

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

Injury No.: 07-083116

Employee: Michael Bartlett
Employer: Siegel Roberts Automotive
Insurer: Self-Insured c/o Hartford Specialty Risk Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Denied)

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 February 17, 2009. The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued February 17, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 1st day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Bartlett, Michael

Injury No. 07-083116

Dependents: N/A

Employer: Siegel Roberts Automotive

Additional Party: N/A

Insurer: Self-insured c/o Hartford Specialty Risk Services

Appearances: For the employee, Mr. Kenneth Seufert
For the employer, Mr. Mark Anson

Hearing Date: November 12, 2008

Checked by: LCK/sm

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes
- Was the injury or occupational disease compensable under Chapter 287? Yes
- Was there an accident or incident of occupational disease under the Law? Yes
- Date of accident or onset of occupational disease? On or about August 7, 2007
- State location where accident occurred or occupational disease contracted: St. Francois County, Missouri
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- Did employer receive proper notice? Yes

- Did accident or occupational disease arise out of and in the course of the employment? Yes
- Was claim for compensation filed within time required by law? Yes
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted: Repetitive motion with right lower extremity
- Did accident or occupational disease cause death? No
- Parts of body injured by accident or occupational disease: Right foot and ankle
- Nature and extent of any permanent disability: 7.5% of the right foot and ankle at the 155 week level.
- Compensation paid to date for temporary total disability: None
- Value necessary medical aid paid to date by employer-insurer: \$120.00
- Value necessary medical aid not furnished by employer-insurer: \$1,975.00
- Employee's average weekly wage: \$405.60
- Weekly compensation rate: \$270.37
- Method wages computation: By agreement
- Amount of compensation payable:

| | |
|------------------------------|--------------------|
| Previously incurred medical | \$ 1,975.00 |
| Temporary total disability | \$ 1,429.10 |
| Permanent partial disability | <u>\$ 3,143.05</u> |
| Total | \$ 6,547.15 |

- Second Injury Fund liability: Denied
- Future requirements awarded: None

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kenneth Seufert

FINDINGS OF FACT AND RULINGS OF LAW

On November 12, 2008, the employee, Michael Bartlett, appeared in person and with his attorney, Ken Seufert, for a hearing for a final award. The employer was represented at the hearing by its attorney, Mark Anson. Also present for the employer was Human Resources Representative Angie Tessmer. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

- Siegel Roberts Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was duly qualified as a self-insured employer through Hartford Specialty Risk Services.
- On or about August 7, 2007, Michael Bartlett was an employee of Siegel Roberts, Inc. and was working under the Workers' Compensation Act.
- The employer had notice of the employee's alleged occupational disease.
- The employee's claim was filed within the time allowed by law.
- The employee's average weekly wage was \$405.60. The rate of compensation for temporary total disability and permanent partial disability is \$270.37 per week.
- The employer had paid \$120.00 in medical aid.
- The employer had not paid any temporary disability.
- The parties agreed that the employer is responsible for and shall reimburse the employee for medical mileage for the trip to Dr. Burke on December 4, 2007. The amount that is to be paid is \$126.10.

ISSUES

- Occupational disease
- Medical causation
- Claim for previously incurred medical
- Temporary total disability
- Nature and extent of permanent partial disability

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- Medical records of Iron County Hospital
- Medical records of Dr. Duberstein, Dr. Krewet and Dr. Burke
- Notice of intent to submit into evidence a complete medical report
- Letter to Dr. Berkin from Ken Seufert.
- Curriculum vitae of Dr. Berkin
- June 16, 2008 report of Dr. Berkin
- Claim for compensation
- Medical records of Hinsdale Hospital
- Medical records of Dr. Burke concerning William Rice. (The employer objected to the admission of these records. The ruling on the admissibility of this exhibit was taken under advisement. The objections of the employer are sustained and Exhibit I is not admitted into evidence. Exhibit I shall be kept with the file for appellate purposes.)
- Medical records of Dr. Brown concerning William Rice. (The employer objected to the admission of these records. The ruling on the admissibility of this exhibit was taken under advisement. The objections of the employer are sustained and Exhibit I is not admitted into evidence. Exhibit I shall be kept with the file for appellate purposes.)
- Itemized statement of Dr. Duberstein
- Itemized statement of Iron County Hospital
- Itemized statement of Parkland Health Center
- Medical expense summary

Note: At the time of their admission, several of the employee's exhibits were highlighted.

