

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

Injury No.: 09-065775

Employee: Ricky Bisch
Employer: City of University City
Insurer: St. Louis Area Insurance Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties submitted the following issues for determination by the administrative law judge: (1) accident; (2) injury arising out of and in the course of employment; (3) notice; (4) medical causation; (5) past temporary total disability from July 20, 2009, through August 12, 2009, September 28, 2009, through October 13, 2009, and November 18, 2009, through December 15, 2009; (6) nature and extent of permanent partial disability; and (7) Second Injury Fund liability.

The administrative law judge concluded that employee failed to meet his burden to demonstrate that an injury by accident occurred.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in concluding employee did not sustain an accident because: (1) employee's expert and a treating podiatrist placed compensability upon the employer; and (2) the award misinterprets the testimony provided by employee's expert.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Employee works for employer as a janitor. On June 27, 2009, employer required employee to work an overnight shift stripping and refinishing floors in preparation for an important event on employer's premises. Nobody was available to help employee perform this task. In order to finish the job, employee spent an entire 13-hour shift on his feet. Employee's tasks involved going to get water, adding stripper to the water, emptying the water, using a scrubber to clean the floors, buffing the floors, dry mopping the floors, and waxing the floors. Employee did not stop working until about 1:00 or 2:00 a.m.

After employee finished his duties, he sat down for about five minutes. When he stood back up, he felt excruciating pain in the center of his right foot toward the heel.

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Employee hadn't noticed any pain in his foot over the course of his shift; employee explained that he had been focused on completing the job and wasn't thinking about anything else.

Because it was a weekend, none of employee's supervisors were available. On the following Monday, employee told his supervisor, Kurt Wright, that he'd hurt his right foot stripping the floors and that he needed to see a doctor. Mr. Wright told employee that he would get him to a doctor, but Mr. Wright then busied himself with other tasks. Employee made several more requests for treatment. Mr. Wright told employee that he'd filed some paperwork, but there was no response from the work comp people. So, employee saw his own personal physician, Dr. Shetty, who sent him to a podiatrist, Dr. Amy Schroeder, on July 21, 2009. Dr. Schroeder diagnosed plantar fasciitis and provided a Kenalog/lidocaine injection, power step inserts, and a night splint. Dr. Schroeder also issued off-work slips covering the period of July 20, 2009, to August 12, 2009.

Employee continued to request that employer provide him with treatment. On August 3, 2009, employer sent employee to its authorized physician, Dr. Cynthia Byler. Dr. Byler examined employee, diagnosed plantar fasciitis, and came to the conclusion employee's right foot problems were the product of a tiny heel spur. Based on Dr. Byler's opinion, employer denied employee's request for treatment.

From September 28, 2009, through October 13, 2009, employee was off work on Dr. Schroeder's orders. On November 18, 2009, Dr. Julie Stewart performed an endoscopic surgery to correct the plantar fasciitis. Following the surgery, Dr. Stewart took employee off work for 6-8 weeks, but employee testified (and we so find) that he was able to go back to work on or about December 15, 2009.

Employee's work causes his right foot to be swollen and painful sometimes, and he has trouble navigating stairs. About every two weeks, employee rolls a bottle of ice water under his right foot to reduce pain and swelling. Employee also takes Aleve.

Expert medical testimony

Employer presents the expert medical testimony of Dr. Byler, who believes that employee's work activity was not the prevailing factor causing his plantar fasciitis, but instead that employee's obesity and a tiny posterior heel spur are the prevailing factors in causing that condition.

Employee presents the expert medical testimony of Dr. Shawn Berkin, who believes that the accident that occurred in June 2009 when employee was working on his feet stripping floors for up to 13 hours was the prevailing factor causing employee to suffer plantar fasciitis in his right foot. Dr. Berkin rated that condition at 30% permanent partial disability of the right lower extremity at the level of the ankle.

