**FINAL AWARD ALLOWING COMPENSATION**
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 14-093366

Employee: Alonzo Brown

Employer: Superior Linen Supply Company

Insurer: Travelers Property Casualty Company of America

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Injury arising out of and in the course of the employment*[1]

The parties asked the administrative law judge to determine whether employee sustained injuries arising out of and in the course of the employment when, after having been locked inside employer's courtyard at the end of his shift, employee suffered a right ankle injury while attempting to escape the premises. The administrative law judge concluded that employee's injuries did arise out of and in the course of the employment, because employee's activities were shown to be sufficiently incidental to his work. We agree with this result, but discern a need to provide some supplemental findings and conclusions to address the effect of the 2005 legislative changes to the Missouri Workers' Compensation Law.

In 2005, the Missouri legislature enacted § 287.020.10 RSMo, which provides as follows:

> In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: Bennett v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo.banc 1999); and Drewes v. TWA, S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

[1] Although the parties and administrative law judge framed the issue as whether employee sustained an "accident" arising out of and in the course of the employment, the appropriate statutory test is whether employee's "injuries" arose out of and in the course of the employment. The distinction is not merely academic where both "accident" and "injury" enjoy unique definitions under Chapter 287, and where we are required under § 287.800.1 RSMo to construe those definitions strictly. From their briefs, at least, it is clear to us that the parties do not now dispute whether employee sustained an "accident," as defined under § 287.020.2 RSMo, but instead ask us to resolve the issue whether employee's injuries arose out of and in the course of the employment for purposes of § 287.020.3(2) RSMo.

We note that, in her analysis, the administrative law judge cited and partially relied on pre-2005 case law interpretations of the meaning of the statutory phrase "arising out of and in the course of the employment" for the following propositions: "arising out of the employment" and "in the course of the employment" are two separate tests; compensability in certain factual scenarios depends on whether the "employee's acts benefit the employer"; and an employee must suffer an accident "within the period of employment at a place where the employee may reasonably be" in order to prove a compensable injury. See *Award*, pages 10 and 11. Giving effect, as we must, to the plain language of § 287.020.10, we hereby disclaim that portion of the administrative law judge's analysis relying on pre-2005 case law interpretations of the meaning or definition of "arising out of and in the course of the employment."

Instead, our analysis turns on the question whether the circumstances surrounding employee's injury satisfy the controlling statutory test under § 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.

There is no contention that employee's fall while attempting to escape employer's premises was not the prevailing factor causing employee's injuries. We find that the accident was the prevailing factor causing employee's right ankle injury; we conclude, therefore, that § 287.020.3(2)(a) is satisfied.

Turning to § 287.020.3(2)(b), our initial task is to identify, as accurately as possible, the "hazard or risk" from which employee's injuries came. See *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012). The parties presented conflicting evidence regarding the circumstances that led to employee falling from a box truck cab during his attempt to leave work on October 31, 2014. Employee's evidence suggests he was inadvertently trapped in employer's courtyard, and the only means of escape that appeared to be available to him was to climb a fire escape onto employer's roof, and then to descend from the roof by way of climbing onto and down from a box truck parked next to the building. Employer's evidence, on the other hand, suggests employee did not act reasonably, because employee should not have been in the courtyard in the first place; employee should have found some other, less dangerous way to escape, such as

entering and descending a rooftop hatch employee occasionally used in performing his duties; or employee should have simply waited and called for help if he was trapped, rather than attempting to escape, or climb down from the roof by way of the box truck.

After a thorough review, the administrative law judge found employee's evidence to be more persuasive. Upon our own careful consideration of the record, we are not persuaded to second-guess the administrative law judge's credibility findings. We adopt, therefore, her finding that employee believed that climbing onto and down from the roof was his only apparent option to escape from employer's premises after having been locked in the courtyard while leaving work on October 31, 2014. We further find that the hazard or risk from which employee's injuries came was that of being trapped in employer's courtyard and subsequently falling while attempting what then appeared to him to be his sole means of escape. We turn now to the question whether this risk or hazard was unrelated to the employment.

Employer points to employee's normal job duties, and correctly points out that these did not ever involve being on top of a box truck. Essentially, employer argues that, because employee was not engaged in an activity bearing any similarity to his work duties when he was injured, the hazard or risk from which his injuries came cannot be deemed related to the employment. However, the courts have recently declared that "compensation is not limited to workers injured while actively engaged in their duties." *Mo. Dep't of Soc. Servs. v. Beem*, 478 S.W.3d 461, 465 (Mo. App. 2015). Instead, "[t]he equal exposure consideration should center on whether the employee was injured *because* he or she was at work, rather than simply while he or she was at work. The focus of the equal exposure analysis should be not on *what the employee was doing* when the injury occurred, but rather on whether the *risk source* of the injury was one to which the employee is exposed equally in his or her nonemployment life. " *Id.* at 467 (emphasis in original). See also *Lincoln Univ. v. Narens*, 485 S.W.3d 811, 820 (Mo. App. 2016).