Employer-Insurer's Exhibits

- Diagram of gate
- Diagram of acrylic mold degating process
- Attendance record of the employee
- Medical records of Dr. Burke
- Deposition of Dr. Burke
- DVD of acrylic mold degating

WITNESSES: Michael Bartlett, the employee; Angie Tessmer, for the employer; and Curtis Stout, for the employer.

BRIEFS: The employer filed its' brief on the day of the hearing. The employee did not file a brief.

FINDINGS OF FACT:

The employee is 38 years old. He testified that prior to working at Siegal Roberts he had no problems or treatment to his right foot, ankle or leg. About 10 years ago, he had a bulging disc in his low back and was treated with epidural steroid injections. The epidurals fixed the problems with his low back.

The medical records regarding the low back show that the injury occurred in 1996. In May of 1996, the employee noted that initially after the accident he had right leg numbness but it had resolved. The employee had right leg pain if he sat too long. His right lower back pain radiated into his hip and into his right lateral

thigh. Testing showed a disc bulge at L5-S1. In June of 1996, the employee stated that after two epidural injections he had complete relief of pain and his only symptom was occasional minimal backache. His right leg pain and numbness had resolved. In October of 1997, the employee had the onset of the same low back pain that radiated into his buttocks but no symptoms in either lower extremity. Another epidural steroid injection was given and in December of 1997, the employee was noted to have another exceptional response and the low back pain was gone.

The employee testified that the problem to his right lower extremity was to his leg and not his right foot and ankle, and the epidurals resolved his low back problems.

In June of 2006, the employee started working for Pro-Staff and was assigned to work at Siegal Roberts in the acrylic molding department. In January of 2007, Siegal Roberts picked up his option and he started working directly for Siegal Roberts in the acrylic molding department. As an employee of Siegal Roberts, he performed the same job as he did when he worked for Pro-Staff.

The employee testified that Siegal Roberts manufactures parts for automobiles including plastic Chevrolet emblems. Machines molded the parts and a robot put the parts on a conveyor belt. The parts were attached to a gate and the parts were cut off by a degater. The degater machine used a saw to cut the parts off the gate. To operate the saw, an employee stands up and uses pressure to push the pedal down with their foot. The pedal is pressed down and held until all of the parts are cut off the gate. The parts are then packaged for shipment.

The employee testified that the conveyor belt was not super fast or super slow and the parts came by in less than ½ minute. His foot was not constantly on the foot pedal. Sometimes he would have to take his foot off the pedal to get the parts. Sometimes he waited to have a stack of parts to pack them. When the parts were packed, he took his foot off the pedal. Most of the time it was a pretty fast operation. Some people used their right foot and others used their left foot. Once his foot was on the pedal, he kept it pressed down until all the parts on the gate were cut. Each gate had either 2 or 4 parts. If needed, he used his hands to use an air hose to clean the part.

The employee testified that in the month or two prior to August of 2007, he would switch machines once a night approximately halfway through the shift. He could be switched to a machine which had no degater. There was a conveyor belt for every machine but not every machine had a manual degater. Some had a robotic heat degater. Some shifts he would only work ½ the shift on a machine with a degater. The employee thought that there were 10-12 molding machines in his unit. The conveyor belt ran at different speeds for different parts. If he ran two lines, the employee would run one degater. The day he left work on August 7, 2007, he was not operating a degater but was trimming flash off of parts which was a sit down job.

Angie Tessmer testified that she has been the employer's Human Resources representative since August 27, 2007. Prior to that, she was at Siegal Roberts as an on site staffing specialist for Manpower employees. She videotaped a degater being operated in the molding department which is Employer-Insurer Exhibit 6. She had a worker who had been employed for several years perform the process. The conveyor belt was running at the normal speed and there was no difference in the process that was filmed and how the process actually worked. The gates would either have two or four parts. The worker was not doing anything more or less than normal and was not performing the job either faster or slower than normal. Sometimes employees would run two machines at a time due to the slow pace of the work. Every part had a different cycle time but the conveyor belt runs slow because the parts have to cool off before being degated. When Ms. Tessmer saw the employee working in the acrylic molding department, he was either working on a conveyor belt or degater.

Ms. Tessmer testified that in the several months before August 7, 2007, the employee would work ½ the shift at two machines and the rest of the shift he would work at two different machines. The employees who worked two machines would never operate two degaters. The two machines would either not have a degater or would have one degater. There were 12-13 conveyor belts running in the acrylic molding department. Each shift had 10-14 employees. The most number of degaters that were used during a shift was two. The employee did not work the degater machine more than other employees. Some machines don't have conveyors or degaters. The primary job during that shift is to work the degater machine. Not all of the parts needed to be degated. There are certain cycle times for each part. Siegal Roberts is a very large factory and at the current time there are 320 employees who manufacture emblems and automotive name plates for the auto industry. She does not know how many Chevy emblems were produced or shipped per day.

Employer-Insurer Exhibit 6 is the CD-R that contains the videotape taken by Ms. Tessmer. It is 6 minutes and 40 seconds long. During that time the worker degated seven gates which contained fourteen parts. The conveyor belt stopped several times during the tape. The average time between the worker picking up a part to inspect, degating the part, and packing the part was approximately 26 seconds. The average time that the worker did not perform any work after a part was packed until he picked up another part to degate was approximately 31 seconds. During the video the employee was not performing any work for more than half the time.

Curtis Stout testified that he has worked for the employer for 12 years. He is the molding supervisor which includes the acyclic molding department. Compared with the videotape, the workers in his department did nothing more or less when degating and the speed of the process was not slower or faster than normal. The cycle time of the Chevy emblems ranged from 45 -75 seconds. The one in the video was a 68 second cycle time. The machine dictates the cycle times on the conveyor belt. Employer-Insurer 2 is an acrylic molding document that describes degating. Employees are expected to pack one or two parts at a time. In the 3-4 months prior to August 7, 2007, there were 12 molding machines in the acrylic molding department. There were two machines to a cell and one operator per cell. Only two of the six cells would have a manual degating machine. The other cells used a robot for some of the degating process. The operators changed cells once a shift usually at the half way point.

The employee testified that the first time he saw the video was the day of the hearing. The employee disagreed with Mr. Stout's testimony that of the 12 machines only two had manual degaters. He testified there were three or four manual degaters. In addition, sometimes the automatic degaters did not work and they would have to shut down the robot and bring in manual degaters to perform the degating. He disagreed with how fast the conveyor belt was running in the video because he did not have that much time to stand and watch. There were no slow times where nothing was going on during the degating process as depicted in the video. The employee stated he could not believe the speed of the machine shown in the video. He was in constant motion when he worked there. He has never worked in a factory as slow as what was shown in the video. When he worked, it was rapid movement.

The employee testified that he initially worked a 12 hour rotating shift but when his option was picked up by Siegal Roberts, he started working the night shift on Sunday through Thursday from 11:00 p.m. through 7:00 a.m. During the eight hour shift, employees worked ½ the shift on one machine and the rest of the shift on another machine. During a typical shift, he would operate the pedal approximately ¾ of the time.

The employee testified that in the year he worked prior to having problems, he had no other jobs that involved his right foot and no other activities where he used his right foot other than driving his vehicle to work and back. In 2007, he started having problems with his right foot and ankle. His right foot felt numb and the back of his ankle was sensitive. Approximately a month before August 7, 2007, the employee started noticing the problems. His symptoms progressed from a mild tingle until on August 7, his foot felt completely numb. He told his night foreman that he was going home due to his foot being numb in the back of his foot

about two to three inches above his heel which went around to the front. He did not finish the shift and left around 1:00 or 2:00 a.m. and went home. Later on that day, he went to the Iron County Hospital emergency room and told them that his right foot felt numb.

The employee went to the Iron County Hospital emergency room on August 8, 2007 for a tingling sensation in his right heel which had been constant for one week. In a different part of the record, the chief complaint was paresthesia in the right leg which started about one week ago with a gradual onset. The employee had L5 disc disease in the 1980s but had no recent back pain. The employee had altered sensation in the right lower extremity with pain from the shin to the top of the foot and numbness in the right calf and heel. He had no prior similar symptoms. The clinical impression of the emergency room doctor was right leg paresthesia; rule out lumbar disc. The doctor told the employee to consider an EMG nerve conduction study, an MRI of the lumbar spine and a neuro consult. The employee was to see Dr. Duberstein.

The employee testified that when he saw Dr. Duberstein, he told her his history and she took him off work.