Dr. Berkin also opined, on cross-examination, that employee's plantar fasciitis didn't develop all in one day of work, but instead developed over time, as employee was on his feet a lot at work. Notably, however, Dr. Berkin did not revise his opinion (provided multiple times in both his report and on direct examination) that the 13-hour shift

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employee spent on his feet was the prevailing factor causing plantar fasciitis. It thus appears to us that Dr. Berkin believes that employee's spending a lot of time on his feet at work was a factor in causing his plantar fasciitis, but that the 13-hour shift employee spent on his feet was *the* prevailing factor causing him to suffer plantar fasciitis.

After careful consideration, we find more persuasive the testimony and opinions from Dr. Berkin. Specifically, we find most persuasive Dr. Berkin's opinion that employee's working on his feet stripping floors for 13 hours was the prevailing factor causing employee to suffer plantar fasciitis in his right foot and associated disability.

Conclusions of Law

Accident

The administrative law judge concluded that employee did not sustain an accident. We disagree. Section 287.020.2 RSMo provides, as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

We have found, based on employee's testimony, that on or about June 27, 2009, employee worked a 13-hour shift on his feet, after which he sat down for five minutes, and that upon rising, employee felt excruciating pain in his right foot. We are persuaded that these facts satisfy each of the foregoing criteria for an "accident," because employee (1) suffered an unexpected traumatic event or unusual strain (working on one's feet for 13 hours) (2) identifiable by time and place (June 27, 2009, at employer's premises) (3) that produced, at the time, objective symptoms (pain in employee's right foot) of an injury (plantar fasciitis) caused by a specific event (working on one's feet for 13 hours) (4) during a single work shift.

We acknowledge the argument that the gradual trauma employee suffered during his 13-hour shift makes this an occupational disease case, and that employee's claim must thereby fail because he has pleaded an injury by accident. Applying strict construction, we find nothing in the Missouri Workers' Compensation Law that compels an injured worker to elect either an accident or occupational disease theory of compensability in order to recover benefits. In theory, at least, this would produce an absurd result wherein an injury may be determined to be equally due to work-related trauma and work-related repetitive trauma but recovery be denied.

For purposes of resolving this case we simply conclude that when evidence in the record establishes that work-related, repetitive trauma may have caused asymptomatic structural weakness or damage to a body part but the employee experiences a sudden onset of disabling symptoms at work due to the performance of job duties during a single shift, the employee has satisfied the burden of proving an accidental injury.

We conclude that employee suffered an accident for purposes of § 287.020.2.

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Medical causation

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

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.

We have found persuasive and adopted the testimony from Dr. Berkin that the June 2009 accident is the prevailing factor causing employee to suffer right plantar fasciitis. We conclude that the accident is the prevailing factor causing both the resulting medical condition of right plantar fasciitis and permanent partial disability to the extent of 10% of the right lower extremity at the 160-week level.

Injury arising out of and in the course of employment

The parties dispute whether employee proved that his injuries arose out of and in the course of employment for purposes of § 287.020.3(2) RSMo, which provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) 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.

We have already determined that the June 2009 accident is the prevailing factor in causing employee's injuries; thus employee has satisfied subsection (a) above. With respect to subsection (b), we note that the courts have recently interpreted the foregoing language to involve a "causal connection" test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012). The *Johme* court held that an employee who fell and suffered injuries while making coffee "failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal nonemployment life." *Id.* at 512.

Advancing *Johme*, employer argues that we should find that the hazard or risk that resulted in employee's injuries is that of standing up after sitting down for five minutes. We are not persuaded. Nothing in the *Johme* case suggests we should view workplace injuries in a vacuum so microscopically focused that we ignore the reality of what actually happened to the employee. We find that employee's injuries resulted from the risk of working a 13-hour shift on one's feet. We note that the record contains no evidence that

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would support a finding that workers would have been equally exposed to that hazard or risk outside the employment in normal nonemployment life. We conclude, therefore, that employee's injuries arose out of and in the course of employment.

Notice

Section 287.420 RSMo sets forth the requirements for the notice employees must provide employers regarding a work injury, and provides, in relevant part, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

There is no evidence to suggest that employee provided a written notice to employer meeting all of the requirements of the above-quoted section. The next question is whether employee can prove employer was not prejudiced by his failure to provide the written notice specified by statute. We have found that employee told his supervisor, Kurt Wright, about his right foot injury as soon as he could, which was a day or two after the accident. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994). We conclude that employer had actual notice of employee's right foot injury when employee informed Mr. Wright that he had hurt his right foot stripping floors and that he needed to see a doctor.

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo. App. 2000)(citations omitted).

Because employee has demonstrated that employer had actual notice of the accident a day or two after it occurred, employee has made a prima facie showing of absence of prejudice and the burden shifts to employer to show it was prejudiced.

We note that employer failed to brief the issue of notice or to provide any argument that would support a finding it was prejudiced by employee's failure to provide the written notice described in the statute. After a careful review of the transcript, we can find no evidence to suggest that employer was prejudiced. Employer had an opportunity to investigate the accident and to send employee for evaluation and treatment mere days after the accident occurred. We are convinced employer had a fair opportunity to investigate employee's claim, have him treated to minimize his injuries, and gather evidence for its defense, despite employee's failure to provide a written notice meeting

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each of the elements of the statute. For the foregoing reasons, we conclude that employee's claim is not barred by § 287.420.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ him during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Accordingly, we look to the evidence of employee's physical condition following the work injury.

Treating physicians restricted employee from working during three time periods in connection with his right foot injury: July 20, 2009, through August 12, 2009, September 28, 2009, through October 13, 2009, and November 18, 2009, through December 15, 2009. We conclude that, given employee's physical condition, no employer in the usual course of business would reasonably be expected to employ him during the claimed periods. We conclude that employer is thus liable for 9 2/7 weeks of temporary total disability benefits at the stipulated rate of \$434.68 per week, for a total of \$4,036.31.

Nature and extent of permanent partial disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee sustained a 10% permanent partial disability of the right ankle as a result of the work injury. This amounts to 16 weeks of permanent partial disability at the stipulated rate of \$404.66. We conclude, therefore, that employer is liable for \$6,474.56 in permanent partial disability benefits.

Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." *Id.* That section imposes minimum thresholds that must be met before the Second Injury Fund can be held liable for permanent partial disability benefits.

We have found that the primary injury resulted in a 10% permanent partial disability of the right ankle. This amount is insufficient to satisfy the 15% threshold for a major extremity injury. We conclude that the Second Injury Fund is not liable for benefits.

Award

We reverse the award of the administrative law judge. Employer is liable for temporary total disability benefits in the amount of \$4,036.31 and permanent partial disability benefits in the amount of \$6,474.56.

The Second Injury Fund is not liable for benefits.

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This award is subject to a lien in favor of Jeffrey Gault, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Linda J. Wenman, issued August 1, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 2nd day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

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DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced employee failed to meet his burden of proof in this matter.

First, I must register my disagreement with the majority's finding that Dr. Berkin provided persuasive testimony in support of employee's claim. It appears to me that the majority strains its analysis in attempting to make sense of the doctor's testimony, which I find to be simply inconsistent beyond repair. Where in the Missouri Workers' Compensation Law (which, of course, must be strictly construed) is the statute authorizing this Commission to award benefits to an employee whose expert is unable to decide whether he suffered an injury by accident or by occupational disease? I find Dr. Berkin's opinions lacking persuasive force. Instead, I credit Dr. Byler's opinion that the prevailing factors causing employee's plantar fasciitis are his obesity and the posterior heel spur in employee's right foot.

I also wish to bring attention to the records from employee's initial treatment with Dr. Schroeder on July 21, 2009. Employee agreed that he filled out an intake form when he saw the doctor on that date. A specific question on that form asked employee to indicate whether his injuries were the product of a workers' compensation injury. Employee said "no." The majority fails to even mention this evidence.

I also disagree with the majority's reading of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012). The *Johme* court made clear that in identifying the risk or hazard that resulted in the employee's injuries, we are not to be distracted by what work-related tasks the employee may have been engaged in at the time of the injury. The *Johme* employee was making coffee, a task related to her work. *Id.* at 506. But the Missouri Supreme Court found that the risk or hazard that resulted in the employee's injuries was not that of making coffee, but instead that of "turning and twisting her ankle and falling off her shoe." *Id.* at 511. The Court concluded that, because employee didn't present evidence to demonstrate she was not exposed to the risk of falling off her shoe in her normal life, she failed to meet her burden of proving her injuries arose out of her employment. *Id.*

Applying the *Johme* analysis to the facts of this case, I believe the majority errs in looking at the employee's work-related activities preceding the onset of right foot pain. Instead, we must focus on the specific mechanism of injury, and ask whether employee was equally exposed to that risk outside of work. Employee's injuries resulted when he stood up suddenly after sitting down for about five minutes. The pertinent question, therefore, is whether employee was equally exposed to the risk of standing up suddenly in his normal nonemployment life.