Notably, there is no evidence in this record that would suggest that employee, or workers generally, spent time in employer's courtyard in normal, nonemployment life, much less that they ever found themselves trapped therein. Nor is there any credible evidence on this record to support a finding that employee was located in employer's courtyard on the night of October 31, 2014, for any purpose unrelated to his work for employer. To the contrary, all of the available evidence suggests that employee found himself locked in employer's courtyard as a direct result of his performance of a normal, daily activity that was unquestionably related to his work: gathering his things before clocking out and heading home. We conclude that the risk or hazard from which employee's injuries came was related to the work, and that employee was not equally exposed to that risk or hazard outside of and unrelated to the employment in normal nonemployment life.

In sum, we are convinced that employee's injuries occurred *because* he was at work, not merely *while* he was at work. We conclude, therefore, that employee's injuries arose out of and in the course of the employment.

**Conclusion**

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Emily S. Fowler, issued February 28, 2017, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 7th day of March 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

VACANT
Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

# FINAL AWARD

Employee: Alonzo Brown Injury No: 14-093366

Dependents: N/A

Employer: Superior Linen Supply Company

Insurer: Travelers Property Casualty Company of America

Additional Party: N/A

Hearing Date: February 6, 2017 Checked by: ESF/lh

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes

2. Was the injury or occupational disease compensable under Chapter 287? Yes

3. Was there an accident or incident of occupational disease under the Law? Yes

4. Date of accident or onset of occupational disease: October 31, 2014

5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes

9. Was claim for compensation filed within time required by Law? Yes

10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted: While in the course and scope of his employment, Employee was attempting to climb down from the cab of a truck when he fell causing injury to his right lower extremity

12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: right lower extremity

14. Nature and extent of any permanent disability: 25% permanent partial disability to the left lower extremity

15. Compensation paid to date for temporary total disability: $0

16. Value necessary medical aid paid to date by employer/insurer? $0

17. Value necessary medical aid not furnished by employer/insurer? $45,305.39

18. Employee's average weekly wages: $424.32

19. Weekly compensation rate: $282.89/$282.89

20. Method wages computation: By stipulation

## Compensation payable

21. Amount of compensation payable: Employer to pay to Employee 25% permanent partial disability to the right lower extremity for a total of $10,961.99. Employer to pay to Employee's medical expenses in the amount of $45,305.39. Employer to pay to Employee 37.4 weeks of temporary total disability equating to an amount of $10,580.09.

22. Second Injury Fund liability: NA

23. Future requirements awarded: Employer shall provide to Employee such future medical care that shall serve to cure and relieve symptoms from which Employee suffers as a result of his work injury of October 31, 2014 as described by Dr. Prostic.

The Court awards attorney fees in the sum of 25% of all benefits herein to Mr. Stephen Mayer, attorney for Employee.

# FINDINGS OF FACT and RULINGS OF LAW:

Employee: Alonzo Brown Injury No: 14-093366

Dependents: N/A

Employer: Superior Linen Supply Company

Insurer: Travelers Property Casualty Company of America

Additional Party: NA

Hearing Date: February 6, 2017 Checked by: ESF/lh

On February 6, 2017, the parties appeared for final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Alonzo Brown, appeared in person and with counsel, Mr. Stephen Mayer. The Employer appeared through counsel, Ms. Katherine Collins.

## STIPULATIONS

The parties stipulated to the following:

1. That the employer, Superior Linen Supply Company, was an employer operating subject to the provisions of the Missouri Workers' Compensation law on October 31, 2014, and was fully insured through Travelers Property Casualty Company of America.

2. That Alonzo Brown was its employee and he was working subject to the law in Kansas City, Jackson County, Missouri;

3. That the Employee notified the Employer of his injuries as required by law and his claim was filed within the time allowed by law;

4. That the Employee's average weekly wage was $424.32 resulting in a compensation rate of $282.89 for temporary total, permanent partial, and permanent total disability compensation;

5. That the Employer has paid no temporary total disability nor anything for medical care;

## ISSUES

The issues to be resolved by this hearing are as follows:

1. Whether Employee sustained an accident arising out of and in the course and scope of his employment;
2. Whether Employee is entitled to Temporary Total Disability of 37.4 weeks for $10,580.09;
3. Whether Employee must be reimbursed for unpaid medical expenses of $45,305.39;
4. Whether Employer must provide Employee with additional medical care;
5. Whether the Employee suffered any disability from the alleged accident; and, if so, the nature and extent of such disability.

## FINDINGS

The Employee, Alonzo Brown, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

Exhibit A - Dr. Edward Prostic IME report dated 6/3/2016
Exhibit B - Dr. Edward Prostic's CV
Exhibit C - Truman Medical Center medical records
Exhibit D Truman Medical Center billing records
Exhibit E - Dr. Pratt IME Report dated October 12, 2015
Exhibit F - Dr. Pratt IME Addendum to IME dated December 23, 2015
Exhibit G - Photo
Exhibit H - Photo

The Employer offered the live testimony of Mr. Matt Kartsonis, Vice President and General Manager of Superior Linen Supply company and Mr. Shane Sowell a production supervisor for Superior Linen Supply Company and offered the following exhibits, all of which were admitted into evidence without objection:

Exhibit 1 - Dr. Terrance Pratt's reports dated December 23, 2015 and October 12, 2015
Exhibit 2 - Deposition Transcript of Claimant dated April 29, 2015
Exhibit 3 - Photo
Exhibit 4 - Photo
Exhibit 5 - Photo taken by Mr. Shane Sowell

Based on the above exhibits and the testimony of the witnesses, I make the following findings:

Alonzo Brown (hereinafter referred to as Employee) is a 42-year-old male who was working for the employer on October 31, 2014. Employee started working for the employer in June of 2014. His job title was a linen tech. His job duties included unloading carts and feeding

the linens through a chute. At times he was required to go to the roof to unclog the chute when something was stuck. The chute system worked with jet air which allows them to send the laundry products to the other side of the warehouse for sorting. When he was required to go to the roof to unclog the chute he would climb up a ladder, go through a hatch, get on to the roof and stick hangers down into the chute to find out what was clogged. This would unclog the chute and allow the airflow to continue. He normally worked between 10:30 AM - 8:30 PM Monday through Friday and also on Saturday. However Saturdays he sometimes worked until 1:00 A.M. He stated that at the end of the day he would have to secure the hatch for the roof ladder by pulling it down and locking a latch.

When a shift would end the supervisor would come by and tell the employees it was time to leave. On the night of October 31, 2014, Employee wanted to go to the break room to collect his lunch materials before he clocked out. He went out a back door of the building where his station was and walked across an open courtyard to a door in the back of the building where the lunchroom or break room was. The door on the back of the building where the break room was had a garage door entrance. This door was closed and locked. Employee knocked on the door for a few minutes and when no one answered he walked back across the courtyard to go back into the building through the door he had exited. When he attempted to get back into the building where his work station was, he found that that door too was locked. He knocked on that door for several minutes but got no answer. Believing he was trapped in the courtyard area, he then climbed up a fire escape ladder to the roof. He walked across the roof to the other side of the building where the delivery trucks were parked. This was the Holmes side of the building where employees would be exiting. He climbed onto the top of a delivery truck and then onto the cab. As he attempted to climb down from the cab he fell to the ground.

When Employee landed on the ground, he injured his right ankle and leg. He felt immediate pain in his leg. He was in a great deal of pain and did not know how long it was until an employee came out and saw him on the ground. His supervisors then came out. Eventually Dave, a supervisor, came and called an ambulance which took him to Truman Medical Center where he was treated. Over the next few months he had two surgeries to his ankle. He recalled that he was initially put on restrictions of no pushing or pulling or lifting more than 5 pounds and taking a break every 10 minutes for every 30 minutes of standing. Eventually on September 8, 2015 he was to have a 5 minute break for every 45 minutes of standing. He was asked about the doctor's notation that he was working as a cook. He explained that he does not know why the doctor said he was working as a cook as he had only just applied for a cook position. He has not worked since the injury. He did go back and ask for his job back but was told he no longer had a job. He has received no benefits from the employer or from unemployment security. He has not received any medical or ambulance bills. When asked why he did not use his phone to call somebody at the plant to let him back in, he stated it was because his battery was low, but also because his phone was in his jacket and he had left his jacket inside at his work station. When asked why he could not climb down the ladder inside the building to his work station when he was on the roof, he stated that he believed the hatch was locked at that time. He noted that he would go home by bus on the weeknights and the last bus he needed to take to get home left at 9:00 P.M. When asked about his current physical problems he stated that he is doing badly. He cannot walk very far. He cannot work full time because of the injury and he did not feel he could return to his old job to perform those job duties.

On cross-examination he again noted he cannot walk very well. He limps and has hardware in his ankle. He stands approximately 10 minutes and has problems with his leg including pain and swelling. He has to elevate his leg for up to 4 hours every time it swells. He stays home during the day and does not do very much at all. He lives with his brother and his brother's daughter in a house. His daughters come and help him with laundry. He does not do any housework or lawn care. His brother does all the housework. He sometimes goes to see his grandchildren. When he goes to visit his grandchildren he takes a bus. He has applied for work on the internet mainly going to job site programs. He does not own a car but takes the bus. He notes that the pain in his ankle comes and goes. When asked if Dr. Pratt told him that if he continues to move or walk on the ankle it gets better, he disagreed with that statement. He takes ibuprofen 800 mg twice a day every day. He admits he was told additional treatment may be necessary including physical therapy. He did have physical therapy after surgery. He admits he was told he may need surgery in the future as well.

He noted that at the end of the shift he would normally clean up, lock the hatch for the ladder, and lock the door where the trucks come in. He would then normally clock out. Normally he passes the time clock to get to the break room. He noted that there was no policy or requirement as to which door to leave from at the end of the day. There are two doors into the facility; one comes out on Cherry Street and one comes out on Holmes Street. He noted that the supervisors normally did not watch to make sure employees got to their cars safely. He noted that when the supervisor came by to tell him it was time to leave it was a little after eight that evening. He noted that October 31, 2014 was on a Friday. He further noted that he had not cleaned everything up but was going to the break room first to get his things and then come back to finish up. He reiterated that he went out the back door of the building where his work station was to go to the other building. He was going to the break room but the garage door into that building was down and locked. Then when he returned to come back into his original building, that door was locked as well. He believed there was no other way to get in. After he fell he did not know how long he was on the ground until somebody showed up. He just knows that Dave and Shane came out and then an ambulance was called. He noted that he did not walk through the building to the break room because the way he was trying to go was a normal shortcut that he and other employee's took. He admitted to the doctors at Truman Medical Center emergency room that he had used marijuana previously, but no other drugs.

On redirect he noted that there was a company rule about cell phones not being allowed in the work areas. That is why the phone was in his jacket. He further noted that on October 31 it was dark outside and there were not very many lights lighting the back area where he believed he was trapped. He stated that the last time he had used marijuana was approximately a week prior to the accident. Finally, he noted that he went to the break room because he wanted to get his Tupperware from lunch and that he had not clocked out prior to going to the break room.

Employee submitted a rating report from Dr. Prostic, who after examining Employee and reviewing numerous medical records, determined that Employee sustained injury to his right ankle during the course of his employment. He had a severe pilon fracture. He would most likely also require ankle arthrodesis. He noted that as Employee's symptoms progressed over time that he would need prescription medicines, solid AFO, and then definitive surgery. He determined that Employee suffered a permanent partial impairment of 30% of the right lower extremity. He also noted that the October 31, 2014 injury was during the course and scope of his

employment for Superior Linen and was the prevailing factor in causing his injury, the medical condition, the need for medical treatment, the resultant disability or impairment, and future medical care.

Employee submitted the medical records from Truman Medical Center, which showed his surgeries and additional follow-up medical care, along with numerous medical bills from Truman Medical Center.

Employee also submitted aerial pictures of the Superior Linen facility. During his testimony Employee showed how he walked from the back of the building, the door he exited, the path he took and the door he attempted to enter.

Employer offered the testimony of Matt Kartsonis. Mr. Kartsonis is the executive vice president and general manager for the past five years of Superior Linen. He was present during Employee's testimony and was aware of how Employee was injured. He was aware that employees would go on the roof to unclog the chute. He noted their service access ladder is inside the building and it led to the roof and the catwalks along the roof used to service clogged chutes. He stated that the latch on the roof hatch in Employee's work area was broken and Employee could have opened it from the outside and climbed down from the roof. He noted that at the end of each shift people are told to go home at different times as different sections finish their work. They are either told personally or called on their cell phones. They clean up their area, lock their doors, then walk through the buildings to the time clock. The path they take is through the building where the time clock is, then they walk through a tunnel to the Cherry Street building, where the employee break room is and then exit by that Cherry Street door. He admitted that an employee could get locked out in the courtyard area that Employee said he was trapped in. However, he noted that someone would have to lock the door from the inside. He also noted although there was a fenced area around all the buildings, there were areas that could easily be climbed. He noted that fencing is generally 6 to 8 feet tall but there were sections which were shorter because the dirt is built up. In the 17 years that he has been employed at Superior Linen he has never known of an employee who has ever been locked out. He was not present on the night that Employee was injured, but Shane Sowell and Tony Konomos were present that evening. He also noted that his brother Dave was called to the business after Employee was found injured. Prior to that Dave was at home. He found out about Employee's injury when he was called by his brother. He noted that his brother is now deceased. The witness stated that he had been told that Employee was in an altered state, and, further, that allegedly Employee had not been seen at his work station for a while prior to the accident. His understanding was that Employee was gone for close to an hour prior to being found on the sidewalk outside. He noted that the business had been robbed approximately one month prior. The robbers had gotten in by prying a gate apart and someone from the inside let them in. After that incident he noted that all employees were watched as they left the premises at the end of the work shift. He also noted that the supervisors made sure that the buildings were secured before leaving each night. He noted that the shortcut that Employee took was not company policy. Cell phones cannot be out during the day but employees can have them with them. There were times when the cell phones were used to contact the supervisors. There was a security camera but nobody ever looked at it.

On cross-examination the witness noted that he met Employee on the date Employee was hired. He was not always at the location at quitting time. He noted that people were instructed to pick up their belongings at the end of the shift then clock out and then leave. He was not certain that managers always followed these policies as he is not always there at closing. He noted that if the garage door on the Cherry Street building had been open that Employee could have walked across the courtyard and gone through that door to get to the break room. He noted that the area behind the buildings which included a courtyard area was generally dark at night, although there was some lighting and there were some street lights. He did note that the policy is for people to exit on the Cherry Street side but they can and do exit on the Holmes side. When asked how someone found Employee on the ground, he speculated that someone must have exited through the Holmes Street exit.

Employer also offered the testimony of Shane Sowell. Mr. Sowell has worked at Superior Linen for approximately five years and he worked with Employee on the night shift in soil sorting. He noted that Employee's job was to unload carts out of trucks and sometimes weigh the carts. The carts would be unloaded onto a conveyor belt and up through chutes. Occasionally the chute would clog and an employee would have to go on the roof to unclog the chute. He noted that the hatch to the roof near Employee's station had no lock and that Employee could have climbed down through that hatch. He noted that Employee was always punctual and if he was ever going to be late, which was seldom, Employee had Mr. Sowell's phone number and would call him and let him know he was going to be late. He noted that people who do the soil sorting are generally the last to go. He also noted there is no specific time that people leave since it is when the last customer's linens are done, and that depends on how much there is left to sort. On the date of Employee's injury he recalls that Employee had not been at his work station for 45 minutes prior to him telling everyone to leave. The supervisors get everyone out and then the maintenance staff locks up. He makes sure that everyone has clocked out, that the plant is locked up and that everybody has gone. He discovered Employee when other workers, who do not speak much English, pounded on the door saying "Alonzo lay down". He does not stand at the door on Cherry Street to watch employees leave. When he saw Employee on the ground, Employee was wearing sweat pants, tennis shoes, Oakland Raiders gloves and a wind breaker. It was 9:14 PM. The shift had been over for 30 minutes prior to anyone seeing Employee on the ground. When he first saw Employee, Employee was only mumbling incoherently and then he saw there was blood coming through Employee's sock. He stated that Employee was calling people on a cell phone and told him that he had a ride coming. Finally, he called Dave, the owner's brother, and Dave said he was on his way. When Dave arrived he called the ambulance. Mr. Sowell testified he did not do any additional investigation after this, other than taking photographs, as Dave did all the investigation.

On cross-examination he noted that he had been employed at Superior Linen for approximately three years. He knew the fences and gates and doors very well. He admitted that Employee had only been working there for four months and may not have been as familiar with fences and the premises in general. He was unaware that any robbery had occurred. On redirect he noted that he was not watching the employees leave, because he was walking through the plant to secure the plant. He noted that Tony was watching as employees left on the Cherry Street side. Most employees parked on Cherry Street and those who parked on Holmes would go out the Cherry Street entrance and walk around 31st Street to Holmes Street. On re-cross-

examination he said he did not actually see the injury to Employee's leg. He did not see any bone sticking through. He was not aware that Employee may have been in shock.