The employee saw Dr. Duberstein on August 14 for right foot numbness and tingling with aching up into the right leg. The symptoms started about a month ago. It was noted that the employee started having pain at work where he stands and works a foot pedal with his right foot. The employee was seen in the emergency room, took two nights off and his foot felt a little better. The employee then had to drive six hours and his foot was worse. He had a low back injury at work in the 1990s, but currently had no low back pain. On exam, Dr. Duberstein noted the employee had tenderness at the insertion of the right Achilles tendon with no swelling, decreased sensation to pinprick and light touch from the dorsal surface of his right foot. Dr. Duberstein diagnosed right heel pain and foot numbness; tenosynovitis of the right ankle, disorder of the synovium, tendon and bursa. Dr. Duberstein ordered x-rays of the right ankle and foot, prescribed Ibuprofen, and a Neoprene support. The employee was to be taken off the foot pedal for one week and to be rechecked. On August 16, the employee had an x-ray of his right ankle and foot due to a history of heel pain and foot numbness. The x-rays were normal.

On August 21, the employee saw Dr. Duberstein with continued pain and stiffness in the right heel; and sensory disturbance and hyperesthesia in his right foot and ankle with light touch. On exam the employee had tenderness of the distal insertion of the right Achilles tendon and trouble heel walking with the right foot. Dr. Duberstein diagnosed work related disorder of the synovium, tendon and bursa; and tenosynovitis of the right Achilles tendon. The employee was to discontinue the support since it aggravated the hyperesthesia. An MRI of the right foot and ankle; and physical therapy was recommended. Dr. Duberstein stated that it was a work-related injury, and the employee will consult with workers' compensation and the employer about how to proceed. He had a form to fill out for work.

The employee testified that he had no other activities or accidents that explained his foot injury other than his work at Siegal Roberts. When he saw Dr. Duberstein he did not have any problems with his toes and he did not report any numbness in his toes. He had foot, ankle, and heel problems. Dr. Duberstein told him that the problems were related to using the foot pedal, and on August 21, he reported to the employer that his problems were work related and asked them to provide treatment. The employer sent him to Dr. Krewet. The employee described to Dr. Krewet the problems he was having with tingling in his ankle, numbness around his foot, and pain in his calf. The employee told Dr. Krewet the type of work he did as a degater which involved pressing and holding a foot pedal down. Dr. Krewet did not believe his condition was work related and to seek treatment on his own.

The employee was sent to Dr. Krewet by the employer on August 29, for right ankle and Achilles tendon area pain. The pain started on August 7, and was in the back of the ankle with a shooting pain or tingling sensation in the foot. On exam the employee had pain when the Achilles tendon was palpated and there was some tenderness over the Achilles tendon. There was no tenderness in the tarsal tunnel area. Dr. Krewet diagnosed right ankle pain and Achilles tendon pain with the etiology to be determined. Dr. Krewet stated that a diagnosis of tarsal tunnel syndrome versus bursitis of the Achilles tendon should be considered. The employee needed an MRI of the ankle and leg; a study for venous disease to rule out tarsal tunnel; nerve conduction studies would be helpful; and the employee

probably needs to be evaluated for inflammatory diseases. Dr. Krewet did not feel that his situation was occupational. The employee was to see his private physician and was off work and unable to work until released by his primary medical doctor.

The employee saw Dr. Duberstein on September 5 for ankle and foot pain. The employee had trouble getting workers' compensation to take care of his problems. The employee was having pain in his right calf with hyperesthesia in his heel and top of the foot. The employee had more calf and heel pain with using his car floor pedal. The employee was off work. The ibuprofen has helped. The exam was unchanged from the last visit. Dr. Duberstein diagnosed work related tenosynovitis of the right ankle; disorder of the synovium, tendon and bursa, and tenosynovitis of the right Achilles tendon. In her plan, Dr. Duberstein noted that the employee had overuse syndrome of the right Achilles and peripheral nerve injury from overuse. She recommended an MRI of the right ankle and an EMG of the right lower extremity. The employee was to continue on rest and anti-inflammatory medication. Follow-up was on an as needed basis. Dr. Duberstein was to call with the results of the studies.

The September 13 MRI of the right ankle was performed with a history of right ankle overuse syndrome of the right Achilles tendon. The impression of Dr. Avendano, the radiologist, was: 1) Minimal amount of fluid surround the Achilles tendon insertion likely representing mild tenosynovitis. 2) Mild amount of bone marrow edema in the posterior talus with minimal surrounding fluid. This likely represents a mild form of os trigonum syndrome. 3) Mild cystic change in the lateral malleolus, likely secondary to mild degenerative changes.

The employee testified that he did not see Dr. Duberstein after the MRI. The employer later sent him to Dr. Burke. The employee testified that he did not fill any part of the intake form and someone else wrote ankle pain for chief complaint. He did not tell anyone that his toes were numb. The only problems he had was to the back of the ankle and around to the top of his foot. He has never had any numbness in his toes.

He saw Dr. Burke, an orthopedic surgeon, on December 4, 2007. The chief complaints was burning and stinging in the right ankle and foot with numbness and tingling. The employee gave a history of burning in his ankle and numbness and tingling involving his entire foot which started in August. The employee had no specific injury and had been working at Siegel Roberts for about a year. The nonspecific numbness and tingling in his foot is unchanged despite having been off work for two months. Dr. Burke reviewed the records of Dr. Krewet, Dr. Duberstein, and the MRI. The MRI interpretation was mild degenerative changes in the lateral malleolus, some mild marrow edema in the posterior talus and some mild edema around the distal portion of the Achilles tendon. The employee stated that the sharp stinging pain in his leg had gone away, but he still had numbness and tingling involving all five toes. Dr. Burke noted the employee has not stepped on a pedal at work in months. His past medical history was unremarkable. On examination, the employee had no calf pain and no distal swelling; no pain about the medial or lateral malleolus; no pain about the length of the Achilles tendon; no pain to provocative stretching of the Achilles tendon; and no evidence of tarsal tunnel.

Dr. Burke ordered x-rays of the foot and ankle which did not demonstrate any abnormalities. Dr. Burke stated that the findings of the foot MRI contained in the report were negligible and the study was very close to normal. A little bit of fluid was noted in the posterior talus. Dr. Burke stated that none of that would correlate with numbness and tingling in the foot. Dr. Burke's impression was nonspecific right ankle and foot pain and numbness.

It was Dr. Burke's opinion that the symptoms were not related to the employee's one year history of repetitive motion at the Siegal Roberts plant. The most glaring fact was that the employee has not worked there in two months and his symptoms were unchanged. The patient's clinical exam was normal and there was no evidence of Achilles tendonitis. There was no evidence of a pinched nerve in his back, tarsal tunnel syndrome or anything else to explain the nonspecific numbness and tingling. From a work related standpoint, Dr. Burke did not recommend any further workup but recommended the employee go to his primary care doctor to look for the reason for the nonspecific numbness and tingling in the foot which would include peripheral neuropathies, vitamin deficiencies and other things. Dr. Burke stated that there was no relationship to the employee's described work activities. There were no restrictions and he could perform his activities as tolerated.

Dr. Burke's deposition was taken on November 10, 2008. Dr. Burke stated that the employee complained of numbness and tingling involving all five toes of his right foot which would involve several different peripheral nerves and would be next to impossible anatomically to be caused by a single entrapment nerve problem in the foot or ankle. The employee had no calf pain; and no pain of the Achilles tendon by either palpation or provocative stretching.

Dr. Burke stated that on the day of the examination, the employee did not have bursitis, Achilles tendonitis, Achilles tenosynovitis or any tenosynovitis in the foot. The employee had complaints of numbness and tingling in all five toes of his foot, but did not have complaints with respect to his heel. The employee had a normal clinical examination. With regard to his conclusion that there was no relationship between the employee's described work and his symptoms, Dr. Burke stated that the two most important things were: 1) the employee had a normal clinical exam when he examined him. 2) A key thing about repetitive trauma disorders is that those conditions are by definition worse when the employees are participating in the activity and by definition should be improved if not resolved when the activity is removed. Those that do not respond in that fashion are not responding according to trauma disorder. The employee's condition was unchanged since not working and that spoke volumes against any sort of association with the work activity.

It was Dr. Burke's opinion that in the right setting, repetitive motion can cause bursitis, tendonitis, tenosynovitis, and synovitis. Dr. Burke stated that Achilles tendonitis (inflammation of the Achilles tendon), Achilles tenosynovitis, a sensitive Achilles tendon, and bursitis of the Achilles tendon can be caused by repetitive motion.

Dr. Burke was aware of the repetitive work at the factory and he discounted that due to the insufficient time of exposure to working the pedal. Dr. Burke did not believe that being in a factory job constantly pushing down on a pedal for approximately a year could cause any type of repetitive motion injury. It was Dr. Burke's opinion that one year of operating a foot pedal in a factory setting was insufficient to cause anything especially in light of a normal clinical examination. Dr. Burke reviewed the MRI and agreed with the finding of a minimal amount of fluid surrounding the Achilles tendon insertion likely representing mild tenosynovitis, but that was not supported by Dr. Burke's clinical exam. Dr. Burke stated that tenosynovitis in certain situations can be caused by repetitive motion. Dr. Burke stated marrow edema is an MRI finding that suggests that there is some fluid within the bone and any trauma can cause that including repetitive motion.