After a careful review of the entire transcript, I can find no evidence that would support a finding that employee's work exposed him to a greater risk of standing up suddenly than he would otherwise face in his normal nonemployment life. I conclude, therefore, that employee's injuries did not arise out of and in the course of his employment.

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For all of the foregoing reasons, I would deny employee's claim. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee:	Ricky Bisch	Injury No.:	09-065775
Dependents:	N/A		Before the
Employer:	City of University City		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	St. Louis Area Insurance Trust		Department of Labor and Industrial
Hearing Date:	June 26, 2012		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

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? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged as June 27, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Disputed
8. Did accident or occupational disease arise out of and in the course of the employment? No
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: After stripping and refinishing a floor for a special event, Employee developed pain in his right heel.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged right heel.
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$652.00
- 19. Weekly compensation rate: \$434.68 / \$404.66
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: - 0 -

23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Ricky Bisch	Injury No.: 09-065775
Dependents:	N/A	Before the
Employer:	City of University City	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	St. Louis Area Insurance Trust	Checked by: LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on June 26, 2012. Post-trial briefs were received by the parties on July 26, 2012. Attorney Jeffrey Gault represented Ricky Bisch (Claimant). The City of University City, (Employer) is insured by the St. Louis Area Insurance Trust, and represented by Attorney Todd Hilliker. The Second Injury Fund (SIF) is represented by Assistant Attorney General Sam You.

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: accident; arising out of and in the course and scope of employment; notice; medical causation; liability of Employer for past temporary total disability (TTD); and liability of Employer and SIF for permanent partial disability (PPD) benefits. Claimant offered Exhibits B-N, Employer offered Exhibit 1, and Claimant and SIF offered Joint Exhibit A/I. The exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 52 years old and has worked for Employer for the past 16 years as a custodian. Claimant's duties as a custodian included: special event set-up; using buffers and scrubbers; stripping and refinishing floors; changing light bulbs; generalized cleaning; and setting up and breaking down events.
2. On June 27, 2009, prior to a special event being held, Claimant came in on his day off to refinish floors. Claimant arrived at the site approximately at midnight, worked through the night and morning finishing the job around 2 pm. Claimant did not sit down until the job was almost completed, and when he arose he felt severe pain in the bottom of his right foot. As the job was being performed on the weekend, Claimant notified his supervisor about his foot pain on Monday

and requested medical care. When Employer did not respond to his request for several days, Claimant sought treatment with his primary care physician. Claimant's primary care physician eventually referred Claimant to a podiatrist.

3. On July 21, 2009, Claimant was examined by the podiatrist and the working diagnosis was right foot plantar fasciitis. Claimant's initial history is recorded as "the pain is of gradual onset with no history of trauma." Claimant's intake form was marked to indicate the injury was not work related. Claimant was given a cortisone injection into his right heel, placed in physical therapy, and provided orthotics and a night splint. Between his initial examination and September 28, 2009, Claimant had no sustained relief from his pain, and during that time was placed in a CAM walker and received a second steroid injection.

4. On October 15, 2009, the podiatrist noted Claimant was relating his right heel pain to work he performed on June 27, 2009, and questioning whether his plantar fasciitis was work related. The podiatrist opined as follows:

In my professional opinion, the patient does spend quite a bit of time standing up on his feet at work. He is also required to push around heavy machinery which can place excessive stress upon and across the plantar fascia. It is possible that he did sustain an injury in June which may have caused microscopic tearing within the plantar fascia which then developed into plantar fasciitis for which I am treating him.

(Exhibit B, pg.14)

5. An MRI of Claimant's right foot was obtained during October 2009 that confirmed the diagnosis of plantar fasciitis. On November 18, 2009, Claimant underwent endoscopic plantar fasciotomy surgery involving his right foot. Claimant was released from medical care on March 4, 2010, and at release Claimant told the physician he was "doing well and is ambulating with no pain in his right heel."

6. As of hearing, Claimant will experience right foot pain when he works a seven day work week. When he has pain, Claimant ices the bottom of his foot, and this occurs approximately one time every two weeks. Claimant also notices right calf fatigue, and takes Aleve to relieve his discomfort.

7. At Claimant's request, he was examined by Dr. Berkin on September 23, 2010. Upon examination, Dr. Berkin noted an abnormality regarding Claimant's right foot as slight tenderness over the plantar surface proximal to the plantar arch. In his report, Dr. Berkin opined as follows: "The industrial accident that occurred in June of 2009 when Mr. Bisch was working on his feet stripping floors for up to 13 hours was the prevailing factor in causing the plantar fasciitis of the right foot." Dr. Berkin rated the right foot disability at 30% PPD referable to the right lower extremity at the ankle.

8. Dr. Berkin was deposed on December 8, 2011. During deposition testimony, Dr. Berkin testified as follows:

Q. Okay. And so, Doctor, I guess, do you feel that the plantar fasciitis

basically came on and developed all in that one day of work?

A. Not really. No. I think it happened over time. I think he was on his feet a lot at work, and I think it kind of developed over time.

(Exhibit N, pg. 35)

In response to a question regarding why Claimant indicated on the podiatrist intake form that his injury was not work related, Dr. Berkin testified “the pain came on very suddenly, which is typical of plantar fasciitis, but, you know, the underlying mechanism is something that occurs over time usually. He wouldn’t know that.” (Exhibit N, pg.38)

9. Employer’s medical expert opined Claimant’s work was not the prevailing factor in his development of right foot plantar fasciitis.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to accident

Claimant alleges on June 27, 2009, he sustained an injury by accident that “occurred during that single work shift.”¹ The Missouri Workers’ Compensation law was amended during the 2005 legislative session. Included in the 2005 amendments to Chapter 287, was the express intent of the legislature rejecting and abrogating established case law that had defined “accident,” and changing statutory construction to strict construction. *Pile v. Lake Regional Health System*, 321 S.W.3d 463 (Mo.App. 2010) (citations omitted) Section 287.020.2 RSMo., 2005, now provides: The word “accident” as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Claimant bears the burden of establishing the essential elements of his claim. Included in the essential elements is establishing that an injury by accident occurred. Claimant has failed to meet his burden. Claimant’s medical expert has provided contradictory opinions regarding whether the injury occurred by accident or occupational disease. Dr. Berkin’s report opines the injury was by accident that occurred in June 2009 after spending 13 hours stripping a floor. This opinion comports with Claimant’s pleadings. However, in deposition testimony, Dr. Berkin testified Claimant’s injury “developed over time,” and “the underlying mechanism is something that occurs over time usually.” This testimony does not comport with Claimant’s pleadings of an injury by accident, rather, would indicate the injury may have been caused by occupational disease.² Due to the conflicting nature of Dr. Berkin’s opinions, I do not find his opinions credible.

¹ As stated on Claimant’s claim form. Administrative Judicial Notice taken of the Division’s official records.

² Claimant’s Division file does not reveal any amended claims after his initial filing.

Claimant may argue his podiatrist's October 15, 2009 note establishes an injury by accident. However, the podiatrist stated "*it is possible*" that Claimant sustained an injury in June that caused microscopic tearing that developed into plantar fasciitis. Claimant's podiatrist was not deposed, the opinion is not stated within a degree of medical certainty, and thus standing alone is insufficient on which to base an award of benefits. Based on the evidence presented, I find Claimant failed to meet his burden to demonstrate that an injury by accident occurred.

CONCLUSION

Claimant failed to establish an injury by accident occurred. Claimant does not allege an occupational injury. Employer owes no benefits. As Claimant failed to establish accident, the remaining issues in dispute are moot. As the primary claim fails, SIF has no liability.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation