Prevailing v. Reasonable: Missouri's Medical Coverage Following a Compensable Injury [*Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. Ct. App. 2011).]

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I. INTRODUCTION

In 2005, Missouri adopted the "prevailing factor" causation standard, replacing its predecessor, a "substantial factor."[1] Under the causation analysis prior to 2005, claimants only needed to show "that the employment was more than a minimal factor in causing the injury."[2] This broad standard allowed for expansive employer coverage of non-work-related injuries

1. Gordon v. City of Ellisville, 268 S.W.3d 454, 459 (Mo. Ct. App. 2008). The court in *Gordon* explained the elimination of the substantial factor standard to prevent the compensability of aggravations:

> Case law preceding the 2005 amendments to the Worker's Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an "aggravated condition." However, since *Rono* was decided, the legislature amended Section 287.020, changing the criteria for when an injury is compensable. In particular, the legislature struck out language stating that an injury is deemed to arise out of and in the course of employment where it is reasonably apparent that the "employment" is a "substantial" factor in causing the injury, "can be seen to have followed as a natural incident of the work" and "can be fairly traced to the employment as a proximate cause."

Id. (citations omitted).

2. Amanda Yoder, *Resurrection of A Dead Remedy: Bringing Common Law Negligence Back into Employment Law* Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations, 277 S.W.3d 670 (Mo. 2009) (en banc), 75 MO. L. REV. 1093, 1102 (2010). Prior to 2005, an injury by accident arose out of work if the following considerations were met:

> (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) 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 nonemployment life[.]

DeVille v. Hiland Dairy Co., 157 S.W.3d 284, 287 (Mo. Ct. App. 2005) (citing MO. REV. STAT. § 287.020.3(2) (2000)).

through aggravations of preexisting conditions.[3] The shift to the prevailing factor helped separate work-injuries from non-work-related injuries.

In order for a work-injury to be compensable, the prevailing factor standard requires the work accident to be the primary cause for a resulting medical condition and disability.[4] This standard provides a yes-or-no answer to the workers' compensation standard for a compensable work injury: "did the injury arise out of work?"[5] Within that question, parties often dispute the gray area concerning the aggravation of preexisting injuries. Such disputes rely heavily on facts and medical evidence to determine the extent to which the claimed injuries arose out of work. This Comment discusses the causation standard when non-work-related physical changes to the body result in the need for a particular surgery.

Tillotson v. St. Joseph Medical Center[6] presented circumstances where part of the injury was held as compensable, but the evidence suggested that the surgery to relieve the injury stemmed from a personal condition, specifically arthritis.[7] The Missouri Court of Appeals reversed the administrative courts and ruled that a compensable injury shall receive the medical treatment when such medical treatment is reasonably required to cure the effects of such injury.[8]

Tillotson followed a two-step analysis for work-injuries according to Missouri's statutory scheme.[9] First, the court must determine whether the accident is the prevailing factor causing the medical condition and disability.[10] Next, the employer shall provide reasonably necessary medical treatment to cure and relieve the injury's effects.[11]

Ms. Tillotson's severe preexisting arthritis, combined with her meniscus tear from the work-injury, resulted in the need for a surgery more extensive than would have been necessary for her meniscus tear alone.[12] Because of the arthritis, she required a total knee replacement instead of the ordinary treatment for a meniscus tear, a meniscectomy.[13] As a result,

3. *Gordon*, 268 S.W.3d at 459; Kelley v. Banta & Stude Const. Co., 1 S.W.3d 43, 49 (Mo. Ct. App. 1999). There are critiques of the term *substantial* given its broad latitude in various contexts beyond workers' compensation. David Jakubowitz, *"Help, I've Fallen and Can't Get Up!" New York's Application of the Substantial Factor Test*, 18 ST. JOHN'S J. LEGAL COMMENT. 593, 623 (2004). Given the vagueness of a substantial factor, as little as five percent of an impact could be substantial. *Id.*

4. MO. REV. STAT. § 287.020.3(1) (2017). All statutory references are to MO. REV. STAT. (2017), unless otherwise indicated.

5. *See Gordon*, 268 S.W.3d at 459.

6. 347 S.W.3d 511 (Mo. Ct. App. 2011).

7. Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 514, 522 (Mo. Ct. App. 2011).

8. *See id.* at 520.

9. *Id.* at 517–18.

10. *Id.* at 517.

11. *Id.* at 51718.

12. *Id.* at 514.

13. *Tillotson*, 347 S.W.3d at 514.

parties disputed whether the prevailing factor analysis should apply to the medical treatment provided.[14]

II. BACKGROUND

A. Case Description

On January 7, 2006, Phyllis Tillotson, a registered nurse, was helping another nurse move a patient from a bed.[15] The bed was not locked, and it began to roll.[16] As a result, Ms. Tillotson lost her balance, bounced off the wall, and struck her right knee against a chair.[17] After working for a couple of weeks, she experienced increasing pain in her right knee.[18] An MRI revealed a lateral meniscus tear and degenerative changes involving the medial meniscus related to arthritis.[19]

Dr. Michael Perll determined that Ms. Tillotson's increased pain resulted from both the accident and the degenerative changes due to Ms. Tillotson's preexisting arthritis.[20] Ordinarily, an arthroscopy would be the appropriate surgery to repair a torn lateral meniscus, but such an operation is often inappropriate when a patient has severe arthritis.[21] Here, because of the arthritis, both Drs. Gregory Van den Berghe and Daniel Stechschulte, both orthopedic surgeons agreed a total knee replacement would best remedy her condition.[22] They believed her arthritis caused her need for the total knee replacement.[23] However, Ms. Tillotson's expert, Dr. P. Brent Koprivica, attributed her need for the surgery to the work accident.[24] Thus, medical experts disagreed whether the work accident or the preexisting arthritis caused the need for a total knee replacement.[25]

Ms. Tillotson's employer authorized medical treatment until Dr. Stechschulte opined that the arthritis, not the work accident, was the prevailing factor in the resultant injury.[26] Ms. Tillotson proceeded with a total knee replacement by Dr. Van den Berghe.[27] She then filed a workers'

14. *Id.* at 517.
15. *Id.* at 513–14.
16. *Id.* at 514.
17. *Id.* (she may have twisted her knee in this process).
18. *Id.*
19. *Tillotson*, 347 S.W.3d at 514. At the time of injury, Ms. Tillotson was 67 years old, 5'3", and 220 pounds. Brief of Respondent at 4, Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511 (Mo. Ct. App. 2011) (No. WD72948), 2011 WL 1475798, at *4.
20. *Tillotson*, 347 S.W.3d at 514.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 515.
25. *Id.* Their testimony each addressed which of the two causes was the prevailing factor resulting in the need of Ms. Tillotson's total knee replacement. *Id.*
26. *Tillotson*, 347 S.W.3d at 514. The amount at this point totaled $4,593.80. *Id.*
27. *Id.*

compensation claim to recover medical expenses, including future medical treatment, temporary total disability for the recovery period, and permanent partial disability for her right leg.[28]

Tillotson presented further medical testimony from Dr. Koprivica, including a disability rating of her right lower extremity.[29] He stated the work-accident "destabilized Tillotson's right knee causing an aggravation and a progression of the pre-existing degenerative arthritis."[30]

B. Legal Background

The administrative law judge ("ALJ") relied on medical evidence presented by Drs. Stechschulte and Van den Berghe over that of Dr. Koprivica.[31] Even though the ALJ found the work accident was the prevailing factor causing Ms. Tillotson's acute lateral meniscus tear, he found the accident was not the prevailing factor causing her medial meniscus tear.[32]

The medial meniscus tear was a chronic condition unrelated to the accident.[33] The ALJ determined the arthritis present at the time of her accident was the prevailing factor causing the need for a total knee replacement.[34] Ms. Tillotson required a total knee replacement because of her arthritis alone that existed at the time of her accident.[35] The ALJ found the total knee replacement was not a result of the work accident and that Ms. Tillotson failed to prove any disability resulted from such accident.[36]

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28. *Id.* The cost of the surgery was $4,646.21 and she was temporarily and totally disabled from June 16, 2006 through December 11, 2006. *Id.* She filed her claim in November 2007. *Id.*

29. *Id.* at 514–15.

30. *Id.* at 515.

31. *Id.* ALJ Carl Mueller explained his reliance in Drs. Van den Berghe and Stechschulte as follows:

> 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.

Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, at *8 (Mo. Lab. Ind. Rel. Com. ["Mo. LIRC"] Aug. 25, 2010).

32. *Tillotson*, 2010 WL 3448815, at *7.

