

**TEMPORARY OR PARTIAL AWARD**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 11-006324

Employee: Jackie Maize  
Employer: Preferred Family Healthcare, Inc.  
Insurer: Missouri Employers Mutual Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated October 31, 2012.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

The award and decision of Administrative Law Judge Vicky Ruth, issued October 31, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

## TEMPORARY AWARD

Employee: Jackie Maize

Injury No. 111-006324

Dependents: N/A

Employer: Preferred Family Healthcare, Inc.

Additional Party: N/A

Insurer: Missouri Employers Mutual Insurance Co.

Hearing Date: July 31, 2012

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 9, 2011.
5. State location where accident occurred or occupational disease was contracted: Kirksville, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee suffered an injury to his right knee when he slipped on some gravel as he was stepping up into his truck in the employer's parking lot.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body allegedly injured by accident or occupational disease: Right knee/leg.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$3,776.43.
17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: \$276.58.
19. Weekly compensation rate: \$184.38/\$184.38.
20. Method of wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable from employer: See below.
22. Second Injury Fund liability: N/A.
23. Future medical awarded: Yes.

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

Employee: Jackie Maize

Injury No. 11-006324

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

Employee: Jackie Maize

Injury No: 11-006324

Dependents: N/A

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Preferred Family Health Care, Inc.

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: N/A

Insurer: Missouri Employer Mutual

On July 31, 2012, Jackie Maize and Preferred Family Health Care, Inc./Missouri Employers Mutual appeared in Jefferson City, Missouri, for a temporary award hearing.<sup>1</sup> Jackie Maize, the claimant, was represented by attorney Keith Link. Preferred Family Health Care, Inc. and Missouri Employers Mutual (the employer/insurer) were represented by attorney Eric Lanham. Late-filed exhibit 3 was submitted on August 2, 2012. Claimant submitted his brief on August 18, 2012. The employer/insurer submitted a brief on August 24, 2012, and the record closed at that time. Claimant's attorney requests an attorney's fee of 25%.

### **STIPULATIONS**

The parties stipulated to the following:

1. On or about January 9, 2011, claimant was an employee of the employer.
2. The claimant and the employer were operating under and subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by Missouri Employers Mutual Insurance (the insurer).
4. A Claim for Compensation was filed within the time prescribed by law.
5. Notice is not an issue.
6. The Missouri Division of Workers' Compensation has jurisdiction and venue in Adair County is proper. By agreement of the parties, the hearing was held in Jefferson City, Missouri.
7. Claimant's compensation rate was \$184.38 for temporary total disability benefits and permanent partial disability benefits.
8. No temporary disability benefits were provided.
9. Medical aid was provided in the amount of \$3,776.43.

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<sup>1</sup> The hearing was a hardship hearing, but was not brought under Section 287.203.

**ISSUES**

At the hearing, the parties agreed that the following issues are to be resolved in this proceeding:

1. Accident arising out and in the course of employment.
2. Medical causation.
3. Need for additional medical treatment.
4. Attorney costs and fees under Section 287.560.

**EXHIBITS**

On behalf of the claimant, the following exhibits were entered into evidence:

- |           |   |
|-----------|---|
| Exhibit A | Deposition of Dr. Dwight Woiteshek.   |
| Exhibit B | Medical records from Dr. Robert Sparks.   |
| Exhibit C | Medical records from Northeast Regional Medical Center.                                   |
| Exhibit D | Kirksville Osteopathic Medical Center.  |
| Exhibit E | Medical Records from North Kansas Hospital.   |
| Exhibit F | Records from Columbia Orthopaedic Group.  |
| Exhibit G | Medical records from Northeast Regional Medical Center Radiology.                         |
| Exhibit H | Letter, dated July 10, 2012, from Keith Link to Eric Lanham.                              |
| Exhibit I | Itemization of costs and fees pursuant to Section 287.560, RSMo. (late-filed on 8/02/12). |

On behalf of the employer/insurer, the following exhibits were admitted into evidence:

- |           |                                     |
|-----------|-------------------------------------|
| Exhibit 1 | Deposition of Jackie Maize.         |
| Exhibit 2 | Deposition of Dr. Michael Nogalski. |
| Exhibit 3 | Medical records.                    |

*Note: All marks, handwritten notations, highlighting, and tabs on the exhibits were present at the time the documents were admitted into evidence. The deposition was received subject to the objections contained therein.*

**FINDINGS OF FACT**

Based on the above exhibits and the testimony presented at the hearing, I make the following findings of fact:

1. Claimant was born on May 25, 1946. At the time of the trial, he was 66 years old. Claimant lives in Kirksville, Missouri.

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2. In late 2010, claimant began working for Preferred Family Health Care (the employer) as a residential care technician. He worked there for two years on a part-time basis until approximately two weeks before the hearing, when he left for reasons unrelated to the work injury. Prior to his employment with the employer, claimant worked for the Kirksville Fire Department and retired after approximately 35 years of service.
3. Claimant's duties as a residential care technician included cleaning rooms, checking on residents, and doing the facility's laundry.
4. On January 9, 2011, claimant completed his work shift and prepared to go home. He walked outside to his pick-up truck, which was parked in the employer's parking lot. He had parked under an overhead light that was surrounded by a circular concrete curb and filled with river gravel. He stepped up onto the curb and his right foot slipped on gravel that was on top of the curb. As he slipped, his right knee bent forward and then backwards. He grabbed the pick-up truck to keep from falling. He heard a pop and felt a sharp snap on the inside of his right knee, and he had immediate pain in the right knee.
5. Claimant testified that this incident occurred on the employer's property, specifically on the parking lot, and that the employer controlled and maintained the area. He testified that employees were allowed and encouraged by the employer to park their vehicles in this area.
6. Claimant testified that this incident occurred on a weekend day and therefore, there was not a supervisor available for him to report the incident to; instead, he went home. Claimant reported the incident the following Monday. Claimant continued to work as he waited to see if his knee would improve.
7. The employer/insurer sent claimant to see Dr. Sparks on February 3, 2011. On that date, claimant provided a consistent history of the January 9, 2011 incident. Dr. Sparks' examination revealed significant tenderness to the entire knee, including significant joint line tenderness along the medial aspect of the right knee.<sup>2</sup> Dr. Sparks diagnosed probable internal derangement of the right knee, recommended an MRI of the right knee, restricted the Employee's duty to "no steps," prescribed Voltaren for pain, and prescribed a knee immobilizer.
8. The right knee MRI was performed on February 3, 2011 at Northeast Regional Medical Center.<sup>3</sup> In addition to arthritic changes in the knee, the MRI was interpreted by the radiologist to also show "an osteochondral injury through the posterior femoral condyle with associated bone marrow edema," as well as "a second region of osteochondral injury of the anterior lateral femoral condyle with underlying bone marrow edema."<sup>4</sup> The radiologist concluded that the MRI findings were consistent with a "high-grade" partial tear versus complete tear of the anterior cruciate ligament, osteochondral injuries of the posterior medial femoral condyle and anterior lateral femoral condyle, severe

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<sup>2</sup> Claimant's Exh. B.

<sup>3</sup> Claimant's Exh. C.

<sup>4</sup> *Id.*

chondromalacia, and severe joint space narrowing of the medial and patellofemoral compartments of the knee.

9. On February 4, 2011, claimant returned to Dr. Sparks, to discuss the MRI results. At that time, Dr. Sparks noted that although claimant did have a history of having had three prior surgeries on his right knee, “[t]he MRI of his right knee shows a tear of the ACL. There is some edema in it so I believe that this is in fact a new injury.”<sup>5</sup> Dr. Sparks further noted “there is certainly a significant amount of arthritis in the knee, i.e., chondromalacia that is not related to this injury but I do believe in spite of all that there is some acute injury here to [sic] and that may involve the ACL.”<sup>6</sup> Dr. Sparks recommended that claimant be referred to an orthopedic surgeon for further evaluation.
10. The employer/insurer referred claimant to Dr. Michael Nogalski, an orthopedic surgeon.<sup>7</sup> At the first visit, on March 16, 2011, claimant provided the history of the January 9, 2011 incident. During that examination, Dr. Nogalski noted that there was a small amount of fluid in the knee and tenderness in the inside portion of the knee rather than the outside along the joint lines. He noted that range of motion in the right knee was “about 0 to 100 degrees” with pain at end ranges of motion. Dr. Nogalski recorded that claimant had fairly significant pain in the knee. Dr. Nogalski also noted that although claimant admitted to having some prior knee problems, he had no significant, prior mechanical symptoms.
11. Dr. Nogalski reviewed the February 3, 2011 MRI and noted a loss of meniscal tissue and fairly significant chondrosis and bone marrow edema in the medial femoral condyle. Dr. Nogalski concluded that the ACL was not well visualized and that he could not identify the suggestion of a new tear. Dr. Nogalski diagnosed a right knee strain with degenerative disease and provided claimant with a steroid injection.
12. On June 22, 2011, claimant returned to Dr. Nogalski.<sup>8</sup> The doctor noted that claimant may have had some slight benefit from the steroid injection, but that his symptoms returned back to about baseline. Dr. Nogalski reviewed the MRI and opined that there was “significant osteoarthritic disease, especially in the medial compartment. MRI itself does not show any conclusive findings to suggest a specific acute injury.”<sup>9</sup> The doctor concluded that claimant did not have anything that clearly indicated surgical intervention, and that his findings were most consistent with osteoarthritis issues. His diagnosis was “right knee stain/degenerative disease.”<sup>10</sup> Dr. Nogalski released claimant from his care to full duty.
13. Although Dr. Nogalski did feel that claimant would have intermittent problems and symptoms in the right knee that may require medical care, he was of the opinion that those were due to pre-existing conditions. In his 2012 report, Dr. Nogalski

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Employer/insurer Exh. 3.

<sup>8</sup> *Id.*

<sup>9</sup> Claimant’s Exh. C.

<sup>10</sup> *Id.*

acknowledged that “it appears reasonable” that a total knee replacement would be an option for claimant if his “pain is subjectively bad enough,” but that this treatment would be designed to resolve symptoms of osteoarthritis.<sup>11</sup>

14. Claimant testified that since his release from Dr. Nogalski, he has been seeing his primary care physician, Dr. Early, for the ongoing symptoms in his right knee. Dr. Early prescribes pain medication for claimant’s knee symptoms, which claimant takes on an “as needed” basis.
15. At the request of his attorney, claimant was examined and evaluated by Dr. Dwight Woiteshek on September 29, 2011.<sup>12</sup> Dr. Woiteshek is board certified in orthopedic surgery. Claimant provided a history of the January 9, 2011 incident to Dr. Woiteshek. Dr. Woiteshek was also provided with claimant’s history of prior right knee difficulties. Dr. Woiteshek’s examination of the right knee showed that claimant had pain and tenderness in the right knee with a small effusion. The doctor noted a slightly positive Lachman test, a positive McMurray’s sign, a slightly positive Drawer sign and Pivot Shift Test, mild patellofemoral mistracking, a positive Apley compression test, a positive Apley distraction test, and a positive patellofemoral grind test. Dr. Woiteshek testified that these positive findings told him that the Employee’s anterior cruciate ligament was not functioning.<sup>13</sup>
16. Dr. Woiteshek reviewed the February 3, 2011 MRI of the right knee; he agreed with the radiologist’s interpretation that claimant had suffered a “high grade partial tear versus complete tear of the anterior cruciate ligament.”<sup>14</sup> Dr. Woiteshek testified that the significance of a “high grade” partial versus complete tear of the ACL means that “the anterior cruciate ligament was really damaged.”<sup>15</sup>
17. Dr. Woiteshek noted that the records show that when Dr. Tarbox did the 2003 surgery, Dr. Tarbox specifically said the scope was placed in the notch that demonstrated a partial ACL tear, but that the patient demonstrated good stability under anesthesia as well as under visualization with a Drawer test.<sup>16</sup> Dr. Woiteshek explained that when he examined claimant in 2011, claimant “had basic changes to that.... His Drawer test was positive and Lachman’s tests were slightly positive on September 21, 2011.”<sup>17</sup> Dr. Woiteshek explained that the findings he made in 2011 were a distinct change from Dr. Tarbox’s observation during the 2003 surgery. And in Dr. Woiteshek’s opinion, this change shows that the work-related injury in January 2011 was the “prevailing factor in the cause of [claimant’s] right knee condition, namely, high grade partial versus complete tear of the right ACL.”<sup>18</sup>

<sup>11</sup> Employer/insurer Exh. 3.

<sup>12</sup> Claimant’s Exh. A, deposition attachment 2.

<sup>13</sup> Claimant’s Exh. 1, pp. 9-10.

<sup>14</sup> Claimant’s Exh. A.

<sup>15</sup> Claimant’s Exh. A, p. 11

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

18. Dr. Woiteshek further testified that the osteochondral injuries to the posterior femoral condyle and anterior lateral condyle were “definitely traumatic” in nature and that an osteochondral injury means “an acute injury.” Dr. Woiteshek was provided with histories of the claimant’s prior right knee problems, including three arthroscopic surgeries on the knee.<sup>19</sup> The doctor indicated that these prior histories do not alter his opinion regarding medical causation.<sup>20</sup>
19. Dr. Woiteshek diagnosed claimant with traumatic internal derangement of the right knee with subsequent high grade partial tear versus complete tear of the anterior cruciate ligament and osteochondral injury of the posterior medial femoral condyle and of the anterior lateral femoral condyle. Dr. Woiteshek opined that the incident on January 9, 2011, is the prevailing factor in causing these conditions. It is also Dr. Woiteshek’s opinion that the claimant has not reached maximum medical improvement, that he requires a total knee replacement of the right knee, and that the incident on January 9, 2011, is the prevailing factor in causing the need for that surgery.

*Pre-existing knee problems*

20. With respect to claimant’s prior conditions affecting his right knee, he did have arthroscopic surgery on his right knee on December 28, 1995, for a torn medial meniscus.<sup>21</sup> During that surgery, the surgeon noted that “the ACL appeared to be intact visually.”<sup>22</sup>
21. Claimant testified that although he continued to have symptoms in his right knee after the 1995 surgery, following a period of recovery and after he was released from medical care, he was able to return to his regular duties with the Kirksville Fire Department without any physical restrictions.
22. Because of the continuing symptoms he had in his right knee following the 1995 surgery, claimant underwent a second arthroscopic surgery on January 21, 1997, to repair a bone that did not heal after the first surgery.<sup>23</sup> This second surgery involved osteochondral drilling and bone grafting of the right femoral condyle to repair necrosis of that bone. During that surgery, the surgeon noted that “[t]he anterior cruciate ligament appeared slightly attenuated but was intact to inspection and probing.”<sup>24</sup>
23. Claimant testified that although he continued to have symptoms in his right knee after the 1997 surgery, following a period of recovery and after he was released from medical care, he was able to return to his regular duties with the Kirksville Fire Department without any physical restrictions.

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<sup>19</sup> Claimant’s Exh. A, pp. 14-21.

<sup>20</sup> Claimant’s Exh. A, pp. 16 and 21.

<sup>21</sup> Claimant’s Exh. E.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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24. Claimant had a third surgery on the right knee on April 24, 2003, for a lateral meniscus tear.<sup>25</sup> During that arthroscopic surgery, the surgeon noted that although claimant “demonstrated a partial anterior cruciate ligament tear... he demonstrated good stability under anesthesia as well as under visualization with a drawer test.”<sup>26</sup>
25. As with the prior two surgeries, claimant testified that although he continued to have symptoms in his right knee after that surgery, following a period of recovery and after he was released from medical care, he was able to return to his regular duties with the Kirksville Fire Department without any physical restrictions.
26. Claimant testified that, prior to January 9, 2011, he never saw a doctor for or received treatment for his right anterior cruciate ligament, that no doctor ever told him that he needed treatment or surgery for his right anterior cruciate ligament, and that after each of his three prior right knee surgeries, none of those surgeons told him that he had a problem with his right anterior cruciate ligament.
27. Between the time Dr. Tarbox released claimant after his 2003 arthroscopic surgery and the January 2011 incident, claimant never sought nor received any type of medical care or treatment for his right knee.

*Current complaints*

28. Claimant testified that since January 9, 2011, he has had symptoms of pain and soreness “inside” his right knee. He has difficulty walking and when bending or stooping, he has to hold onto a chair or table to lower himself to the floor or the knee will give out. Prior to January, 9, 2011, claimant did not complain of the problems or limitations and his symptoms were on the “outside” of the knee and not the “inside.”
29. Claimant testified that he now has significant and ongoing pain in his right knee. He is unable to kneel without pain, and it is difficult for him to get up off the floor. He requests additional treatment for his right knee.

**CONCLUSIONS OF LAW**

Based upon the findings of fact, the applicable law, and the parties’ stipulations, I find the following:

The injury in this case occurred on January 9, 2011. Thus, the substantive changes that became effective in August 2005 apply. The Workers’ Compensation law is now to be strictly construed and the administrative law judge is to weigh the evidence impartially, without giving the benefit of a doubt to any party when weighing evidence and resolving factual conflicts.

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<sup>25</sup> Claimant’s Exh. F.

<sup>26</sup> *Id.*

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Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.<sup>27</sup> Proof is made only by competent and substantial evidence, and may not rest on speculation.<sup>28</sup>

The fact finder is encumbered with determining the credibility of witnesses.<sup>29</sup> It is free to disregard that testimony which it does not hold credible.<sup>30</sup> I find that claimant was a credible and persuasive witness. His appearance, attitude, and demeanor at the hearing were appropriate and he testified forthrightly and candidly.

### **Issue 1: Accident arising out of and in the course of employment**

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."<sup>31</sup>

An "injury" is defined to be "an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."<sup>32</sup> An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.<sup>33</sup>

Claimant asserts that his burden of proof with respect to accident, arising out of and in the course and scope of employment, is satisfied and relies, in part, upon the extended premises doctrine in Section 287.020.5, RSMo. In pertinent part, this provision provides as follows:

The "extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employees to get to and from their place of employment.

Section 287.020.5 thus expressly limits the application of the extended premises doctrine to those cases where the accidents occur on property owned or controlled by the employer. In

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<sup>27</sup> *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

<sup>28</sup> *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

<sup>29</sup> *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).

<sup>30</sup> *Id.* at 908.

<sup>31</sup> Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

<sup>32</sup> Section 287.020.3(1).

<sup>33</sup> Section 287.020.3(c).

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this case, the accident occurred on the employer's parking lot as claimant was climbing into his truck to go home. Claimant testified that the parking lot was employer's property, that the employer controlled and maintained the area. There was no evidence to the contrary.

Claimant experienced an unexpected traumatic event or unusual stain that was identifiable by time and place, which produced at the time, objective symptoms of an injury. Based on a careful consideration of the evidence and the law, I find that claimant has met his burden and has established that his accident arose out of and in the course and scope of his employment within the meaning of Section 287.020.3(2) and Section 287.020.5, RSMo.

## Issue 2: Medical causation

To receive workers' compensation benefits, the claimant bears the burden of proving not only that the accident arose out of and in the course of employment, but also that the alleged injury was caused by the accident.<sup>34</sup> In other words, the claimant must establish a causal connection between the accident and the injury.<sup>35</sup> Section 287.020.3(1), RSMo, provides that an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability and defines "the prevailing factor" as the primary factor, in relation to any other factor, causing both the resulting medical condition and the disability. Medical causation must be established by scientific or medical evidence "showing the cause and effect relationship between the complained of condition and the asserted cause."<sup>36</sup> When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.<sup>37</sup>

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.<sup>38</sup> Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.<sup>39</sup>

This case is similar to *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo.App. 2011). In both cases, the employees had pre-existing conditions affecting their injured knee, suffered work-related injuries to the affected knee, and required total knee replacements to cure and relieve them from the effects of their respective, work-related injury. The Missouri Appeals Court held that once the prevailing factor test is applied to the question as to whether an employee has a compensable injury, an employer is obligated to provide "such medical, surgical, chiropractic and hospital treatment, including nursing, custodial, ambulance and medicine, as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury."<sup>40</sup> "The 2005 amendments to The Workers' Compensation Law did not, however,

<sup>34</sup> *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 279 (Mo.App. 1997).

<sup>35</sup> *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 138 (Mo.App. 2002).

<sup>36</sup> *Williams v. DePaul Health Center*, 996 S.W.2d 619, 631 (Mo.App. 1999).

<sup>37</sup> *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

<sup>38</sup> *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

<sup>39</sup> *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

<sup>40</sup> *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 518. See also Section 287.140.1, RSMo.

incorporate a 'prevailing factor' test into the determination of medical care and treatment required to be afforded for a compensable injury by Section 287.140.1." <sup>41</sup>

In this case, it is uncontested that claimant had pre-existing conditions that affected his right knee. He had three arthroscopic surgeries on his right knee prior to his work-related accident and injury on January 9, 2011. These surgeries were performed on December 28, 1995, January 21, 1997, and April 24, 2003. The first and third surgeries were to repair meniscal tears and the second surgery was to perform a bone graft to repair bone that had not properly healed after the first surgery.

During the December 28, 1995 surgery, the orthopedic surgeon noted that "the ACL appeared to be intact visually."<sup>42</sup> During the January 21, 1997 surgery, the orthopedic surgeon noted that "[t]he anterior cruciate ligament appeared slightly attenuated but was intact to inspection and probing."<sup>43</sup> During the April 24, 2003 surgery, the orthopedic surgeon noted that although claimant "demonstrated a partial anterior cruciate ligament tear . . . he demonstrated good stability under anesthesia as well as under visualization with a drawer test."<sup>44</sup>

At trial, claimant testified credibly that following each of these prior surgeries, although he continued to have symptoms in his right knee, he was able to return to his regular duties with the Kirksville Fire Department without any physical restrictions after he was released from medical care. Claimant further testified that prior to January 9, 2011, he never saw a doctor for or received treatment for his right anterior cruciate ligament, that no doctor ever told him that he needed treatment or surgery for his right anterior cruciate ligament, and that after each of his three prior right knee surgeries, none of those surgeons told him that he had a problem with his right anterior cruciate ligament. After Dr. Tarbox released claimant following the April 2003 surgery, but before the January 2011 injury, claimant never sought or received any type of medical care or treatment for his right knee.

Both medical experts agree that claimant would benefit from a right, total knee replacement, but they disagree on what has caused the need for that treatment.

Dr. Dwight Woiteshek examined claimant on September 21, 2011; his examination of claimant's right knee showed that claimant had pain, tenderness and a small effusion. The Lachman test, Drawer sign, and pivot shift tests were all slightly positive. Dr. Woiteshek also noted mild patellofemoral mistracking, a positive Apley distraction test, a positive Apley compression test, and a positive patellofemoral grind test. Dr. Woiteshek testified that these positive findings told him that claimant's anterior cruciate ligament was not functioning.<sup>45</sup>

Based upon the histories that were provided to Dr. Woiteshek, together with his findings on examination, the doctor diagnosed a traumatic internal derangement of claimant's right knee with subsequent high grade partial tear versus complete tear of the anterior cruciate ligament, together with osteochondral injuries of the posterior medial femoral condyle and anterior lateral

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<sup>41</sup> *Id.* at 519.

<sup>42</sup> Claimant's Exh. D.

<sup>43</sup> Claimant's Exh. E.

<sup>44</sup> Claimant's Exh. F.

<sup>45</sup> Claimant's Exh. A, pp. 9-10.

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condyle.<sup>46</sup> Each of these diagnoses is supported by the radiologist's interpretation of the claimant's February 3, 2011 MRI of the right knee.<sup>47</sup>

Dr. Woiteshek testified that the significance of a "high grade" partial versus complete tear of the ACL means that "the anterior cruciate ligament was really damaged."<sup>48</sup> Dr. Woiteshek further testified that the osteochondral injuries to the posterior femoral condyle and anterior lateral condyle were "definitely traumatic" in nature and that an osteochondral injury means "an acute injury." Dr. Woiteshek was provided with histories of claimant's prior right knee problems, including three arthroscopic surgeries on the knee. These prior histories did not alter Dr. Woiteshek's opinion regarding medical causation

During his deposition, Dr. Woiteshek was asked about the mechanism of claimant's injury in relation to the diagnoses he arrived at. Specifically, he was asked the following by Mr. Link:

Q. When Mr. Maize's deposition was taken, he testified, quote, "There was rock on the concrete curb, and I stepped on it to open the door to the pickup, and my foot slipped out from underneath me, and when it did, my leg kind of went forward and back and I felt a pop in my knee on the inside of my knee," end quote.

Doctor, how, if at all, does that history of Mr. Maize's description of the accident support your diagnoses, your treatment recommendations and your opinions regarding medical causation as they relate to his January 9, 2011 accident?

A. That injury that he had as described in the deposition is a classic injury where you would expect injury to the anterior cruciate ligament, a popping and then the movement of the knee front and back. Those are classic signs of an anterior cruciate ligament tear.<sup>49</sup>

Dr. Woiteshek concluded that claimant's January 9, 2011 accident when he slipped on some rocks and twisted his right knee, was the prevailing factor in causing the high grade versus partial tear of the anterior cruciate ligament, together with osteochondral injuries of the posterior medial femoral condyle and anterior lateral condyle. Dr. Woiteshek further testified that claimant has not yet reached maximum medical improvement and that he needs additional medical treatment, including but not limited to a right total knee replacement; the doctor also testified that the January 9, 2011 accident was the prevailing factor in the cause for the need of this surgery.

Dr. Michael Nogalski examined claimant on March 16, 2011. During that examination, Dr. Nogalski noted that there was a small amount of fluid in the knee and tenderness in the inside portion of the knee rather than the outside along the joint lines. He also noted that range of motion in the right knee was "about 0 to 100 degrees" with pain at end ranges of motion. With respect to the right knee MRI that was performed on February 3, 2011, Dr. Nogalski noted that it

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<sup>46</sup> Claimant's Exh. A, pp 10-11.

<sup>47</sup> Claimant's Exh. C.

<sup>48</sup> Claimant's Exh. A.

<sup>49</sup> Claimant's Exh. A, pp. 16-17.

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showed significant chondrosis and bone marrow edema in the medial femoral condyle. Dr. Nogalski could not identify “a suggestion of a new tear or something that was unstable” and felt “[t]he ACL or anterior cruciate ligament was not well visualized.”<sup>50</sup>

Based upon his examination and evaluation of claimant, Dr. Nogalski diagnosed him with a right knee strain, which he felt was related to the January 9, 2011 accident, and degenerative disease, which the doctor did not feel was related to the January 9, 2011 accident. Dr. Nogalski did provide a steroid injection into claimant’s right knee, and he indicated that this was reasonable and necessary treatment in relation to his diagnosis of right knee strain.<sup>51</sup>

Dr. Nogalski agrees that a total knee replacement would be a treatment option for the claimant’s right knee; however, he attributes the need for that treatment and surgery to claimant’s symptoms of osteoarthritis and not to his January 2011 accident.

I find that the testimony and opinions of Dr. Woiteshek are more persuasive and credible on the issue of medical causation than those of Dr. Nogalski. Dr. Woiteshek concluded that claimant’s January 9, 2011 accident was the prevailing factor in causing the diagnoses he arrived at (specifically the high grade versus partial tear of the anterior cruciate ligament, together with osteochondral injuries of the posterior medial femoral condyle and anterior lateral condyle.

I find that claimant has met his burden of proof with respect to the issue of medical causation. Claimant experienced 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 on January 9, 2011; this event was the prevailing factor in causing the resulting medical condition of traumatic internal derangement of claimant’s right knee, with corresponding high grade partial versus complete tear of the ACL.

### **Issue 3: Additional medical care**

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

In addition to all other compensation paid to the employee under this section, 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.

Dr. Woiteshek opined that claimant would benefit from additional treatment in the form of a right total knee replacement, and Dr. Nogalski appears to agree that this could be a treatment option. Dr. Woiteshek concluded that claimant’s January 9, 2011 accident was the prevailing factor in causing the high grade versus partial tear of the anterior cruciate ligament, together with osteochondral injuries of the posterior medial femoral condyle and anterior lateral condyle. Dr. Woiteshek further opined that claimant had not yet reached maximum medical improvement, that he would need additional medical treatment, including but not limited to a right total knee

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<sup>50</sup> Employer/insurer Exh. 3.

<sup>51</sup> *Id.*

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replacement, and that the January 2011 injury was the prevailing factor in the cause for the need of this surgery. Dr. Woiteshek further concluded that the right total knee replacement that he recommends is reasonable and necessary to help cure and relieve claimant from the injury he suffered on January 9, 2011.

I find that claimant suffered traumatic internal derangement of his right knee, including a high grade partial versus complete tear of the right ACL. I further find that claimant's accident and injury on January 9, 2011, is the prevailing factor in causing these conditions. I also find that additional medical care and treatment is reasonably required to cure and relieve claimant from the effects of his right knee injury and that the employer/ insurer is to provide such further medical care and treatment to claimant. This treatment should include, but is not limited to, a total knee replacement of the right knee. In making these determinations, I find the opinions and testimony of Dr. Woiteshek to be more credible than those of Dr. Nogalski.

#### **Issue 4: Costs and fees pursuant to Section 287.560, RSMo**

Claimant requests that, pursuant to Section 287.560, RSMo., the Administrative Law Judge assess costs and attorney's fees against the employer/insurer due to the employer/insurer's denial of treatment. Claimant contends that the employer/insurer's defense has been without reasonable ground that that he is entitled to \$2,249.35 for his costs and \$5,205.00 for attorney fees associated with these proceedings.<sup>52</sup>

Under Section 287.560, RSMo, costs *may* be assessed against a party who defends without reasonable grounds. In *Landman v. Ice Cream Specialties*, the Missouri Supreme Court held that costs under Section 287.560, RSMo, should only be assessed "where the issue is clear and the offense egregious."<sup>53</sup> In *Landman*, costs were assessed against an employer where the employer's own medical examiner found an employee's injury to be work-related and the employer nevertheless refused to pay medical and temporary benefits. In another recent case, costs were similarly assessed where benefits were denied even after the employer/insurer's examiner concluded an injury was work-related.<sup>54</sup>

The conduct by the employer/insurer in the recent appellate decisions where costs were assessed is distinguishable from the conduct of the employer/insurer in the present case. Based on all the facts in this particular case, employer/insurer's reliance on expert medical opinion to deny additional medical treatment and the employer/insurer's insistence that claimant sustain his burden of proof on these disputed issues is not egregious conduct. I find that the employer/insurer is not liable for costs or attorney's fees under Section 287.560, RSMo.

I find that the matter of claimant's attorney fees should be deferred to the final resolution of this case.

Any pending objections not expressly ruled on in this award are overruled.

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<sup>52</sup> Claimant's Exh. I.

<sup>53</sup> 107 S.W.3d 240, 250 (Mo. banc 2003).

<sup>54</sup> *Monroe v. Wal-Mart Associate, Inc.*, 163 S.W.3d 501 (Mo.App. E.D. 2005).

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This award is temporary or partial in nature, and the matter left open pending an acknowledgement of the parties that issues are ripe for further adjudication.

Made by: \_\_\_\_\_  
Vicky Ruth  
*Administrative Law Judge*  
*Division of Workers' Compensation*