge concerning Dr. Volarich's reports. Turning to the transcript of the hearing, we discover that counsel for employer stated that he had no objection to the admission of Dr. Volarich's reports into evidence. *Transcript*, page 11. Because employer failed to avail itself of the appropriate pretrial procedures for challenging Dr. Volarich's reports, and thereafter abandoned any objection at the hearing and instead consented to the admissibility of Dr. Volarich's reports, employer's objection is

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waived. As a result, there is no need for us to determine whether the omission of a curriculum vitae for Dr. Volarich renders employee's exhibits inadmissible as complete medical reports under § 287.210. We conclude that employee's Exhibits A and B are properly in evidence.

To the extent employer is arguing that employee's failure to provide a curriculum vitae for Dr. Volarich means that Dr. Volarich's opinions in this matter should be deemed lacking credibility, we are not persuaded. The lack of a curriculum vitae certainly leaves us with little evidence whereby to discern the extent of Dr. Volarich's experience with regard to the medical conditions and disability at issue in this case. But employer failed to provide any contrary expert medical opinion evidence. Given these circumstances, Dr. Volarich's opinions, as the only expert medical opinions available to us, are by default the best qualified, despite our inability in this case to assess Dr. Volarich's professional history, publications, or achievements.

Employee's need for total knee replacement surgery

Employer challenges the administrative law judge's finding that employee's need for a total knee replacement surgery flowed from the injury she sustained on October 1, 2008, while undergoing physical therapy in connection with a compensable low back work injury. (The back injury is not at issue here.) Employer acknowledges Dr. Volarich's opinion that the need for the total knee replacement flowed from the injury employee sustained during physical therapy. Employer further acknowledges that Dr. Volarich was the only doctor to provide an opinion as to the reason employee required a total knee replacement surgery, but argues we should reject Dr. Volarich's opinion because it is contradictory.

Employer argues that Dr. Volarich's opinion is contradictory because he identified different diagnoses for employee's right knee condition as between his May 17, 2010, and August 25, 2011, reports. We acknowledge that Dr. Volarich initially diagnosed the right knee injury as a right knee bone bruise of the tibial plateau with effusion. We also note that Dr. Volarich then offered the additional diagnosis of accelerated right knee post-traumatic arthropathy in his August 2011 report. But we do not perceive any contradiction. Dr. Volarich's August 2011 report plainly reveals that the doctor still believed employee's right knee injury was a bone bruise of the tibial plateau, but that employee's condition had progressed. Specifically, Dr. Volarich opined that employee had suffered right knee post traumatic arthropathy "as a direct result" of the injury on October 1, 2008, which the doctor explained involved injury to the medial compartment of the knee. It appears to us that Dr. Volarich did not contradict his earlier diagnosis but instead identified a deterioration of employee's right knee condition which had developed since the last time he evaluated her.

Employer has failed to direct us to any contrary medical evidence suggesting that the post-traumatic arthritis identified by Dr. Volarich did not result from the work injury but instead from what employer describes as "degenerative changes." Employer suggests we will find such evidence in the notes from Dr. Burke, the treating doctor who performed the total knee replacement, but Dr. Burke merely diagnosed the arthritis and provided treatment for it; he did not offer any opinion as to what caused the condition. Dr. Burke's notes provide little support for employer's contention that Dr. Burke believed

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the arthritis to be wholly unconnected to the work injury, and certainly do not contradict, or as employer argues, “impeach” Dr. Volarich’s opinions. We note that employer’s use of “degeneration” as short-hand for a condition not caused by a work injury fails, in this case, to provide any material distinction from Dr. Volarich’s opinion—Dr. Volarich indeed identified “deterioration” in employee’s right knee, but he opined that it was a product of the work injury.

In sum, we are not persuaded that the distinction identified by employer amounts to a legitimate contradiction in the reports from Dr. Volarich. We find Dr. Volarich’s opinions credible. Because we are convinced that employee satisfied her burden of proving her need for a total knee replacement flowed from her October 1, 2008, right knee injury, see *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519-20 (Mo. App. 2011), we discern no reason to disturb the administrative law judge’s well-reasoned award.

Conclusion

The Commission affirms and adopts the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with this supplemental opinion.

The award and decision of Administrative Law Judge Maureen Tilley, issued July 23, 2012, is attached and incorporated by this reference.

We approve and affirm 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 1st day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Patsy J. Allgier Injury No. 08-122036
Dependents: N/A
Employer: Claru DeVille Healthcare, a/k/a Claru DeVille Nursing Center
Additional Party: N/A
Insurer: Missouri Nursing Home Insurance Trust, c/o Maxim Insurance Solutions, LC
Hearing Date: April 24, 2012 Checked by: MT/rf

SUMMARY OF FINDINGS

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? On or about October 1, 2008.
5. State location where accident occurred or occupational disease contracted: At Madison Medical Center in Fredericktown, Madison County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was undergoing physical therapy following a work-related injury

to her low back on July 10, 2008. Following the back injury she walked with an uneven gait and began to experience persistent pain in her right knee. During physical therapy, the therapist raised her right knee, causing it to pop. Employer initially provided treatment for the right knee in the form of an emergency-room visit, physical therapy, narcotic pain medication, an injection into the right knee by employer's doctor, Phillip Beyer, and an MRI was scheduled by Dr. Beyer on March 17, 2009. However, immediately before employee was to undergo the MRI, the employer-insurer's representative declined to pay. Dr. Beyer provided further treatment in the form of pain medication. Dr. Beyer's request to refer employee to an orthopedist was denied. No further treatment was provided by employer-insurer. On October 5, 2010, employer's attorney sent a letter to claimant's attorney formally denying treatment. Immediately thereafter employee began treatment with an orthopedist, Dr. Burke, paid for by her husband's insurance. During the interim, her gait continued to be altered and the right knee worsened. Dr. Burke recommended and performed a total right knee replacement.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right knee.
14. Nature and extent of any permanent disability: See findings.
15. Compensation paid to date for temporary total disability: None.
16. Value necessary medical aid paid to date by employer-insurer: Unknown (no breakdown was provided by employer-insurer concerning treatment for 7/10/08 back injury and this injury)
17. Value necessary medical aid not furnished by employer-insurer:
- | | |
|---|------------------|
| a. Missouri Baptist Hospital | \$28,628.99 |
| b. Dr. Burke of Orthopedic Associates | \$12,529.00 |
| c. Madison Medical Center | \$ 6,212.00 |
| d. Madison Medical Center re 3/17/09 MRI paid for
by employee's husband, Tim Allgier | \$ 1,911.00 |
| e. Out-of-pocket prescription medication paid by employee | <u>\$ 120.00</u> |
| Total | \$49,400.99 |
18. Employee's average weekly wage: \$401.03.
19. Weekly compensation rate: \$267.36.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Findings.

22. Second Injury Fund liability: N/A
23. Future requirements awarded: See Findings.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Daniel Fall.

FINDINGS OF FACT AND RULINGS OF LAW

On April 24, 2012, the employee, Patsy J. Allgier, appeared in person and with her attorney, Daniel P. Fall, for a hearing for a final award. The employer was represented at the hearing by its attorney, Patrick M. Reidy. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to provisions of the Missouri Workers' Compensation Act and its liability was fully insured by Missouri Nursing Home Insurance Trust, c/o Maxim Insurance Solutions, LC.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Claru DeVille Healthcare, a/k/a Claru DeVille Nursing Center, and was working under the Workers' Compensation Act.
3. Employer had notice of Employee's accident.
4. Employee's claim was filed within the time allowed by law.
5. The average weekly wage was \$401.03, resulting in a TTD rate of \$267.36 and a PPD rate of \$267.36.
6. The employer did not pay any temporary total disability benefits.

ISSUES

1. Whether on or about October 1, 2008, the employee sustained an accident or occupational disease arising out of and in the course of her employment.
2. Whether employee's injury was medically causally related to accident or occupational disease.
3. Whether the employer-insurer is provided medical aid to employee.
4. Whether the employer-insurer should be required to pay for previously incurred medical aid.
5. Employee's claim for mileage or other medical expenses under Section 287.140 RSMo.
6. Claim for additional or future medical care.
7. Employee's request for additional temporary total disability for a period of 12 weeks resulting from her total right-knee replacement.
8. The nature and extent of employee's permanent partial disability.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Independent medical exam, report, rating and opinion of David T. Volarich, D.O., dated May 17, 2010;
- B. Independent medical exam, report, rating, opinion and addendum to IME of May 17, 2010, of David T. Volarich, D.O., dated August 25, 2011;
- C. Medical records of Beyer Medical Group;
- D. Letter of David G. Yingling, M.D., neurosurgeon, dated November 11, 2008;
- E. Medical records of Surgery Center of Farmington;
- F. Medical records of Madison Medical Center (per affidavit dated October 12, 2009);
- G. Medical records of Madison Medical Center (per affidavit dated June 6, 2011);
- H. Business and medical records of Claru DeVille Nursing Center;
- I. Medical records of Orthopedic Associates;
- J. Billing records of Missouri Baptist Hospital;
- K. Billing records of Dr. Burke at Orthopedic Associates;
- L. Billing records of Madison Medical Center;
- M. Wal-Mart Pharmacy records;
- N. MRI results from Madison Medical Center;
- O. November 5, 2009 letter from Attorney Patrick Reidy;
- P. November 10, 2009 note from B.C. Schafer, M.D.;
- Q. October 5, 2010 letter from Attorney Patrick M. Reidy;
- R. Attorney Daniel P. Fall's letters to Attorney Patrick Reidy dated July 22, 2009; July 23, 2009; October 30, 2009; November 23, 2009; and December 2, 2009;
- S. Physical therapy prescription and note of Dr. Phillip Beyer dated October 20, 2008;
- T. October 1, 2008 x-ray reading of R. A. Murphy, D.O.;
- U. March 17, 2009 MRI reading of Barrett Schaefer, M.D.;
- V. October 12, 2010 x-ray reading of Raymond Murphy, D.O.;

Employer-Insurer's Exhibits:

- 1. CV of Dr. Burke;
- 2. MRI from Mineral Area Regional Medical Center;
- 3. Missouri Baptist admission record.

Employee's Exhibit W, the CV of Dr. Volarich, was sent to Administrative Law Judge Tilley via email on June 14, 2012. This was not admitted into evidence because Administrative Law Judge Tilley received the exhibit after the record was closed.

FINDINGS OF FACT

Patsy Allgier and Corroborating Records

Patsy Allgier has been employed by Claru Deville Nursing Center for 14 years. On July 10, 2008, she was asked to assist the visiting podiatrist during his examination of patients. Her

assistance consisted of the removal of a wheel-chair-bound patient's shoes and socks, wheeling the patient into the examination room, after the examination putting the patient's socks and shoes back on, and then wheeling the patient back to his or her room. She assisted with approximately 20 to 30 patients, and the process took three and a half to four hours. At the end of the day she noticed severe pain in her lower back. The pain radiated into her hips and legs, and she had difficulty sleeping that night.

The following morning, on July 11, 2008, she notified her employer and was instructed to seek treatment at Madison Medical Center's emergency room. Thereat, she was x-rayed, and examined. She was diagnosed with a lumbosacral sprain/strain (Pages 31 and 32, Exhibit F).

The employer referred her to Dr. Phillip M. Beyer, D.O. She first saw Dr. Beyer on or about July 14, 2008 (Page 13, Exhibit C). At that time she was experiencing acute low back pain and pain radiating into her lower extremities. Her pain at worst was between 8 and 10 and at best, between 7 and 10. She was off work for approximately two and one-half weeks and thereafter placed on light duty (Page 29, Exhibit H). Dr. Beyer initially treated her conservatively with narcotic pain medication, supplemented by over-the-counter pain medication, trigger-point injections, physical therapy and work hardening. She saw Dr. Beyer both at his office and at Claru DeVille Nursing Home.

Employee first physical therapy for her low back was at Claru DeVille Nursing Home from July 16 to August 14, 2008 (Exhibit H). She reported pain of between 6 and 7 and up to level 10 on a scale of 1 to 10. The pain was located across her lower back and radiated down her thighs to both knees. A gait deviation was observed as an "antalgic pattern." (Page 75, Exhibit H). The therapy did not provide significant improvement. Dr. Beyer recommended additional therapy at Madison Medical Center. She began the additional therapy on August 20, 2008, and completed it on September 12, 2008 for a total of 10 sessions (Pages 17-29 of Exhibit F). The additional therapy was also of limited benefit and she was reportedly "a shade better." (Page 30, Exhibit F).

On or about August 11, 2008, an MRI of her back was performed (Page 85, Exhibit H). Dr. Barrett Schaefer interpreted the MRI and stated under "Impression" 1. Degenerative disc change, mainly at L5-S1. Mild endplate lipping including dorsal change at L4-5 and L5-S1 with associated mild stenosis.

As a result of the low-back pain, Employee altered her gait. The altered gait resulted in swelling and pain in the right knee. During physical therapy the therapist raised her right leg, causing her knee to pop. The next day she noticed that the knee began swelling and continued to get worse. She reported it to her employer and was instructed to go to the emergency room for treatment on her right knee. On October 1, 2008, she went to Madison Medical Center's emergency room (Page 15, Exhibit F).

Beginning October 28, 2008, through December 10, 2008, she underwent physical therapy for her right knee at Claru DeVille Nursing Home (Page 90, Exhibit H).

Dr. Beyer referred her to neurosurgeon, David G. Yingling, M.D. for evaluation of the low-back pain. Mrs. Allgier saw Dr. Yingling on November 11, 2008. He concluded her back pain was as a result of her July 10, 2008 work activities (Page 2, Exhibit D). He reviewed the August 11, 2008 MRI results of her lumbar spine and noted dehydration of the L4-5 and L5-S1 discs with broad bulging of the L4-5 disc and severe disc space narrowing at L5-S1. Although Mrs. Allgier had some degenerative disease at L4-5 and L5-S1, Dr. Yingling found it to be chronic and unlikely to have been causing her symptoms (Page 2, Exhibit D). Dr. Yingling made no lumbar surgical plans and referred Mrs. Allgier back to Dr. Beyer for back-injection therapy.

During Mrs. Allgier's consult with Dr. Beyer on December 11, 2008, an injection regimen of three lumbar epidural steroid injections was discussed and planned (Page 5, Exhibit C). The first injection was administered on December 23, 2008, and the second, on January 6, 2009; both at the Farmington Surgery Center (Pages 4 and 12, Exhibit E). Neither was successful in alleviating her pain, so the third injection was cancelled. Mrs. Allgier continued her regimen of narcotic pain medication and over-the-counter pain medication.

From February 25, 2009, to March 18, 2009, she was referred by Dr. Beyer to Madison Medical Center for additional physical therapy for her back and right knee (Pages 33-44, Exhibit F). Each physical-therapy progress note commented concerning Mrs. Allgier's right-knee progress, to-wit: (a) continued swelling in her right knee (page 35-37), (b) limited ability to walk (page 37), (c) limited mobility and range of motion to her right knee (pages 39,40) and (d) ongoing right-knee pain (pages 42,44).

On March 10, 2009, Dr. Beyer recommended that Employee undergo an MRI of her right knee (Page 2, Exhibit C). She was scheduled to have the MRI of her right knee at Madison Medical Center on March 17, 2009. Immediately before undergoing the procedure she was notified that the employer's insurer would not pay for the MRI. She called her husband and they agreed the MRI was necessary and paid for the MRI. The cost was \$1,911 (Exhibit N).

Employee's last office visit with Dr. Beyer was March 24, 2009. At that time Dr. Beyer was still treating her for the low-back and right-knee pain. Employee stated that Dr. Beyer told her that he wanted to refer her to an orthopedist for further treatment on the right knee, but the employer's insurer would not agree. Employee was still on light duty and had never been released to full-duty work. Thereafter, Employee retained an attorney. Employee's attorney sent letters to the employer's attorney on July 22, 2009, July 23, 2009, October 30, 2009, November 23, 2009, and December 2, 2009, seeking additional medical care and treatment (see Exhibit R). Prehearing conferences were set and pursued. Based upon her complaints and phone calls, Dr. Beyer continued to provide pain medication through November 27, 2009 (Page 6, Exhibit M). At that time he issued a prescription for a refill of 75 tablets of hydrocodone to be taken over a period of 25 days (Page 6, Exhibit M). On December 24, 2009, Dr. Beyer refilled said hydrocodone prescription of 75 tablets for a 25-day supply, but the tablets were paid for by Mrs. Allgier's husband's private insurance carrier.

The employer's attorney arranged for an examination and follow-up treatment (according to Mrs. Allgier's understanding) and scheduled an appointment with Dr. Schafer, an orthopedist,

on November 10, 2009 (Exhibit O). Mrs. Allgier traveled to Cape Girardeau but was advised by Dr. Schafer's office of a scheduling conflict and was not seen by Dr. Schaefer (Exhibit P). Many additional requests were made for treatment, and all such requests were ignored. Mrs. Allgier was never released by Dr. Beyer or any other physician from treatment resulting from her injuries on July 10, 2008, to her low back or to her right knee. Her low back remained unimproved and her right knee worsened. She continued to walk with an uneven gait due to the low-back pain. She continued to work on a light-duty basis.

On October 5, 2010, employer's attorney provided a written statement indicating the employer-insurer would not provide any treatment for her right knee (Exhibit Q). Immediately thereafter, Employee sought treatment through her own physician. She saw Dr. Burke, an orthopedist, on November 2, 2010, for the right-knee pain. On that date she told Dr. Burke that she had a prior work injury but had been released from the work injury (i.e. the employer would not provide any treatment). She commented to Dr. Burke that she had not had any recent history of trauma to the right knee (the trauma having occurred in late September or October 2008 when the physical therapist lifted the right knee, causing it to pop) (see page 2 of Exhibit I). Dr. Burke recommended a cortisone injection and advised her of the possibility of a total-knee replacement. On January 18, 2011, following the cortisone injection she saw Dr. Burke again, indicated the cortisone injection had only alleviated the pain for approximately one and a half months and Employee agreed to have a total-knee replacement (Page 1, Exhibit I). On March 16, 2011, Dr. Burke performed a total-knee replacement of her right knee. Dr. Burke's report from March 16, 2011 under "Impression" stated "Bone on bone medial compartment arthritis on the right, moderate patellofemoral arthritis unresponsive to conservative care." Following the total-knee replacement, she was off work for approximately 12 weeks and did not receive any TTD. She underwent additional physical therapy beginning on April 20, 2011. The therapy was three times per week for four weeks (Exhibit G). None of her out-of-pocket expenses or medical treatment associated with Dr. Burke's cortisone injection, total-knee replacement or physical therapy was paid for by her employer. All such bills and costs were paid for either by Employee, or private insurance, through her husband's employment.

Employee testified that she continues to suffer constant pain in her low back. It is a burning-type pain located across the beltline. The pain continues to radiate into her hips and legs. The pain is worse with movement and certain chores. She rates the pain at 5 to 6 without exertion and up to 8 when working, standing, doing dishes, or walking. Because of the pain she continues to take over-the-counter pain medication. She takes 12 to 14 ibuprofen per day, to-wit:

- a. Three tablets at 7:00 a.m.;
- b. Three tablets at 12:00 noon;
- c. Two tablets at 2:00 p.m.;
- d. Three additional tablets at 5:00 p.m.—after work; and
- e. Three tablets before bed at 9:30 p.m. each day.

Employee never took such pain medication prior to the July 10, 2008, injury. She also takes hydrocodone, a narcotic prescription medication, but tries to limit that to very severe outbreaks of pain. She testified she does not want to take too much hydrocodone because of the possibility of being addicted to narcotic pain medication.

She testified that her activities have been severely limited. She does not do yard work or gardening. Employee stated that she gave up dancing, bowling and bingo (because she cannot sit too long). Employee stated that she cannot pick up her grandchildren. She also stated that she no longer goes camping. She further stated that she limits her driving to no more than 10 to 20 miles. She also limits her trips as a passenger to 20 miles because of the pain. When she does the dishes, she does so very slowly and must rest periodically. She cooks occasionally but has trouble standing. She avoids bending, stooping, does very limited twisting and turning. She has difficulty bathing herself. Furthermore, she does not get in a bathtub because she cannot get in or out due to the pain associated with her low back and right knee. She has trouble tying her shoes and does not ride a four-wheeler. She is awakened quite often at night because of the back pain and does not recall the last time she was able to sleep throughout the night. Each day the pain radiates into her hips and legs. She avoids steps, gravel and uneven surfaces. If she goes up and down the steps, she takes one step at a time.

She testified that none of the aforesaid symptoms were present prior to the injury to her back. She had never seen a doctor for her back, never taken pain medication for her back, or otherwise experienced pain in her back, except for routine back pain that resolved itself within one or two days.

With respect to her right knee, she had never had trouble with her right knee prior to the change in gait following the back injury and the pop which occurred during physical therapy when the therapist was stretching her right knee to alleviate pain in her lower back, causing the right knee to pop. She also denies any additional trauma to her right knee subsequent to the popping injury in the fall of 2008. Employee stated that she sought treatment for the right knee, following Dr. Beyer's efforts in March 2009, by contacting Lewis Leek, the contact person for the employer's insurer. Mr. Leek declined to allow her to see her own physician and refused to give a letter stating that the right knee injury was unrelated to her employment. She testified that for that reason she could not see Dr. Burke. Her condition continued to worsen. It was only after the letter of October 5, 2010, that she was able to seek treatment with Dr. Burke and pay for it with her husband's insurance.

Since the total right-knee replacement, the right knee pain has improved. However, if she sits for very long, the knee becomes stiff and she still has occasional swelling. If she stands for very long, she has pain in the right knee and must sit down and rest. She has loss of movement and range of motion. She is often awakened at night by knee pain. Driving a vehicle continues to be difficult, and she drives for just a few minutes at a time; and she does very limited house work, no yard work, and must rely upon her family to assist her.

Timothy Allgier

Timothy Allgier is Employee's husband. His testimony affirmed that of Mrs. Allgier. He confirmed her severe limitation of activities due to back and right-knee pain and use of narcotic and over-the-counter pain medication. He also assisted her in attempting to have treatment provided for both her low back and right knee. He agreed to pay for the MRI on March 17, 2009,

when, at the last moment, the employer-insurer declined to pay for the MRI of the right knee as arranged by Dr. Beyer. He confirmed Employee's complaints of waking up at night, difficulty standing, walking, bending, twisting, turning and the like. He drove her to the hearing site in Ironton, Missouri. He confirmed her very limited lifestyle, no yard work, no flower garden, no hobbies, difficulty walking, altered gait and progressively worsening condition to her right knee prior to the knee replacement.

David T. Volarich, D.O.

At the request of Employee's attorney, Dr. Volarich reviewed all of Employee's medical records, examined and visited with her, prepared an Independent Medical Evaluation and addendum thereto dated May 17, 2010 and August 25, 2011 (Exhibits A and B).

He is the only physician to have provided an opinion, based upon a reasonable degree of medical certainty, as to the cause of Mrs. Allgier's injuries. He is also the only physician to provide a PPD rating, opinion as to maximum medical improvement or the need for future care and treatment.

Dr. Volarich saw Employee for the first time on May 17, 2010. He noted her complaints with respect to her low-back injury of July 10, 2008. He diagnosed the back injury as a lumbar syndrome secondary to disc bulging at L4-5 and L5-S1, as well as aggravation of an underlying degenerative disc disease without radicular symptoms. He opined that the injury on July 10, 2008, caused by repetitively bending to prepare wheel-chair-bound patients for podiatry examinations, after which she experienced back pain, to be the substantial contributing factor as well as the prevailing or primary factor causing the disc bulging at L4-5 and L5-S1, as well as the aggravation of the underlying degenerative disc disease that caused her back-pain syndrome requiring conservative treatment. In his opinion Employee has a 25% permanent partial disability of the body as a whole due to the disc bulging at L4-5 and L5-S1, as well as the aggravation of the underlying degenerative disc disease and degenerative joint disease (Page 9 of Exhibit A). He also opined that she had a preexisting 5% disability of the body as a whole due to the preexisting degenerative disc disease and degenerative joint disease. He recommended that a loading factor be added.

In his May 17, 2010 report, Dr. Volarich opined that the work accident that occurred 10/08 when Employee was in physical therapy and had a physical therapist do a straight leg raise maneuver when her right knee popped is the substantial contributing factor as well as prevailing or primary factor causing the right knee tibial bone bruise and effusion that required conservative care.

With respect to her back, Dr. Volarich recommended that she limit her repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing, and other similar tasks to an as-needed basis. She should not handle any weight greater than 25 pounds and to do so only on an occasional basis. She should not handle weight over her head or away from her body or carry weight over long distances or uneven terrain. She should avoid remaining in a fixed position for more than 30 minutes, including both sitting and standing. She should change her positions

frequently. He advised her to pursue appropriate stretching, strengthening and range-of-motion exercises (Page 10-11, Exhibit A).

On May 17, 2010, with respect to Employee's right knee, Dr. Volarich indicated that Mrs. Allgier complained of increasing right-knee pain. She told him her knee hurts all the time. After being on her feet for over an hour the knee pain increases. She stated her knee is stiff and aches. She didn't want to do anything but go to work, to church, and to the grocery store. She was occasionally awakened with knee pain. Dr. Volarich specifically asked her concerning any difficulties she had with her knee prior to October 2008, and Employee denied having any problems in the past (Page 5, Exhibit A). Dr. Volarich opined, based upon a reasonable degree of medical certainty, that the accident that occurred on or about October 1, 2008, when Employee was in physical therapy and the physical therapist did a straight-leg-raise maneuver, causing her right knee to pop, was the prevailing or primary factor causing the right-knee bruise and effusion which required conservative treatment (Page 9, Exhibit A).

On August 25, 2011, Dr. Volarich re-examined Employee and provided an addendum to his IME of May 17, 2010. He saw her following the total knee replacement. He noted Dr. Burke stated the need for an injection into her right knee was because she was favoring her right knee (Page 2, Exhibit B). The initial cortisone injection was ineffective; and when Employee returned to Dr. Burke, he recommended a total-knee replacement. Said total-knee replacement was performed on March 16, 2011. Dr. Volarich's August 25, 2011 report diagnosed the injury from October 2008 as "Right Knee bone bruise of the tibial plateau with effusion." Dr. Volarich was the only physician to provide an opinion, based upon a reasonable degree of medical certainty, as to the causation of Employee's right-knee injury and total-knee replacement and stated in relevant part, to-wit:

CAUSATION:

It is my opinion that the progression of her right knee post traumatic arthropathy occurred as a direct result of the injury to the medial compartment of the knee that occurred on 10/08. I note that the initial x-rays of the right knee performed at the Madison Medical Center on 10/1/08 were essentially normal without evidence of medial compartment narrowing. The MRI scan from the Madison Medical Center on 3/17/09, which I also had a chance to review when I saw her for my IME on May 17, 2010, showed effusion as well as some bone marrow edema of the medial tibial plateau but the joint space was well preserved and there was no evidence of significant chondral injury, meniscal tear, or ligamentous tear. In the absence of intervening trauma which Ms. Allgier denies, the medial compartment of the right knee deteriorated significantly over the next 2 years so that x-rays that were performed at the Madison Medical Center on 10/12/10 showed medial joint space collapse with bone on bone. It is my opinion that the need for the total knee joint replacement flowed directly from the result of the 10/08 injury to the knee while in physical therapy when the therapist raised her right leg causing her knee to pop (Page 5, Exhibit B).

Dr. Volarich opined that there is a permanent partial disability rating of 65% at the level of the right lower extremity rated at the knee due to the bone bruise to the tibial plateau. He stated that the rating accounts for the development of accelerated post traumatic arthropathy that required total knee joint replacement.

His rating accounts for the total knee-joint replacement, ongoing pain, swelling, weakness and difficulties with prolonged weight-bearing and impact activities (Page 6, Exhibit B). He recommended she avoid all stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers. She is to avoid uneven terrain, slopes, steps, and ladders. She should limit her prolonged weight bearing by not standing or walking for more than 30 minutes or to her own personal tolerance. If she must kneel on her knees for any reason, she should pad the surface upon which she is kneeling. He recommended a daily supplement of glucosamine to maintain surface cartilage. He also recommended appropriate strengthening, stretching and range-of-motion exercises.

In order to maintain her current state, he stated she will require ongoing care for her pain syndrome using narcotic and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments. She may benefit from treatments at a pain clinic, intra-articular injections, epidural steroid injections, trigger-point injections, foraminal nerve root blocks, TENS units, and similar treatments to help her pain syndrome (Page 10, Exhibit A).

Phillip Beyer, D.O.

Employee was referred by her employer to Dr. Beyer for treatment. He treated both her back and initially her right knee. He first saw her for the work-related injuries on July 14, 2008, and continued to see her both at his private medical office and when visiting the Claru DeVille Nursing Home through March 24, 2009. He examined her at his office on 12 occasions from July 14, 2008, through March 24, 2009. He provided and recommended conservative treatment in the form of pain medication, exercises, physical therapy on several different occasions, trigger-point injections, epidural steroid injections into the back, injections into the right knee, referred her to a neurosurgeon, Dr. Yingling, had an MRI and x-rays performed of the low back, x-ray of the right knee, recommended an MRI of the right knee, and also recommended that she be allowed treatment through an orthopedist for the right-knee injury.

With respect to the right-knee pain Dr. Beyer noted on October 20, 2008 "Has changed gait pattern since her back pain." He ordered physical therapy at Madison Medical Center for her right knee. His notes reflect her complaint of swelling in the right knee. On March 10, 2009, he noted her right knee was tender and painful on the joint line. He planned to request an MRI (Page 2, Exhibit C). On March 24, 2009, his last visit with Employee, he noted the right knee was still painful and tender along the joint line. He commented about the right knee being sterile and prepared for injection of the patella and that he in fact injected the right knee with 4 cc's of Lidocaine (Page 1, Exhibit C). He commented that the MRI showed effusion. Dr. Beyer, the employer's treating physician, sought additional treatment for Employee and a referral to an orthopedist but was denied.

Dr. Beyer's notes do not reflect that Employee was ever released from treatment, released to full duty or that she had ever achieved maximum medical improvement. He did not provide a PPD rating.

David G. Yingling, M.D.

Dr. Yingling is a neurosurgeon with an office located in Cape Girardeau, Missouri. He was referred by Dr. Beyer and saw Employee on or about November 11, 2008. He reviewed her x-ray and MRI scan of the lumbar spine. His impression was that Employee had musculoskeletal back pain as a result of her activities at work "four months ago" (July 2008). Dr. Yingling noted on the day in question her assistance to patients being seen by the podiatrist and later that day and evening having severe lower-back pain which has persisted. He noted she had physical therapy for two months which she said did not help and that she had also been treated with medication. He reviewed the MRI of her back and noted it shows dehydration of the L4-5 and L5-S1 discs with bulging of the L4-5 disc and severe disc space narrowing at L5-S1. His impression was that Employee does have some degenerative disease at L4-5 and L5-S1 but same is chronic and unlikely to be causing her back pain symptoms. He opined that her symptoms were due to lumbar strain. He recommended that she not have surgery and be referred for injection therapy. (Exhibit D).

APPLICABLE LAW:

- The burden is on the employee to prove all material elements of the employee's claim. Melvies v. Morris, 422 S.W. 2d, 335 (Mo.App. 1968). The employee has the burden of proving that not only the employee sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and the injuries and the medical treatment for which the employee is seeking compensation. Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo.App. 1973).
- Under Mo. Rev. Stat. §287.140.1 "the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."
- Employees must establish through competent medical evidence that the medical care requested "flows from the accident", before the employer is responsible. Landers v. Chrysler Corporation 963 S.W.2d (Mo.App. 1997).
- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is "possible" that the Employee will need future medical treatment. Modlin v. Sunmark, Inc., 699 S.W.2d 5, 7 (Mo.App. 1995). The cases establish that to meet their burden the Employees are required to show by a "reasonable probability" that they will need future medical treatment. Dean v. St. Lukes Hospital, 936 S.W.2d 601 (Mo.App. 1997). In addition, employees must establish through competent medical evidence that the medical care requested, "flows from the

accident” before the employer is responsible. *Landers v. Chrysler Corporation*, 963 S.W.2d 275 (Mo.App. 1997).

RULINGS OF LAW:

Issue 1. Whether on or about October 1, 2008, the employee sustained an accident or occupational disease arising out of and in the course of her employment; Issue 2. Whether employee’s injury was medically causally related to accident or occupational disease; and Issue 8. The nature and extent of employee’s permanent partial disability.

In Missouri, injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequence of the compensable injury and the employer is liable for all resulting disability. *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561 at 563 (Mo.App.W.D. 1991). Therein the Missouri Western District Court of Appeals noted:

The law is well settled, that where a claimant sustains an injury arising out of and in the course of her employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body, is compensable as a direct and natural result of the primary or original injury. *Lahue*, at 563

Further, where the primary injury is aggravated by medical treatment, without fault of the employee, there is a causal connection between the original injury and the resulting disability. *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, at 557 (Mo.App.E.D. 2006). In *Jennings* evidence supported a finding that claimant’s original work-related injury was aggravated by the medical treatment she received when she developed an infection from a discogram, which was reasonably required to cure and relieve the effects of the underlying work-related injury. Dr. Volarich, the employee’s expert therein, stated that absent the discogram, there would have been no discitis (infection), no erosion of the bone, no need for fusion surgery, and no increase in claimant’s level of disability. The Commission’s final award found Dr. Volarich’s conclusions to be credible. *Jennings*, at 557.

Said principles are longstanding and have been part of Missouri’s case law for decades. In *Wilson v. Emery Bird Thayer Company*, 403 S.W.2d 953 (Mo.App. 1966), claimant injured her neck, arm and shoulder at work when she fell from her chair. At the employer’s direction, she went to the company doctor for treatment and was referred to an orthopedist. Thereafter the employer cut off all treatment and claimant continued to be treated by her family physician who placed her in the hospital and treated her with traction. Traction caused her to develop a temporomandibular joint (TMJ) condition in her jaw. *Wilson* at 955-56. The Commission found her TMJ directly resulted from her accident. She was awarded the expenses she incurred for treatment after her employer cut off medical aid, as well as TTD and PPD benefits. The court affirmed. *Wilson*, at 958. In *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836 (Mo.App.S.D. 2007), the Commission’s decision was affirmed wherein it found disability was caused by scarring from surgery after claimant’s back injury—despite said surgery being without the permission of employer. In affirming the *Wilson* general rule, the *Martin* court accepted the following analysis, to-wit:

The court held that when an employee's original compensable injury is aggravated by medical or surgical treatment without fault on the employee's part, there is a sufficient causal connection to make the resulting disability compensable as well. *Id* at 957. As the court noted, the employer's refusal to authorize treatment "had no impingement or effect whatsoever on the physical aspects of causation here considered. The chain of causal events producing claimant's additional injuries was consecutive, uninterrupted and complete and did not include the employer's disclaimer of legal duty." *Id* at 958. We [the Martin court] agree with the reasoning in Wilson. Martin at 845.

Consequently the employee's disability was found to be the direct result of the reasonable and necessary treatment she received. Martin at 848. Further, in Kathy Meyer v. Pyramid Home Health Care, Inc., Injury No. 98-008526 (June 24, 2010), the Commission affirmed the ALJ's finding that the employee's injury to her right shoulder, caused by leaning into crutches because her hands were weak from carpal tunnel syndrome resulting in the need for the employee's subsequent right shoulder surgery, was medically causally related to the employee's initial accident. Kathy Meyer v. Pyramid Home Health Care, Inc., at page 20.

In this case, Employee stated that during physical therapy for her low back injury, the physical therapist raised her right leg, which caused her knee to pop. Based on all of the evidence presented, I find that Employee was a credible witness.

Dr. Burke's, the treating physician, has a report from March 16, 2011 under "Impression" stated "Bone on bone medial compartment arthritis on the right, moderate patellofemoral arthritis unresponsive to conservative care." Dr. Volarich considered the report from March 16, 2011, along with various other medical records when he gave his causation opinion.

Dr. Volarich was the only doctor who gave a causation opinion.

In his May 17, 2010 report, Dr. Volarich opined that the work accident that occurred 10/08 when Employee was in physical therapy and had a physical therapist do a straight leg raise maneuver when her right knee popped is the substantial contributing factor as well as prevailing or primary factor causing the right knee tibial bone bruise and effusion that required conservative care.

In Dr. Volarich's supplemental report on August 25, 2011, Dr. Volarich stated:

It is my opinion that the progression of her right knee post traumatic arthropathy occurred as a direct result of the injury to the medial compartment of the knee that occurred on 10/08. I note that the initial x-rays of the right knee performed at the Madison Medical Center on 10/1/08 were essentially normal without evidence of medial compartment narrowing. The MRI scan from the Madison Medical Center on 3/17/09 which I also had a chance to review when I saw her for my IME on May 17, 2010, showed effusion as well as some bone marrow edema of the medial tibial plateau but the joint space was well preserved and there was no evidence of significant chondral injury, meniscal tear, or ligamentous tear. In the

absence of intervening trauma which Ms. Allgier denies, the medial compartment of the right knee deteriorated significantly over the next 2 years so that x-rays that were performed at the Madison Medical Center on 10/12/10 showed medial joint space collapse with bone on bone. It is my opinion that the need for the total knee joint replacement flowed directly from the result of the 10/08 injury to the knee while in physical therapy when the therapist raised her right leg causing her knee to pop.

Dr. Volarich's report of August 25, 2011 states that the diagnosis of the October 2008 injury was right knee bone bruise of the tibial plateau with effusion.

Dr. Volarich opined that there is a permanent partial disability rating of 65% at the level of the right lower extremity rated at the knee due to the bone bruise to the tibial plateau. He stated that the rating accounts for the development of accelerated post traumatic arthropathy that required total knee joint replacement.

Based on all of the evidence presented, I find that Dr. Volarich's causation opinion was credible. I find that Employee met her burden of proof that on or about October 1, 2008, Employee sustained an accident arising out of and in the course of her employment. Employee also met her burden of proof in that Employee's injury was medically causally related to her accident. Furthermore, Employee met her burden of proof that the accident was the prevailing factor in causing her right knee bone bruise of the tibial plateau with effusion and development of accelerated post traumatic arthropathy.

Based on all of the evidence presented, I find that Employee sustained 40% (64 weeks) permanent partial disability at the 160 week level from the injury sustained on October 1, 2008. Employee's rate for permanent partial disability was \$267.36. Therefore, Employer-Insurer is directed to pay Employee \$17,111.04.

Issue 3. Whether the employer-insurer provided medical aid to employee.

Employer-Insurer is claiming that they did not provide any medical care for Employee's knee injury. However, the evidence is clear that they provided Employee with medical care for her knee with Dr. Beyer and Madison Medical Center (physical therapy) in February and March of 2009.

Issue 4. Whether employer-insurer should be required to pay for previously incurred medical aid. and Issue 7. Employee's request for additional temporary total disability for a period of 12 weeks resulting from her total right-knee replacement.

The Employer-Insurer ignored the numerous requests of Mrs. Allgier, her attorney and even its treating physician, Dr. Beyer, for care and treatment to Mrs. Allgier's right knee. The Employer-Insurer, through its attorney on October 5, 2010, specifically stated its refusal to provide any treatment for her right knee and thereby released Mrs. Allgier to seek necessary medical care and treatment and attempt to hold the Employer liable therefor.

I find credible and uncontroverted evidence was provided with respect to the cost of Mrs. Allgier's medical care and treatment for her right knee and right-knee replacement in the following sums:

a. Missouri Baptist Hospital	\$28,628.99
b. Dr. Burke of Orthopedic Associates	\$12,529.00
c. Madison Medical Center	\$ 6,212.00
d. Madison Medical Center re 3/17/09 MRI paid for by employee's husband, Tim Allgier	\$ 1,911.00
e. Out-of-pocket prescription medication paid by employee	<u>\$ 120.00</u>
Total	\$49,400.99

The only medical expert opinion presented concerning the causation of Mrs. Allgier's right-knee injury was provided by Dr. David T. Volarich.

The Employer-Insurer did not ever release Mrs. Allgier from ongoing medical care and treatment but simply denied additional treatment following Mrs. Allgier's office visit to Dr. Beyer on March 24, 2009. The Employer-Insurer has not provided any medical opinion as to the causation of Mrs. Allgier's right-knee injury. Furthermore, based on all of the evidence presented, I find that Dr. Volarich's opinion regarding causation and medical treatment was credible.

Based on all of the evidence presented, I find that the need for Mrs. Allgier's total-knee-joint replacement flowed directly from the result of the October 1, 2008, injury to the knee while in physical therapy when the therapist raised her right leg, causing her knee to pop. I find no evidence of any intervening trauma to the right knee and note that Mrs. Allgier's uncontradicted testimony denied any such intervening trauma. Furthermore, based on all of the evidence presented, I find that Mrs. Allgier was a credible witness.

Employer provided no evidence supporting any reduction or offset of said amount and therefore Employer-Insurer shall be ordered to pay directly to Mrs. Allgier the sum of \$49,400.99 for said necessary medical aid pertaining to her right knee and not previously furnished by the Employer-Insurer.

Based upon the aforesaid findings, I find the Employer liable for the reasonable and necessary medical care and treatment of Mrs. Allgier with respect to her right knee and specifically the right-knee-replacement surgery performed by Dr. Burke on March 16, 2010. Therefore, Employer-Insurer directed to pay Employee \$49,400.99 for previously incurred medical aid.

I further find that Mrs. Allgier is entitled to temporary total disability benefits for 12 weeks (3-15-2011 to 6-8-2011) in which she was off work following said right knee replacement surgery. Therefore, Employer-Insurer is directed to pay Employee \$3,208.32 for temporary total disability.

Issue 5. Employee's claim for mileage or other medical expenses under Section 287.140 RSMo.

Employee traveled from Fredricktown, Missouri to Missouri Baptist Medical Center, in St. Louis on two separate occasions due to this accident. The first was on January 18, 2011. The second was on March 16, 2011. Employee traveled 190 miles round trip for each occasion. The mileage rate during that time period was .50 cents. Therefore, the Employer-Insurer is directed to pay Employee \$95.00 in unpaid mileage because St. Louis is not in the same "local or metropolitan area as Employee's "principle place of employment."

Issue 6. Claim for additional or future medical care.

Dr. Volarich stated that in order to maintain her current state, Employee will require ongoing care for her pain syndrome using narcotic and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments. Based on this uncontroverted medical opinion, I find that the Employee was met her burden of proof that there is a "reasonable probability" that Employee will need future medical treatment because of this accident. Furthermore, I find that the aforementioned medical care "flows from the accident" that occurred on October 1, 2008. Therefore, Employer-Insurer is directed to provide employee with future medical aid, including but not limited to ongoing care for her pain syndrome using narcotic and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments.

ATTORNEY'S FEE

Dan Fall, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Patsy Allgier

Injury Number 08-122036

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation