

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

Injury No.: 06-015463

Employee: Phyllis A. Tillotson  
Employer: St. Joseph Medical Center  
Insurer: Self-Insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 6, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Carl Mueller, issued October 6, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25<sup>th</sup> day of August 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

**DISSENTING OPINION FILED**

Attest: 

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John J. Hickey, Member

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Secretary

## **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge to deny benefits should be reversed.

### **Preliminaries**

On January 7, 2006, employee and a coworker were repositioning a patient on a bed. The wheels of the bed were not locked and the bed rolled unexpectedly causing employee to lose her balance and strike her knee on the arm of a chair. Employee immediately felt severe pain and could not put weight on her right leg.

An MRI revealed that claimant had a lateral meniscus tear. The MRI also revealed degenerative changes involving the medial meniscus. The treating physician selected by employer recommended a knee replacement. Employer sent employee to be evaluated by Dr. Stechschulte who agreed a knee replacement is indicated but opined that employee's "preexisting arthritis is the major prevailing factor for the need for this surgery."

The administrative law judge found that employee sustained a compensable accident, but failed to prove that the accident was the prevailing factor in causing her need for surgery. Further, the administrative law judge concluded that employee failed to prove that she sustained any disability as a result of the accident.

### **Compensability**

Section 287.120.1 RSMo (2005)<sup>1</sup> sets out employer's obligation to provide compensation under Chapter 287.

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

In turn, "injury" and "accident" are defined in § 287.020 RSMo. Section 287.020.3(1) RSMo defines "injury" as an injury that arises out of and in the course of employment.

In this chapter the term "injury" is hereby 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.

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<sup>1</sup> All references are to the 2005 Revised Statutes of Missouri, unless otherwise indicated.

If an injury by accident is compensable under the Workers' Compensation Law, we look to § 287.140.1 RSMo, to determine employer's liability to provide treatment for the injury.

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.

### **Strict Construction**

Section 287.800.1 RSMo provides that, "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

"[A] strict construction of a statute presumes nothing that is not expressed." 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. 82 C.J.S. Statutes § 376 (1999). Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008).

*Allcorn v. Tap Enterprises*, 277 S.W.3d 823, 828 (Mo. App. 2009)

### **Past Medical Expenses and Future Medical Care**

Although the administrative law judge found employee sustained an injury by accident arising out of and in the course of employment, the administrative law judge denied compensation for medical expenses. The administrative law judge's denial was based upon his erroneous belief that the statute requires employee to prove that the accident was the prevailing factor in causing her need for a total knee replacement (TKR). I have highlighted the erroneous standard as it appears in the following administrative law judge's findings.

14. Ms. Tillotson's arthritis present at the time of her accident was the **prevailing factor in causing her need for her TKR**. Employer's Exhibit 2 at 17:5-22, and Employer's Exhibit 1 at 10:12-14.

...

17. While Dr. Koprivica is a well-qualified rating doctor, I find that he does not possess the expertise necessary to offer credible conclusive opinions regarding the cause of precise orthopedic conditions. When presented with the opinions of board certified and board eligible orthopedic surgeons whose practices are predominantly centered on treating patients, such as Drs. Van Den Berghe and Stechschulte, I will defer – and give greater weight – to their medical causation opinions instead of Dr. Koprivica’s opinions. I do not find Dr. Koprivica’s opinion that Ms. Tillotson’s January 7, 2006 accident was **the prevailing factor in causing her need for a TKR** credible and I disbelieve this opinion. While interesting, Dr. Koprivica’s “torn rag” analogy misrepresents the medical condition and effects of Ms. Tillotson’s arthritis that was diagnosed by Drs. Van Den Berghe and Stechschulte. See, Claimant’s Exhibit A at 24:11-25:6. More accurately, at the time of Ms. Tillotson’s accident, the “rag” already was worn so thin that it required being replaced before it “tore”; the “tear” simply brought attention to a fact that already existed at the time it occurred.

18. I reject Dr. Koprivica’s conclusion that the **prevailing factor in causing Ms. Tillotson’s need for a TKR** was both her tri-compartmental arthritis and her January 7, 2006 injury. *Id.* at 45:2 – 46:5. Had Ms. Tillotson suffered only a meniscal tear, a TKR would not have been required. Employer’s Exhibit 2 at 9:16 – 11:14, and Employer’s Exhibit 1 at 16:7 – 19. Ms. Tillotson required a TKR because of her arthritis alone that existed at the time of her accident.

...

20. Because I find that Ms. Tillotson’s **accident was not the prevailing factor in causing her TKR** I deny her request for future medical care. Neither Drs. Van Den Berghe nor Stechschulte testified that Ms. Tillotson required additional medical care, and Dr. Koprivica only testified that she required testing for deep venous thrombosis related to her TKR. *Id.* at 54:12-22.

...

23. Ms. Tillotson requested reimbursement for medical expenses totaling \$4,646.21 related to her TKR. **Because I find that the TKR was not due to her accident, I deny her request for reimbursement of these expenses.**

The primary problem with the administrative law judge’s analysis is that the Workers’ Compensation Law does not impose upon employee the burden to prove that her accident was the prevailing factor in causing her need for medical treatment. The text of § 287.140.1 bears repeating.

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.

The statute does not recite a prevailing factor standard and, under a strict construction, the operation of the statute is confined to matters affirmatively pointed out by its terms. *Id.*

The administrative law judge correctly determined that employee sustained a compensable injury. Under § 287.140.1, we are called upon to determine if the TKR was reasonably required to cure and relieve employee from the effects of the work injury. If the TKR was reasonably required to cure or relieve employee of the effects of the work injury, employer should have provided the TKR and is now required to reimburse employee for the expenses of the TKR.

So what were the effects of employee's work injury? Employee sustained a torn lateral meniscus. Dr. Van den Berghe removed employee's menisci, so the TKR undoubtedly cured the tear. As a result of the work injury, employee suffered pain due to the swelling, tear, and rapid progression of her arthritis. Dr. Van den Berghe removed employee's knee structures, thereby reducing the pain. The TKR clearly relieved employee of the pain in her knee. The TKR cured and relieved employee of the effects of her injury. Dr. Van den Berghe testified he would not have performed the surgery if employee was not suffering pain. Clearly, the surgery was reasonably required to eliminate the lateral meniscus tear and to alleviate employee's pain.

We are not charged with considering whether the TKR also cured or relieved employee of the effects of other conditions. "[T]he need for the treatment must flow from the work injury, the fact that it also benefits a noncompensable condition is irrelevant." *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 268 (Mo. App. 2004).

Employee is entitled to reimbursement of her medical expenses.

Dr. Koprivica testified that employee suffers from continued swelling of her right lower extremity, which exposes her to a greater risk of deep venous thrombosis. Dr. Koprivica believes employee should be medically monitored for this risk. Dr. Koprivica also believes employee may need another TKR in the future because the life expectancy of a TKR is 10 – 15 years.

Employee is entitled to an award of future medical care.

### **Temporary Total Disability**

Because claimant's TKR was reasonably required to cure and relieve the effects of employee's work injury, she is entitled to temporary total disability for her recovery period after the TKR. The administrative law judge found that employee was totally disabled following the TKR from June 16, 2006, through December 11, 2006, representing twenty five and three-sevenths weeks. I agree. Since employee was entitled to compensation in the form of the TKR, employee is entitled to temporary total disability benefits during her hearing period.

**Permanent Partial Disability**

Employee no longer has her natural knee. Dr. Koprivica testified employee suffers from continued swelling of her right lower extremity, which exposes her to a greater risk of deep venous thrombosis. Employee's right leg is atrophied resulting in loss of strength. Since her surgery, employee experiences aching in her knee after being on her feet for some time. Dr. Koprivica opines that as a result of the January 7, 2006, injury, employee sustained a 50% permanent partial disability at the level of the knee (160-week level).

"Disability" is defined as "inability to do something"; "deprivation or lack of esp. of physical, intellectual, or emotional capacity or fitness"; "the inability to pursue an occupation or perform services for wages because of physical or mental impairment"; "a physical or mental illness, injury, or condition that incapacitates in any way." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).

*Loven v. Greene County*, 63 S.W.3d 278, 284 (Mo. App. 2001).

Employee testified that since the TKR, she has to modify the way she gardens because she cannot put pressure on her knee. She can no longer bicycle or backpack.

I find credible the opinion of Dr. Koprivica. I believe employee is entitled to 50% permanent partial disability at the level of the knee.

**Conclusion**

Based upon the foregoing, I would reverse the award of the administrative law judge on the issues of past medical expenses, future medical care, temporary total disability and permanent partial disability. I would award the compensation as described in this opinion. For that reason, I must respectfully dissent from the decision of the Commission majority.

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John J. Hickey, Commissioner

## FINAL AWARD

Employee: Phyllis A. Tillotson Injury No: 06-015463  
Dependents: N/A  
Employer: St. Joseph Medical Center  
Additional Party: N/A  
Insurer: Self-Insured  
Hearing Date: September 28, 2009 Checked by: RCM/rm

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? 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 January 7, 2006
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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 occurred or occupational disease contracted: Employee struck her right knee against a chair.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right lower extremity at the 160-week level.
14. Nature and extent of any permanent disability: Claimant did not meet burden of proof that disability resulted from the accident.
15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? \$4,593.80
17. Value necessary medical aid not furnished by employer/insurer? Claimant alleged \$4,646.21 reimbursement due; denied.
18. Employee's average weekly wages: \$980.00
19. Weekly compensation rate: \$653.33 for temporary total and \$365.08 for permanent partial disability compensation
20. Method wages computation: By stipulation.
21. Amount of compensation payable: None
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Phyllis A. Tillotson

Injury No: 06-015463

Dependents: N/A

Employer: St. Joseph Medical Center

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: September 28, 2009

Checked by: RCM/rm

On September 28, 2009, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Ms. Phyllis A. Tillotson, appeared in person and with counsel, Mark Kolich. The employer appeared through attorney Scott Gordon with corporate representative Eric Christiansen. The Second Injury Fund was not a party to the case. The primary issues the parties requested the Division to determine were whether Ms. Tillotson's accident caused her need for her right total knee replacement and the nature and extent of her disability. For the reasons noted below, I find that while Ms. Tillotson sustained a compensable accident on January 7, 2006, that accident was not the prevailing factor in causing her need for a total knee replacement, and that she failed to prove any disability resulted from her accident.

### STIPULATIONS

The parties stipulated that:

1. On or about January 7, 2006 ("the injury date"), St. Joseph Medical Center ("SJMC") was an employer operating subject to Missouri's Workers' Compensation law with its liability fully self-insured;
2. Ms. Tillotson was its employee working subject to the law in Kansas City, Jackson County, Missouri;
3. Ms. Tillotson notified SJMC of her alleged injury and filed her claim within the time allowed by law; and
4. SJMC provided Ms. Tillotson with medical care costing \$4,593.80.

**ISSUES**

The parties requested the Division to determine:

1. Whether Ms. Tillotson sustained an accident arising out of and in the course of employment?
2. Whether Ms. Tillotson is entitled to temporary total disability benefits from June 16, 2006 through December 11, 2006 representing twenty five and three-sevenths weeks for compensation totaling \$16,613.25?
3. Whether SJMC must reimburse the employee for medical expenses totaling \$4,646.21
4. Whether SJMC must provide the employee with additional medical care?
5. Whether Ms. Tillotson suffered any disability and, if so, the nature and extent of the Employee's disability?
6. Whether the alleged accident, caused the disability the employee claims?
7. Whether the amendments to the workers' compensation law included in Senate Bills 1 and 130 effective August 28, 2005 are constitutional?

**FINDINGS OF FACT AND RULINGS OF LAW**

Ms. Tillotson testified on her own behalf and presented the July 21, 2009 deposition testimony of her rating doctor, P. Brent Koprivica, MD, and the attached exhibits as Claimant's Exhibit A which was admitted into evidence without objection.

Although the employer did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1 – Deposition, Daniel Stechschulte, MD, Sept. 18, 2009
- Exhibit 2 – Deposition, Gregory R. Van Den Berghe, MD, Sept. 21, 2009
- Exhibit 3 – Incident Report #1077, January 25, 2006
- Exhibit 4 – Incident Report #1076, January 25, 2006
- Exhibit 5 – MRI Prescription, Michael F. Perll, MD, February 6, 2006
- Exhibit 6 – Timecard

Based on the above exhibits and the testimony of Ms. Tillotson, I make the following findings.

1. After working for St. Luke's Hospital for 33 years Ms. Tillotson – who is a registered nurse – accepted employment with SJMC in 2001.
2. Ms. Tillotson's job required her to work on her feet all the time during her 12 hour shifts.
3. On January 7, 2006, Ms. Tillotson was assisting a fellow nurse move a nonresponsive patient who was lying in a bed in room 408. Ms. Tillotson and the other nurse pulled the mat upon which the patient was lying and, because the bed's wheels were not locked, the bed rolled and pushed her into a wall with enough force that she bounced off the wall and struck her right knee against a chair. Ms. Tillotson did not fall, but may have twisted her knee. *See*, Employer's Exhibit 4.
4. I find that Ms. Tillotson sustained a compensable accident that arose out of and in the course and scope of her employment on January 7, 2006 when she struck her right knee on the chair.
5. Ms. Tillotson worked full time for the next two and one half weeks following her accident. *See*, Employer's Exhibit 6.
6. Ms. Tillotson completed an incident report on January 25, 2006 documenting this accident. *See*, Employer's Exhibit 4.
7. Ms. Tillotson obtained medical care for her knee on her own from a chiropractor. *Id.*
8. The Employer authorized Ms. Tillotson to be seen by Michael Perll, MD, who examined her on February 6, 2006 and recommended an MRI of her knee. *See*, Employer's Exhibit 5.
9. The Employer authorized Ms. Tillotson to be seen by an orthopedic surgeon, Gregory R. Van Den Berghe, MD, who examined the employee on February 9, 2006. *See*, Employer's Exhibit 2 at 6:22.
10. Dr. Van Den Berghe is a board eligible orthopedic surgeon whose primary focus is treating patients. *Id.* at 5:20. He has performed hundreds of knee surgeries in the past three years. *Id.* at 6:6. He is an extremely well qualified and credible medical expert and I adopt his opinions as fact.
11. Ms. Tillotson's January 7, 2006 accident was the prevailing factor in causing her acute lateral meniscus injury. *Id.* at 21:14 - 23:12.
12. Ms. Tillotson's January 7, 2006 accident was not the prevailing factor in causing her medial meniscus injury; this was a chronic condition unrelated to the accident. *Id.* at 20:19 – 21:13.

13. Ms. Tillotson's July 17, 2006 right total knee replacement ("TKR") would not have been performed absent symptoms (pain). *Id.* at 27:1-9, and Employer's Exhibit 1 at 19:1-8.
14. Ms. Tillotson's arthritis present at the time of her accident was the prevailing factor in causing her need for her TKR. Employer's Exhibit 2 at 17:5-22, and Employer's Exhibit 1 at 10:12-14.
15. Ms. Tillotson's tri-compartmental arthritis present at the time of her accident was significant enough to warrant a TKR. Employer's Exhibit 2 at 32:6-10.
16. Ms. Tillotson was a very poor historian which makes it difficult to make any findings of fact based on her testimony. While I did not sense any intent to deceive, Ms. Tillotson's testimony was replete with contradictions that give me pause to rely on it in any substantive manner. Such contradictions include: inability to recall a specific date of injury; inability to remember within a month of accuracy her first date of treatment; inaccurate information in incident reports that she prepared; reference to doctors to falling at the time of her accident which she denied at hearing; denial of having arthritis which her long-term family doctor treated and referenced throughout her records; denial – then recanting – of chiropractic treatment of her knee injury, to name a few examples.
17. While Dr. Koprivica is a well-qualified rating doctor, I find that he does not possess the expertise necessary to offer credible conclusive opinions regarding the cause of precise orthopedic conditions. When presented with the opinions of board certified and board eligible orthopedic surgeons whose practices are predominantly centered on treating patients, such as Drs. Van Den Berghe and Stechschulte, I will defer – and give greater weight – to their medical causation opinions instead of Dr. Koprivica's opinions. I do not find Dr. Koprivica's opinion that Ms. Tillotson's January 7, 2006 accident was the prevailing factor in causing her need for a TKR credible and I disbelieve this opinion. While interesting, Dr. Koprivica's "torn rag" analogy misrepresents the medical condition and effects of Ms. Tillotson's arthritis that was diagnosed by Drs. Van Den Berghe and Stechschulte. *See*, Claimant's Exhibit A at 24:11-25:6. More accurately, at the time of Ms. Tillotson's accident, the "rag" already was worn so thin that it required being replaced before it "tore"; the "tear" simply brought attention to a fact that already existed at the time it occurred.
18. I reject Dr. Koprivica's conclusion that the prevailing factor in causing Ms. Tillotson's need for a TKR was both her tri-compartmental arthritis and her January 7, 2006 injury. *Id.* at 45:2 – 46:5. Had Ms. Tillotson suffered only a meniscal tear, a TKR would not have been required. Employer's Exhibit 2 at 9:16 – 11:14, and Employer's Exhibit 1 at 16:7 – 19. Ms. Tillotson required a TKR because of her arthritis alone that existed at the time of her accident.
19. Neither Drs. Van Den Berghe nor Stechschulte offered an opinion as to whether Ms. Tillotson suffered any disability from either her torn lateral meniscus or her TKR. Claimant's Exhibit A at 9:22-25 and 81. Further, from Dr. Van Den Berghe's description of the TKR procedure, the entire menisci were removed and replaced. *See* Employer's

Exhibit 2 at 11:18 – 12:10. Thus, it would be very difficult for a doctor to apportion the disability from a torn lateral meniscus when a TKR is performed. And, while Dr. Koprivica rated Ms. Tillotson’s disability that he attributed to her injury including the effects of a TKR, he did not apportion the disability that resulted from her torn lateral meniscus and the TKR. Absent such apportionment any such finding would be speculative. Therefore, the Claimant failed in her burden of proof regarding whether she suffered any disability from her torn lateral meniscus alone.

20. Because I find that Ms. Tillotson’s accident was not the prevailing factor in causing her TKR I deny her request for future medical care. Neither Drs. Van Den Berghe nor Stechschulte testified that Ms. Tillotson required additional medical care, and Dr. Koprivica only testified that she required testing for deep venous thrombosis related to her TKR. *Id.* at 54:12-22.

21. I find that Ms. Tillotson was totally disabled from June 16, 2006 through December 11, 2006 representing twenty five and three-sevenths weeks. However, she was totally disabled for this period of time because she was recuperating from a TKR. Because I find that the TKR was not due to her accident, I deny her request for temporary total disability compensation.

22. Ms. Tillotson was released to full unrestricted duty on December 11, 2006. She returned to her regular job without any accommodations and worked normal full time 12 hour shifts until October 1, 2007 when she retired as she had planned. While Ms. Tillotson no longer back packs, she is able to dance and ride a trike and has highly recommended Dr. Van Den Berghe to her friends.

23. Ms. Tillotson requested reimbursement for medical expenses totaling \$4,646.21 related to her TKR. Because I find that the TKR was not due to her accident, I deny her request for reimbursement of these expenses.

24. Claimant questioned the constitutionality of the amendments to the workers’ compensation law included in Senate Bills 1 and 130 effective August 28, 2005. While the Division does not have jurisdiction to rule on the constitutionality of our laws, I do note that our Supreme Court considered this issue and did not invalidate the new law. See, Missouri Alliance for Retired Americans v. Department of Labor and Indus. Relations, 277 S.W.3d 670, (Mo. 2009).

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Carl Mueller  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
Division of Workers' Compensation