33. *Id.*

34. *Id.* at *8.

35. *Id.*

36. *Id.* at *6. The ALJ found the lateral meniscus tear alone was compensable. *Id.* at *7.

Thus, she was not entitled to reimbursement for her medical expenses, temporary total disability compensation, or permanent partial disability.[37] The Commission affirmed the ALJ's decision with a dissenting opinion by John J. Hickey.[38]

III. COURT'S DECISION

Ms. Tillotson contended that the Commission erred, arguing the Missouri Workers' Compensation Act ("the Act") does not require her otherwise compensable accident to be the prevailing factor requiring a total knee replacement.[39] The Missouri Court of Appeals Western District agreed and reversed the administrative decision.[40] Summarily, the court held that because a compensable injury existed, the total knee replacement was reasonably required to cure the lateral meniscus tear.[41]

The court elaborated on two statutes of the Act: (1) "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability" and (2) "the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury."[42]

The Missouri Court of Appeals followed the guidance of the ALJ in part by holding that the accident was the prevailing factor causing the lateral meniscal tear.[43] Despite the ALJ's finding that the resultant disability was

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37. *Id.* at *1.

38. *Tillotson*, 2010 WL 3448815, at *1–5. "The Labor and Industrial Relations Commission (Labor Commission) hears appeals from administrative law judge awards in workers' compensation cases." MO. DEP'T OF LAB. & INDUS. REL., *Workers' Compensation Appeals Process*, https://labor.mo.gov/LIRC/appeal_wc (last visited Oct. 11, 2019).

39. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 513 (Mo. Ct. App. 2011).

40. *Id.* at 525.

41. *Id.*

42. *Id.* at 517–18 (citing MO. REV. STAT. §§ 287.020.3(1) (2008), 287.140.1 (2005)). The ALJ provided his rationale as follows:

> 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.

Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, *9 (Mo. LIRC Aug. 25, 2010).

43. *Tillotson*, 347 S.W.3d at 515, 517; *Tillotson*, 2010 WL 3448815, at *7. The Court of Appeals did not detail this analysis and merely adopted an excerpt from the ALJ's finding that Ms. Tillotson sustained a compensable accident when she struck her knee:

> The Division found that "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." (Finding number 4.) The Division found that "Ms. Tillotson's January 7, 2006 accident was the prevailing factor in causing her acute lateral meniscus injury." (Finding number 11.) This determination has not been appealed by the Employer and, thus, is not at issue in this case.

Tillotson, 347 S.W.3d at 515.

not caused by the lateral meniscus tear, the court proceeded to the second statute after holding that Ms. Tillotson sustained a compensable injury.[44] The court found an employee receiving treatment for a compensable injury is not based on a prevailing factor analysis, but whether the treatment is reasonably required to cure and relieve the effects of the injury.[45] Even though the compensable injury was not the main reason for the surgery, the court found the total knee replacement was reasonably required to cure and relieve the pain and effects of the torn lateral meniscus.[46]

IV. COMMENTARY

In order for the injury to be compensable, Missouri requires that the accident is the prevailing factor causing the resulting medical condition and disability.[47] Contrary to a compensable injury, the ALJ had additionally held that the claimant failed to prove there was a disability from the accident.[48] The ALJ used language from Missouri's injury by accident statute, section 287.020.3(1), to indicate Ms. Tillotson failed to meet her burden of proving a disability from the work accident.[49]

The Court of Appeals failed to analyze the injury by accident statute which requires a clear link between a work accident and the resulting medical condition and disability.[50] The court accepted Ms. Tillotson's torn lateral meniscus as the requisite medical condition and her time off of work recovering from her total knee replacement as her disability.[51] The Court of Appeals circumvented analysis of the arising out of statute by pointing to the ALJ's finding of a compensable injury and, thereafter, allowed coverage for the entire knee replacement.[52]

Upon closer scrutiny, the Court of Appeals erred in awarding Ms. Tillotson compensation for a primarily non-work-related injury. The court

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44. *Tillotson*, 347 S.W.3d at 517–22.

45. *Id.* at 521–23.

46. *Id.* at 525. "[S]ubsequent Missouri cases have noted *Tillotson* addresses liability for medical treatment for compensable injuries, and not whether a compensable injury has occurred." Kornmesser v. Kansas, No. 1,057,774, 2015 WL 2169348, at *9 (Kan. Work. Comp. App. Bd. ["WCAB"] Apr. 2, 2015) (citing generally Armstrong v. Tetra Park, Inc., 391 S.W.3d 466 (Mo. Ct. App. 2012); Jordan v. USF Holland Motor Freight, Inc., 383 S.W.3d 93 (Mo. Ct. App. 2012)).

47. MO. REV. STAT. § 287.020.3(1).

48. *Tillotson*, 2010 WL 3448815, at *8 ("the Claimant failed in her burden of proof regarding whether she suffered any disability from her torn lateral meniscus alone."). The Court of Appeals conveniently left this portion out of the analysis. Despite being within the first sentence of the respondent's brief, the Court disregarded this portion of the ALJ's decision as it would explicitly conflict with the outcome. Brief of Respondent, Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511(Mo. Ct. App. 2011) (No. WD 72948), 2011 WL 1475798, at *4.

49. *Tillotson*, 2010 WL 3448815, at *8.

50. MO. REV. STAT. § 287.020.3(1).

51. *See Tillotson*, 347 S.W.3d at 518, 522. In a footnote, the court explains that the temporary total disability resulted from Ms. Tillotson's time recovering from surgery and the permanent partial disability resulted from the life-long limitations from having a total knee replacement. *Id.* at 518 n.3.

52. *Id.* at 522–25.

improperly analyzed Ms. Tillotson's accident under a reasonable treatment analysis, instead of first determining whether the accident was the prevailing factor causing the medical condition and disability.[53] Instead of analyzing whether the entire result of the injury arose out work, the court presumed Ms. Tillotson's lateral meniscus tear was a compensable injury, and, as a result, the entire knee qualified for further treatment.[54]

The ALJ and Commission determined arthritis was the prevailing factor that caused the need for a total knee replacement.[55] The Court of Appeals held these rulings inappropriately conflated two distinct statutes.[56] This Comment addresses: (A) the statutory analysis in *Tillotson*; (B) the purpose of the prevailing factor; and (C) how Kansas addresses similar situations.

A. Statutory Analysis

The Court of Appeals largely focused on the challenged causation standard between the accident and the need for a total knee replacement.[57] The analysis turned on whether medical treatment belongs in the statute.[58] The court briefly weaved through the arising out of standard, largely because the issue questioned the appropriate causation standard for the medical treatment.[59] If the court had analyzed the injury by accident statute, it would have affirmed the lower courts.[60] The prevailing factor is the appropriate causation standard for the claimant's medical treatment.[61]

1. Arising Out of Standard: Prevailing Factor Causing Medical Condition

53. *Id.* at 517–22.
54. *Id.* at 517–18.
55. Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, *8 (Mo. LIRC Aug. 25, 2010).
56. *See Tillotson*, 347 S.W.3d at 525.
57. *Id.* at 517–22.
58. *Id.* at 517–18.
59. *Id.* at 517.
60. *See id.*; Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, at *9 (Mo. LIRC Aug. 25, 2010). The Court of Appeals merely adopted the finding that there was a compensable accident. *Tillotson*, 347 S.W.3d at 515.
61. *See Tillotson*, 347 S.W.3d at 517; *Tillotson*, 2010 WL 3448815, at *9; Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, *9 ¶ 21 (Mo. LIRC Aug. 25, 2010).

and Disability

The prevailing factor requires a clear link between a work accident and the resulting medical condition and disability.[62] This ensures the resultant injury arose out of work and not from a preexisting condition.[63]

i. Medical Condition

As a result of *Tillotson*, a discrepancy emerged between Missouri Courts of Appeals Eastern and Western Districts.[64] While the *Tillotson* decision allowed the claimant's lateral meniscal tear to satisfy the term "medical condition," the Eastern District interpreted "medical condition" to include the need for surgery.[65]

Preceding *Tillotson*, *Gordon v. City of Ellisville*[66] analyzed the need for surgery on the basis of the prevailing factor, not on a reasonably necessary standard.[67] The Eastern District analyzed whether the preexisting condition or the work accident resulted in the need for rotator cuff surgery.[68] The issue in *Gordon* concerned an aggravation which caused the need for a rotator cuff repair; the court explicitly noted the work accident was not the prevailing factor causing the need for the operation.[69]

Tillotson determined *Gordon* was distinguishable because there was no compensable injury.[70] *Gordon*, however, determined there was no compensable injury because the work accident did not cause the rotator cuff tear, and thus was not the prevailing factor warranting the rotator cuff

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62. MO REV. STAT. § 287.020.3(1) (2017). Interestingly Oregon's legislature addressed this issue via statute:

> If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.

OR. REV. STAT. § 656.005(7)(a)(B) (2018).

63. *See* Leake v. City of Fulton, 316 S.W.3d 528, 532 (Mo. Ct. App. 2010).

64. Respondent's Application for Transfer, Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511 (Mo. Ct. App. 2011). The Missouri Supreme Court denied respondent attorney's application for transfer to resolve the discrepancy between the Missouri Courts of Appeals Eastern and Western Districts' interpretation of medical condition. *Id.*

65. *See* Gordon v. City of Ellisville, 268 S.W.3d 454, 459 (Mo. Ct. App. 2008).

66. 268 S.W.3d 454, 459 (Mo. Ct. App. 2008). In a work accident, a claimant suffered an aggravation of preexisting conditions resulting in the need for a rotator cuff surgery. *Id.* at 460.

67. *Id.*

68. *See id.* at 459. "[W]e must limit our consideration of Claimant's claim for benefits to the standard contained in the current version of section 287.020.3. Specifically, we are to review whether Claimant established that his 2005 work accident was the prevailing factor in causing his need for rotator cuff surgery and post-surgery recovery." *Id.*

69. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 520–21 (Mo. Ct. App. 2011).

70. *Id.* The *Tillotson* Court distinguished the facts from *Gordon* and *Tillotson* because there was no acute injury in Gordon's shoulder. *Id.* at 520 ("during surgery to correct the rotator cuff tear, the surgeon found no evidence of acute injury, and found only evidence of a pre-existing degenerative condition.").

repair.[71] The *Gordon* court's definition of medical condition encompassed the necessary treatment.[72] The *Tillotson* court's interpretation limited the medical condition to the lateral meniscus tear.[73] Despite the *Tillotson* court's interpretation of medical condition, other courts have interpreted the term medical condition to encompass medical treatment.[74]

Tillotson, as it stands, allows the entire aftermath of an injury to be compensable, despite only a smaller component of the injury arising out of work.[75]

ii. Disability

The administrative courts in *Tillotson* analyzed the disability prong of section 287.020.3(1) of the Missouri Revised Statutes, suggesting the claimant did not satisfy her burden of proof.[76] More specifically, the ALJ and the Commission determined that the claimant failed to prove her work accident was the prevailing factor resulting in her permanent disability.[77] However, the Court of Appeals reversed and adopted Dr. Koprivica's testimony of the disability rating of her right lower extremity.[78]

The ALJ and Commission's connection between the need for treatment and a disability was not far-fetched. Disability ratings stem from the treatment and recovery post-surgery.[79] The ALJ accepted Ms. Tillotson's disability as the recovery period following the total knee replacement, which was not caused by the lateral meniscal tear.[80] Thus, when the ALJ held the arthritis was the prevailing factor causing the total knee replacement, the assertion was appropriately analyzed under the arising out of standard.[81] Absent a disability resulting from the accident, Drs. Van den Berghe and Stechschulte did not attempt to apportion the cause of the total knee replacement between the severe tri-compartmental arthritis and the

71. *See Gordon*, 268 S.W.3d at 459.
72. *See id.*
73. *See Tillotson*, 347 S.W.3d at 522.
74. *See* Kornmesser v. Kansas, No. 1,057,774, 2015 WL 2169348, at *9, *14 (Kan. WCAB Apr. 2, 2015) (holding "the evidence is insufficient to establish claimant's accident was the prevailing factor in causing her medical condition and disability, including her need for injections or a total knee replacement"); Zavala v. Twin City Foods, 343 P.3d 761, 771 (Wash. Ct. App. 2015) (holding the claimant did not prove "the industrial injury proximately caused the need for her knee to be replaced"); SAIF Corp. v. Sprague, 217 P.3d 644, 645 (Or. 2009) (identifying four types of medical conditions: (1) ordinary conditions; (2) preexisting conditions; (3) consequential conditions; and (4) combined conditions).
75. *See Tillotson*, 347 S.W.3d at 518. The Act now assigns responsibility for mostly work-related injuries. *See* MO. REV. STAT. § 287.020.3(1).
76. *Tillotson*, 347 S.W.3d at 518–19; MO. REV. STAT. § 287.020.3(1) (2005).
77. Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, at *5 (Mo. LIRC Aug. 25, 2010).
78. *Tillotson*, 347 S.W.3d at 523.
79. *Tillotson*, 2010 WL 3448815, at *9.
80. *See id.*
81. *See id.*

lateral meniscus tear.[82] Additionally, they opined the arthritis was the main reason for the total knee replacement, not the work accident.[83] As a result, the disability due to the total knee replacement was primarily caused by arthritis.[84] Neither surgeon provided a disability rating, concluding there was no permanent disability to rate on account of the accident.[85]

Instead of maintaining the arising out of standard, the court shifted to section 287.140.1 to use a "reasonably required" analysis.[86] In this process, the court seemingly adopted Dr. Koprivica's testimony of a disability as the temporary total disability and permanent partial disability resulting from the entire total knee replacement, not just that of the compensable injury.[87] This analysis bypassed section 287.020.3(1) and defeated the prevailing factor's purpose in preventing primarily personal injuries.[88]

2. Reasonably Required Medical Treatment

All medical testimony recommended the total knee replacement as the necessary treatment for Ms. Tillotson.[89] Thus, the court provided little analysis to whether the total knee replacement was necessary.[90] While the

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82. *See id.* at *8. Dr. Koprivica provided a disability rating for the entire total knee replacement, with no attempt to parse the supposed compensable portion of the injury. *Id.*

83. *Id.* at *8–9.

84. *Id.* at *8. Conflicting testimony between medical experts existed. *Id.* Dr. Stechschulte, in fact, performed Tillotson's total knee replacement. While not explicitly applying the following statute, the ALJ and Commission appropriately weighed Dr. Stechschulte and Dr. Van den Berghe's opinion over Dr. Koprivica:

> Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

MO. REV. STAT. § 287.190.6(2).

85. *See Tillotson*, 2010 WL 3448815, at *8. Had Drs. Stechschulte and Van den Berghe considered the meniscal tear a compensable injury, they would have provided a permanent partial disability rating: "Any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment." MO. REV. STAT. § 287.190.6(3).

86. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 522 (Mo. Ct. App. 2011).

87. *Id.* The disability was created from the total knee replacement. *See id.* Because the lateral meniscal tear was not the main reason for the total knee replacement, the lower courts appropriately held the claimant did not sustain her burden of proving a disability. *See id.*

88. *See id.* at 517.

89. *Id.* at 514. As addressed in previous sections, the medical experts maintained different stances on the medical causation for the total knee replacement. *Id.* at 515.

90. *Id.* at 522. In a footnote, the court emphasized the parties did not dispute the reasonableness of the surgery:

> At the conclusion of the cross examination of Dr. Van den Berghe, counsel for Tillotson inquired of counsel for the Employer "it's my understanding that there's no dispute regarding the reasonableness or the necessity of the treatment provided, and it's simply a matter of whether this was the preliminary [sic] factor or not. Is that true?" Counsel for the Employer responded: "Yes. We're not challenging that the knee replacement

lower courts emphasized that the need for surgery did not stem from work, the Court of Appeals narrowed its lens, explaining the total knee replacement was a consequence of a compensable injury, the lateral meniscal tear.[91]

Had Ms. Tillotson's arthritis not been severe, a doctor would have performed a meniscectomy.[92] A lateral meniscus tear repair, a procedure where the surgeon removes all or part of a torn meniscus, would certainly qualify as "reasonably required" treatment which could justify a permanent partial disability rating.[93] However, with Ms. Tillotson's reality of severe arthritis, the issue is whether the total knee replacement was "reasonably . . . required after the injury or disability, to cure and relieve from the effects of the injury."[94]

Because each doctor suggested the total knee replacement was the next appropriate step for Ms. Tillotson, the court had no difficulty holding the surgery was reasonably required.[95] Each doctor indicated the total knee replacement was the appropriate procedure because of the tri-compartmental arthritis and meniscal tear.[96] Again, the medical experts disagreed as to the medical causation requiring the total knee replacement.[97]

The court adopted language from the Commission's dissenting opinion using precedent from before the 2005 amendments, requiring strict construction, to interpret reasonably required treatment.[98] In determining whether the medical treatment was reasonably required, the court asked whether the need for treatment and medication "flow[ed] from the work injury."[99]

Admittedly, this portion of the statute did not face drastic changes following the 2005 amendments.[100] Greater deference is given to medical testimony in determining whether treatment was reasonably required, and each doctor had said a total knee replacement was appropriate to relieve Ms. Tillotson's pain.[101] The courts have kept the "flow from" measure, but

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> wasn't reasonable and necessary, just that it is not work related." During oral argument, counsel for the Employer agreed the Employer was not contesting the reasonableness of Tillotson's total knee replacement.

Id. at 522 n.7.

91. *Id.* at 517–22.
92. *Tillotson*, 347 S.W.3d at 514.
93. *See id.* at 523.
94. MO. REV. STAT. § 287.140.1.
95. *Tillotson*, 347 S.W.3d at 514.
96. *Id.*; Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, at *8 (Mo. LIRC Aug. 25, 2010).
97. *Tillotson*, 347 S.W.3d at 515.
98. *Id.* at 519; *Tillotson*, 2010 WL 3448815, at *4 (Hickey, dissenting).
99. *Tillotson*, 347 S.W.3d at 519 (citing Bowers v. Hiland Dairy Co., 188 S.W.3d 79, 83 (Mo. Ct. App. 2006)). Following Tillotson, the Missouri Supreme Court has additionally equated the reasonably required standard to determine whether the medical "treatments flowed from his compensable work injury." Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 633 (Mo. 2012).
100. MO. REV. STAT. § 287.140.1.
101. *Tillotson*, 347 S.W.3d at 514.

should remain cautious in expanding coverage of compensable injuries to include non-work-related injuries.[102]

B. The Purpose of the Prevailing Factor and a Return to Gray

The prevailing factor was adopted to promote clarity between an injury and an aggravation of preexisting injuries. This distinction separates work injuries from personal injuries. Prior to the "prevailing factor" standard, Missouri had a "substantial factor" standard and a liberal interpretation favoring compensability.[103] The *Tillotson* approach departs from the legislature's intent and provides courts a backdoor to compensate aggravated injuries.[104]

Dr. Koprivica explained Ms. Tillotson's knee was similar to a torn rag where it was largely functional, but the accident rendered the rag unusable.[105] However, in favoring Drs. Stechschulte and Van den Berghe, the ALJ analogized that: "at the time of Ms. Tillotson's accident, the 'rag' already was worn so thin that it required being replaced before [the lateral meniscus] 'tore'; the 'tear' simply brought attention to a fact that already existed at the time it occurred."[106] This case provides an opportunity for the Missouri legislature to discuss its intention relative to the prevailing factor standard.[107]

C. Kansas' Interpretation

Kansas adopted the prevailing factor standard for injuries occurring on or after May 15, 2011.[108] Like Missouri, Kansas' adoption of the prevailing factor standard was meant to prevent compensability for non-work-related injuries.[109] The consistent challenge thereafter became measuring how much of an injury relates to a work accident as opposed to a personal injury, such as arthritic or degenerative changes.[110] Medical experts weigh heavily

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102. Dierks v. Kraft Foods, 471 S.W.3d 726, 734 (Mo. Ct. App. 2015); *Hornbeck*, 370 S.W.3d at 633.

103. Leake v. City of Fulton, 316 S.W.3d 528, 532 (Mo. Ct. App. 2010). The court explained,

> Prior to the 2005 changes in the Workers' Compensation Law, an employee's work only had to be a "substantial factor" and not the "prevailing factor." § 287.020.3(2)(a). The 2005 changes also required the Commission and the courts to construe the law "strictly" rather than liberally in favor of coverage the way it had been before the revisions. § 287.800.

Id.

104. MO. REV. STAT. § 287.020.2. The court does not incorporate that "[a]n injury is not compensable because work was a triggering or precipitating factor." *Id.*; *Tillotson*, 347 S.W.3d at 516.

105. Tillotson v. St. Joseph Med. Ctr., 2010 WL 3448815, at *8 (Mo. LIRC Aug. 25, 2010).

106. *Id.*

107. *See id.*

108. KAN. STAT. ANN. § 44-508(f)(2); Buchanan v. JM Staffing, LLC, 379 P.3d 428, 432 (Kan. Ct. App. 2016).

109. *See* KAN. STAT. ANN. § 44-508(f)(2).