The employee testified that since he stopped working, he had a little bit of improvement in his symptoms.

The employee was sent to Dr. Berkin by his attorney on May 15, 2008. The employee reported symptoms of numbness and tingling in his right foot beginning in June of 2007. Since June of 2006, he had been working at Siegel Roberts on an assembly line operating a degater machine and used his right foot to operate the pedal. The employee stated that his symptoms had improved since he was not working. The employee's continued symptoms were numbness to his right foot, aching pain to his shin, and sensitivity to the Achilles tendon. Dr. Berkin's examination of the right foot and ankle showed tenderness over the anterior surface of the right foot and the anterior ankle. The Achilles tendon was intact without soft tissue thickening or tendon laxity. The employee had normal sensation of the right foot and ankle but global loss of sensation over the right lower leg. Dr. Berkin stated the employee presented with complaints of numbness to his right foot, aching pain to his right shin, and sensitivity to his Achilles tendon. It was Dr. Berkin's opinion that the employee had overuse tendonitis of the right foot.

It was Dr. Berkin's opinion that the operating the foot pedal of a machine while standing throughout his work shift was the prevailing factor in causing the overuse tendonitis of the right foot. The August 2007 injury that occurred while in the employ of Siegel Roberts was the direct and proximate cause of the employee sustaining a permanent partial disability of 15% of the right lower extremity at the level of the ankle.

The employee testified that his present complaints are pain in the back of the ankle up to his calf, tingling in his ankle and into his foot, and constant numbness around top of the right foot. His problems are made worse by driving. He no longer mows his yard; and cannot stand or walk too long. If he is on his foot too long, he then has to elevate it. He is taking over the counter Ibuprofen. He is still on the rolls as a volunteer

fireman and has had training as a fireman. He has not completely stopped doing any activity due to the injury

RULINGS OF LAW:

Issue 1. Occupational Disease and Issue 2. Medical Causation

The employer is disputing that on or about August 7, 2007 that the employee sustained an occupational disease arising out of and in the course of his employment and the employee's injuries were medically causally related to the alleged occupational disease.

The employee is claiming an injury to his right foot and ankle. There is a disagreement among the physicians as to the employee's exact diagnosis. Dr. Duberstein diagnosed tenosynovitis of the right ankle and Achilles tendon; disorder of the synovium, tendon and bursa; overuse syndrome of the right Achilles tendon; and overuse peripheral nerve injury.

Dr. Krewet diagnosed right ankle pain and Achilles tendon pain with the etiology to be determined. Dr. Avendanio diagnosed tenosynovitis of the Achilles tendon and a form of os trigonum syndrome. Dr. Burke's impression was nonspecific right ankle and foot pain and numbness but the employee did not have bursitis, Achilles tendonitis, Achilles tenosynovitis or any tenosynovitis in the foot. It was Dr. Berkin's opinion that the employee had overuse tendonitis of the right foot.

Based on a review of all the medical evidence, I find that the opinions of Dr. Duberstein, Dr. Avendanio, and Dr. Berkin are persuasive and more credible than the opinions of Dr. Krewet and Dr. Burke on the diagnosis for the employee's right foot, ankle and lower leg. I find that the employee has tenosynovitis of the right ankle and Achilles tendon; disorder of the synovium, tendon and bursa; overuse syndrome of the right Achilles tendon; overuse peripheral nerve injury; and overuse tendonitis of the right foot.

Under Section 287.020.3 (1) RSMo, "injury" is defined to be an injury which has arisen out of and in the course of employment. Under Section 287.067.2 and 287.067.3 RSMo, an injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. An injury due to repetitive motion is recognized as an occupational disease. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Black's Law Dictionary 621 (Abridged Fifth Edition 1983) defines primary as "First; principal; chief, leading." Webster's College Dictionary 1071 (1991) defines primary as "First in rank or importance; chief;"

There were differences in the testimony of the employee and the employers' witnesses regarding how often the employee used the foot pedal to operate the degater machines and how fast the degater line operated. Based on a review of all the evidence including the videotape, I find that the employee's testimony is persuasive and more credible than the testimony of Angie Tessmer and Curtis Stout on the use of the degater foot pedal and the speed the line operated. The employee's credible testimony was that he started working in 2006 at Siegal Roberts. The job he performed while standing was repetitive and intensive involving his right lower extremity. He worked full time and had no other right lower extremity intensive jobs or activities. I find that the employee had a repetitive and intensive occupation involving his right lower extremity and did not have any repetitive and intensive activities involving his right lower extremity outside of work. The employee's symptoms to his right foot and ankle began a year after starting to perform the work activities at Siegal Roberts.

It was Dr. Krewet's opinion that the employee's problems were not occupational and he should seek treatment from his private physician.

It was Dr. Burke's opinion that the symptoms were not related to the employee's one year history of repetitive motion at the plant. Dr. Burke discounted the repetitive work due to the insufficient time of exposure to working the pedal. Dr. Burke did not believe that being in a factory job pushing down on a pedal for approximately a year could

cause any type of repetitive motion injury. Dr. Burke noted that the most important fact was that the employee had not worked in several months and his symptoms were unchanged which goes against any sort of relationship with the described work activity. Dr. Burke noted that the employee complained of numbness and tingling involving all five toes which would be next to impossible anatomically to be caused by a single entrapment nerve problem in the foot or ankle.

Dr. Burke's causation opinion is substantially affected by the fact that the employee told Dr. Berkin that his condition had improved and the employee testified at the hearing that since he stopped working, he had some improvement in his symptoms. In addition, the employee's credible testimony was that he never had any numbness or tingling in his toes and there was no mention in any of the medical records other than Dr. Burke's that the employee had numbness or tingling in his toes.

Dr. Duberstein noted that the employee started having pain at work where he stood and operated a foot pedal with his right foot. Dr. Duberstein stated that the tenosynovitis of the right ankle and right Achilles tendon; disorder of the synovium, tendon and bursa; overuse syndrome of the right Achilles; and peripheral nerve injury was work related, the employee had a work related injury, and those conditions were from overuse.

It was Dr. Berkin's opinion that standing and operating the foot pedal on a machine throughout his work shift was the prevailing factor in causing the overuse tendonitis of the right foot, and that the employment was the direct and proximate cause of the employee sustaining a permanent partial disability of the right lower extremity at the level of the ankle.

Based on a thorough review of the evidence, I find that the opinions of Dr. Berkin and Dr. Duberstein are persuasive and are more credible than the opinions of Dr. Krewet and Dr. Burke. I find that the employee's work activities and job duties was the prevailing factor in causing the resulting medical conditions and disability of tenosynovitis of the right ankle and Achilles tendon; disorder of the synovium, tendon and bursa; overuse syndrome of the right Achilles tendon; overuse peripheral nerve injury; and overuse tendonitis of the right foot. I find that the employee sustained a compensable work-related occupational disease and injury that arose out of and in the course of his employment. I find that the employee's tenosynovitis of the right ankle and Achilles tendon; disorder of the synovium, tendon and bursa; overuse syndrome of the right Achilles tendon; overuse peripheral nerve injury; and overuse tendonitis of the right foot, and the need for his medical treatment is medically causally related to the employee's occupational disease.

Issue 3. Claim for previously incurred medical.

The employee is requesting previously incurred medical benefits in the amount of \$2,941.44. Employee's Exhibit L are bills from Iron County Hospital in the amount of \$182.00 for a date of service of August 8, 2007; and in the amount of \$619.44 for a date of service of August 16, 2007. Exhibit K contains medical bills for treatment by Dr. Duberstein on August 14, August 21, and September 5 of 2007; and September 24, 2008, that total \$215.00. Employee's Exhibit M is a \$1,925.00 medical bill from Parkland Health Center for the MRI of September 13, 2007. The employer is disputing those bills with regard to the issue of authorization, reasonableness, necessity and causal relationship.

With regard to the issue of authorization, under Section 287.140 RSMo, the employer has the right to select the treating physician but waives that right by failing or neglecting to provide necessary medical aid. See Banks v. Springfield Park Care Center, 981 S.W.2d 161 (Mo. App. 1998). In Wiedower v. ACF Industries, 657 S.W.2d 71 (Mo. App. 1983), medical bills were awarded to the employee when the employer had notice of the injury but chose to treat the injury as non-compensable and did not offer medical services.