The employer also offered the deposition of Employee as well as medical records and a medical evaluation by Dr. Terence Pratt. In Dr. Pratt's report of November 2, 2015 he notes Employee's two surgeries and that Employee underwent a course of physical therapy. In his report Dr. Pratt stated, "Employee had progressed functionally and was eventually released from care with restrictions, which per Employee's report limits lifting and pushing to less than 5 pounds. He had not had any additional evaluations or care since then. Employee reported continuous medial ankle involvement and intermittent symptoms anteriorly. He has more burning and gripping, has weakness of the ankle and notes numbness of the medial aspect of the right foot and involving the first toe. He has stiffness of the ankle and notes that the area can become hot, but no discoloration, low back pain, or difficulty with bowel or bladder. Symptoms are exacerbated with change in weather, standing, and range of motion of the ankle. He has palliation when he continues to move or ambulate. He utilized a cane for continuous mobility. He is independent in activities of daily living. Pain diagram reveals a discomfort level between 5 - 9/10 with burning anterior aspect of the right ankle and numbness posteriorly. Employee was somewhat limited by discomfort. There was generalized giveaway weakness for the right lower extremity on motor assessment and, of interest, giveaway weakness for the left lower extremity. There were limitations in ankle active movement, some discomfort limiting the assessment but he does have a decrease in calf circumference right vs. left and had a displaced fracture distal tibia and fibula resulting in operative intervention."

Dr. Pratt's January 27, 2016 report notes that after reviewing Truman Medical Center records it was noted that Employee was full weight bearing and utilizing a cane to ambulate 60% of the time. He noted pain was controlled with ibuprofen. Employee was going to physical therapy, but due to co-pays, which became too expensive, he was doing an in-home therapy program. He noted that on examination Employee did not have any palpable tenderness about his ankle, and dorsal and plantar flexed to about 5-10°. He was felt to be status post his open reduction and internal fixation of right tibial pilon fracture, doing well and could ambulate without a cane and use a regular shoe. He felt it would take several months for Employee to get a little bit more flexibility in his ankle. There was also a restriction form from that date of September 8, 2015 noting 5 minute sit break was recommended every 45 minutes of standing. He noted that objective findings included the radiographic studies and the need for operative intervention. Employee had some residual decrease in calf circumference as well, which would be considered as objective. Functionally Employee was considered doing well based upon his last treating physician evaluation. Dr. Pratt determined that permanency would be evaluated at 25% permanent partial disability to the right lower extremity at the 155-week level.

In reviewing the testimony of all witnesses this Court has found some discrepancies. Employee stated that he believed the hatch to the roof from the ladder at his work station was locked. The testimony from the employer's witnesses was that that particular hatch lock was broken. Employee stated that he had left his jacket and cell phone at his work station when he went to get his lunch belongings. However, employer's witness testified that when he found Employee on the ground he was wearing his jacket and using his cell phone. With regard to that testimony, Mr. Sowell initially testified that when he found Employee he was mumbling; and, further, employer's witness Mr. Kartsonis stated that he had been told Employee was altered

when he was found. This Court presumes that was intended to convey that Employee may have been under the influence of drugs or medication. It is confusing to this Court that employer's witnesses would state that Employee was "altered" and mumbling when initially found but also able to speak on a cell phone and state that he had a ride coming for him. The photographs submitted which allegedly depict Employee on the ground only shows someone's legs and it is unclear if there is a jacket or a cell phone present. Further Employer's witness, Mr. Sowell testified that Employee was missing from his station approximately 45 minutes prior to when the employees were told to leave. There are two problems with this testimony. First, Nr. Sowell stated that his job duties required him to go around and tell people when their shift was ending. He further would make sure everyone had clocked out and lock up. This makes it difficult to believe he could know Employee was missing from his work station as it is clear that Mr. Sowell was not at Employee's work station for that full 45 minutes to know if Employee was there or not. Further it is entirely possible that this was the time period where Employee was locked out of the buildings and had climbed to the roof and attempted to climb down, had fallen, and was lying on the ground until someone found him. Further contradicting this is the Employee's testimony that his supervisor told him the shift was over. This is when he left to go get his lunch materials. It is not clear if Mr. Sowell was the supervisor Employee was talking about or someone else.

After reviewing the testimony of all witnesses this Court finds that Employee's testimony although sometimes confusing is basically credible. In reviewing the employer's witnesses this Court finds that the testimony is at times confusing and less credible than Employee's testimony. In this situation it is the Court's duty to determine which testimony is most credible. It appears that in general the Employee's testimony is more believable. Although at times it is confusing, his testimony was mostly consistent. With regard to the employer's witnesses there are points that were not clarified, such as what Mr. Sowell did when he determined that Employee was missing. He did not discuss whether he went to look for Employee or that it was inappropriate for Employee to not be at his station. Mr. Sowell testified that he was going through the building and locking doors at the end of the shift and it is entirely possible that he, himself locked Employee out while Employee was in the courtyard area. It was Mr. Kartsonis who stated that the door Employee had exited would have to be locked from the inside in order for Employee to not be able to return through that door. Further, although both employer's witnesses stated that it was policy that people clean their work areas, time out and then leave through the Cherry Street exit, it is clear that employees did not follow this policy. It is also clear that there was no specific enforcement of the policy. And, finally, employer offered no written policy that employees follow these particular rules. Further, it is curious that if the business had been robbed the previous month, as Mr. Kartsonis testified, that they would not have made efforts to better secure the plant buildings, including fixing a broken ladder hatch lock.

The first issue to be determined by this Court is whether Employee sustained an accident arising out of and in the course of his employment. Section 287.120.1 holds an employer liable, regardless of fault, when an employee sustains an injury "arising out of and in the course of his employment." An employee has sustained a compensable injury arising out of and in the course of employment "where an employee's acts were reasonably incidental to commencement of employee's work and were also for the benefit of the employer." *James v. CPI Corp.*, 897 S.W.2d 92, 95 (Mo.App. E.D.1995). The benefit to the employer need not be tangible or great. *Id.* "Arising out of" and "in the course of" are two separate tests. *Simmons v. Bob Mears Wholesale*

*Florist*, 167 S.W.3d 222, 225 (Mo.App. S.D.2005). "The general rule is that an injury 'arises out of' the employment if it is a natural and reasonable incident thereof and it is 'in the course of employment' if the accident occurs within the period of employment at a place where the employee may reasonably be fulfilling the duties of employment." *Automobile Club Inter–Insurance Exchange v. Bevel,* 663 S.W.2d 242, 245 (Mo. banc 1984). An injury arises "out of" the employment when there is a causal connection between the nature of the employee's duties or conditions under which he is required to perform them and the resulting injury. *Ford v. Bi–State Development Agency,* 677 S.W.2d 899, 901 (Mo.App.E.D.1984).

Employer's argument is that they believe Employee was doing something which was not normal activity in the course and scope of his employment. The circumstances in this situation are basically that the Employee had been told work was done. He went to go get his personal lunch items from the break room prior to clocking out. He went out a back door of the building into a courtyard area, walked the path across a courtyard to a garage door that he intended to enter. That garage door was locked. He knocked on the door for anywhere from 1 to 5 minutes, then returned back across a courtyard to the door he had exited. He found this door too was locked. After pounding on this door for 1 to 5 minutes he determined that no one was going to let him back in. He then climbed up the fire escape ladder on the outside of the building and walked across the roof of the building to the loading dock area on Holmes Street. He climbed onto the top of a box truck, then climbed onto the cab of the truck with the intention of then climbing down from the cab of the truck to the street. Unfortunately at this point he slipped and fell causing injury to his ankle. This apparently was an extreme injury as he had a fracture which pierced through the skin of his leg. An interesting point herein is that Employee's climbing on the roof was not unheard of as it was common practice to be on the roof to clear out clogs in the jet air system. In this case Employee was familiar with the roof as he had been up there numerous times before.

Employer's evidence seems to imply that Employee was not in the course and scope of his employment when he was injured because Employee was not working at the time and in fact was climbing a roof and tried to climb down on a truck. Although Employee's activities were not necessarily connected to his specific job duties, this Court finds that Employee was in fact in the course and scope of his employment when he was injured. Employee had not clocked out and so was still working at the time of the accident. Employee had simply gone out a door to take a shortcut to another area of the employer's property to obtain his personal items from lunch. When he found that the door of the building where his personal items were was locked, he attempted to return to the building he had come from. Finding that that door was locked as well and believing there was no way out of the courtyard area, which he understood was surrounded by high fences, he climbed to the roof of the building and attempted to climb down off of the trucks which were parked next to the building. Since he had been on the roof numerous times before, as part of his job duties, this area was not foreign to him. Although this may not have been the safest route to take, it appears Employee believed it was his only option. Employer submitted evidence that the roof hatch which led to the ladder down into Employee's work area was not locked. Employee's evidence was that he did not realize that hatch did not have a lock on it and believed in fact it was locked and therefore he would not be able to climb down that ladder. Employee's activities were incidental to his work in that he was attempting to get back into the plant building, so he could clean up his work area, collect his personal items, clock out and then leave for the day. These actions are exactly what the employer had testified were

required at the end of the workday. Although Employee's actions were a bit unorthodox, it is clear he was just trying to get back into the building so he could leave properly. Wherefore this Court finds that in fact Employee did sustain an accident arising out of and in the course of his employment.

The next issue to be determined by this Court is whether Employee is entitled to temporary total disability benefits for 37.4 weeks for a total of $10,580.09. In reviewing the medical records from Truman Medical Center, it appears that from the date of the accident and until at least a report of April 21, 2015 Employee was non weight bearing on his right leg. The report of April 21, 2015 notes that "as his healing has progressed since his last visit while using the bone stimulator and he reports no pain with weight bearing, we will now progress to weight bearing as tolerated on the right lower extremity." There is a June 9, 2015 note in the medical records that states, "Work note provided today - OK to return to work but no pushing/ pulling/ lifting greater than 5 pounds. Should do seated work or will need rest every 30 minutes standing." It appears that the June 9, 2015 report is the first time that a doctor noted that Employee could return to work. It is also noted that at some point Employee returned to the employer and asked for his job back. He testified that he was told there was no job for him. It appears that employer did not offer Employee any accommodated work throughout this time period. This Court therefore finds that Employee is entitled to weeks of 37.4 weeks of temporary total disability equating to an amount of $10,580.09.

The next issue to be determined is whether the employer must reimburse Employee for medical expenses totaling $45,305.39. Section 287.140.1 requires an employer to provide such care "as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Mo.Rev.Stat. § 287.140.1. A claimant seeking past medical expenses must prove "that the need for treatment and medication flow[s] from the work injury." *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo.App.W.D.2011). A sufficient factual basis exists for the Commission to award compensation for past medical expenses when: (1) the claimant introduces his medical bills into evidence; (2) the claimant testifies that the bills are related to and the product of his work injury; and (3) "the bills relate to the professional services rendered as shown by the medical records in evidence." *Martin*, 769 S.W.2d at 111–12, *superseded by statute on other grounds,* 1990 Mo. Legis. Serv. S.B. 751, Mo.Rev.Stat. § 287.160.3. "The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question." *Martin,* 769 S.W.2d at 112.

Employee submitted both the medical records and the medical bills from Truman Medical Center. These bills and records were submitted without objection by the employer. Further it is noted that Dr. Prostic comments that the injury Employee sustained on October 31, 2014 was in the course and scope of his employment and was the prevailing factor in causing the injury, the medical condition, the need for medical treatment, the resultant disability, and future medical care. Although the medical bills amount to more than the $45,305.39 requested by the Employee, they only asked for that amount to be reimbursed. Wherefore, this Court finds that the medical bills are reasonable for the care Employee received and therefore orders employer to reimburse employee for medical expenses totaling $45,305.39.

The next issue to be determined by this Court is whether the employer must provide Employee with additional medical care. Employee submitted the report of Dr. Prostic who stated that as Employee's symptoms progress he will most likely need an arthrodesis as well as additional prescription medication. Employer offered the report of Dr. Pratt. It appears that Dr. Pratt in his report does not address any future medical. The last medical record from Truman Medical Center dated September 8, 2015 notes that Employee would continue ibuprofen as needed for pain control and that it may take several months for him to get a little more flexibility in his ankle. Further they noted that his ankle may never feel the same but that he has made very good progress. At that time he was given a prescription for a 5 minute sit break for every 45 minutes of standing. It appears that the only medical opinion regarding future medical care is from Dr. Prostic who determined that Employee may need an arthrodesis as well as additional prescription medication. Based on this evidence, this Court finds that employer shall provide to Employee such future medical care that shall serve to cure and relieve symptoms from which Employee suffers as a result of his work injury of October 31, 2014 as described by Dr. Prostic.

The final issue to be determined herein is whether the Employee suffered any disability and if so the nature extent of Employee's disability. Dr. Prostic determined that Employee suffered a 30% right lower extremity impairment. Dr. Pratt determined that Employee suffered permanent partial disability of 25% of the right lower extremity. In Missouri the proper rating is a disability rating. Since Dr. Pratt gave a disability rating and Dr. Prostic gave an impairment rating, Dr. Pratt's rating is more reliable. Therefore this Court finds that employer shall pay to Employee 25% permanent partial disability to the right lower extremity at the 155-week level for a total of 38.75 weeks at a rate of $282.89 for a total of $10,961.99.

All compensation awarded to the Employee in this matter shall be subject to a lien in the amount of 25% to Mr. Stephen Mayer attorney for the Employee for legal services rendered.

Made by: _____
Emily S Fowler
*Administrative Law Judge*
*Division of Workers' Compensation*