110. Le v. Armour Eckrich Meats, 364 P.3d 571, 574–75 (Kan. Ct. App. 2015).

in such fact-finding; however, legal questions arise concerning the reach of the prevailing factor standard.[111] By design, Kansas' statutory scheme does not support compensability when arthritic changes are the prevailing factor for said injury.[112]

Kansas shares similar language with Missouri in both statutes. In Kansas, an injury by accident requires that "the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment."[113] Further, "an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."[114] Following Board decisions, the Kansas Court of Appeals has appropriately held that the statute does not preclude aggravations from being compensable.[115] Rather, the accident cannot result from the aggravation alone.[116] Further, the accident must be "the prevailing factor causing the injury, medical condition, and resulting disability or impairment" in order to arise out of the employment.[117]

Board decisions have followed the logic from the Kansas Court of Appeals and concluded that the cases are highly fact dependent.[118] *Kornmesser v. State of Kansas*[119] shares similar facts and cited *Tillotson*.[120] The claimant was awarded treatment for her compensable injuries, which were also meniscus tears.[121] However, when she requested future medical care for a total knee replacement, the court concluded the medical condition and injury was a result of preexisting arthritis and did not arise out of work.[122]

Similar cases remain factually driven and focus on whether the injury arose out of work.[123] In another Board decision, *Sloniger v. Jefferson*

111. *See id.*

112. *See* KAN. STAT. ANN. § 44-508(f)(2).

113. KAN. STAT. ANN. § 44-508(f)(2)(B)(ii).

114. *Le*, 364 P.3d at 575; KAN. STAT. ANN. § 44-508(f) ("(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined. (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.").

115. *Le*, 364 P.3d at 575.

116. *Id.* at 578.

117. *Id.*; KAN. STAT. ANN. § 44-508(f)(2)(B)(ii).

118. Sloniger v. Jefferson County, 2016 WL 3669852, at *7 (Kan. WCAB June 8, 2016) ("Cases . . . demonstrate that determining whether there is solely an aggravation or whether the prevailing factor requirement is met depend on the particular facts and, to a large degree, the medical evidence specific to the case.").

119. Kornmesser v. Kansas, 2015 WL 2169348, at *9 (Kan. WCAB Apr. 2, 2015).

120. *Id.*

121. *Id.* at *15.

122. *Id.* "The Board concludes claimant's accidental injury resulted in aggravation of her underlying arthritis and menisci tears, but her accident was not the prevailing factor in causing an injury or medical condition which necessitates injections or a total knee replacement." *Id.*

123. *Sloniger*, 2016 WL 3669852, at *2.

County,[124] a 70 year old jailer slipped and fell, injuring her knee.[125] Dr. Stechshulte diagnosed the injury as a "meniscal tear, multiple loose bodies, an ACL strain and exacerbation of degenerative joint disease."[126] She did not have any previous knee problems, but since receiving treatment, Dr. Stechshulte noted considerable progression of arthritis.[127] The Board held the case distinguishable from *Kornmesser*, noting "her injury was not solely an aggravation, acceleration or exacerbation of a preexisting condition or rendered a preexisting condition symptomatic, and her work accident was the prevailing factor in her injury, disability and medical condition."[128] Thus, the respondent was responsible for the total knee replacement.[129]

While these cases have gone both ways, each maintains the proper focal points within the arising out of standard–analyzing the medical condition and disability.[130]

V. CONCLUSION

A claimant must prove the medical condition and disability were a result of the work accident before the employer provides coverage for the injured worker's medical treatment. In *Tillotson*, the Missouri Court of Appeals demanded coverage of medical treatment and disability for an injury primarily non-work-related. The court of appeals improperly relied on Ms. Tillotson's lateral meniscus tear from work to award a total knee replacement which was primarily required because of severe arthritis. Further, the court of appeals should not have disturbed the lower court's holding: the disability resulted from the arthritis, not the work injury. If the Missouri Court of Appeals had analyzed the injury by accident, it would have affirmed the lower courts because the prevailing factor is the appropriate causation standard for Ms. Tillotson's medical treatment.

124. *Id.*
125. *Id.* at *1.
126. *Id.* at *2.
127. *Id.*
128. *Id.* at *7.
129. *See Sloniger*, 2016 WL 3669852, at *8.
130. Kornmesser v. Kansas, 2015 WL 2169348, at *9 (Kan. WCAB Apr. 2, 2015); *Sloniger*, 2016 WL 3669852, at *2.