The employer will be liable for medical expenses incurred by the employee when the employer has unsuccessfully denied compensability of the claim. Denial of compensability is tantamount to a denial of liability for medical treatment. Beatty v. Chandeysson Elec. Co., 190 S.W.2d 648 (Mo. App. 1945). 1 Mo. Workers' Compensation Law Section 7.2 (Mo. Bar 3rd ed. 2004).

Under Section 287.140 RSMo, the employee has the right to select his own physician at his own expense. Based on the evidence, I find that the employee selected his own physicians at his own expense from August 8, 2007 when he went to Iron County Hospital until after August 21, 2007, when he requested that the employer provide treatment. I therefore find that the employer is not responsible for the following bills:

Exhibit L Iron County Hospital: Treatment on August 8, 2007 and August 16, 2007.
Exhibit K Dr. Duberstein: Treatment on August 14, 2007 and August 21, 2007.

After the employee requested medical treatment on August 21, the employer sent the employee to Dr. Krewet on August 29. After Dr. Krewet opined that the employee's condition was not work related, the employer denied additional treatment and denied the compensability of the claim. Based upon the case law and a review of the evidence, I find that the employer waived its right to select the treating physician by denying the compensability of the case and by failing or neglecting to provide necessary medical aid. The defense of authorization is not valid after August 29, 2007.

I find that the September 24, 2008 bill to Dr. Duberstein is not recoverable by the employee because the medical records for that visit were not in evidence. See Martin v. Mid-America Farm Lines, Inc. 769 S.W. 2d 105 (Mo. Banc 1989).

The remaining bills are the \$50.00 bill to Dr. Duberstein for treatment on September 5, 2007 (Exhibit K) and the \$1,925.00 bill for the September 13, 2007 MRI at Parkland Health Center (Exhibit M). Based on my ruling on occupational disease in Issue 1 and medical causation in Issue 2, I find that these two medical bills were medically causally related to the occupational disease and injury that the employee sustained to his right foot and ankle on or about August 7, 2007. I further find that these two medical bills were reasonable and the treatment was necessary as a result of the August 7, 2007 injury. I therefore find that the employer is responsible for and is directed to pay the employee the sum of \$1,975.00 for the previously incurred medical bills to Dr. Duberstein for treatment on September 5, 2007 and to Parkland Health Center for treatment on September 13, 2007.

Issue 4. Temporary total disability.

The employee is requesting 17 weeks of temporary total disability benefits beginning on August 7, 2007 and continuing through December 4, 2007, when he saw Dr. Burke. Temporary total disability benefits are intended to cover healing periods and are payable until the employee is able to return to work or until the employee has reached the point where further progress is not expected. See Brookman v Henry Transportation, 924 S.W.2d 286 (Mo.App.1996).

The employee did not finish his August 7, 2007 shift, stopped working, and started receiving medical treatment. He was kept off work while being treated by Dr. Duberstein. On August 29, Dr. Krewet stated that the employee was unable to work. On September 5, Dr. Duberstein stated that the employee was to continue on rest. After the September 13, 2007 MRI the employee did not go back to Dr. Duberstein and was not under active medical treatment.

I find that from August 7, 2005 through September 13, 2005, the employee was not able to return to work, was under active medical treatment, had not reached the point where further progress was not expected, and was entitled to temporary total disability. The employer is therefore ordered to pay the employee \$1,429.10 which represents 5 2/7 weeks of temporary total disability at the rate of \$270.37 per week.

Issue 5. Nature and extent of permanent partial disability.

It was Dr. Berkin's opinion that the employee had sustained a 15% permanent partial disability at the level of the right ankle. Based on a review of the evidence, I find that as a direct result of the work-related injury that the employee sustained a 7.5% permanent partial disability of the right foot and ankle at the 155 week level. The employer is ordered to pay to the employee 11.625 weeks of compensation at the rate of \$270.37 per week for a total award of permanent partial disability of \$3,143.05.

ATTORNEY'S FEE:

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

INTEREST:

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

Claim against the Second Injury Fund:

The employee has filed a claim against the Second Injury Fund for permanent partial disability as a result of the combination of preexisting disabilities with his primary injury to his right foot and ankle. Based on the award of 7.5% permanent partial disability of the ankle, I find that the primary case does not meet the statutory minimum threshold of 15% of a major extremity. The employee's claim against the Second Injury Fund is denied.

Date: _____

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Peter Lyskowski
Acting Division Director
Division of Workers' Compensation