

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

Injury No.: 98-123431

Employee: Karen Eichelberger
Employer: Gateway Preventive Dental Group, LLC.
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (previously dismissed)
Date of Accident: October 14, 1998
Place and County of Accident: St. Louis City, Missouri

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 (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 28, 2004. The award and decision of Administrative Law Judge John Howard Percy, issued July 28, 2004, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions as to the existence of an employer-employee relationship, that the injury arose out of and was in the course of employee's employment, employee's entitlement to reimbursement for medical expenses, the lack of need for additional treatment and the nature and extent of permanent partial disability. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002), *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.879 (Mo. App. S.D. 2001), *Landman v. Ice Cream, Specialties, Inc.*, 107 S.W. 3d 240 (Mo. banc 2003).

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 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Karen Eichelberger Injury No.: 98-123431
Dependents: N/A Before the
Employer: Gateway Preventive Dental Group, LLC **Division of Workers'
Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund (previously dismissed) Relations of Missouri
Jefferson City, Missouri
Insurer: Uninsured
Hearing Date: April 26, 27 and May 19, 2004 Checked by: JHP:tr

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 14, 1998
5. State location where accident occurred or occupational disease was contracted: St. Louis City, 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? 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? No - Uninsured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Tripped and fell over loose deck board.
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: Left ankle
14. Nature and extent of any permanent disability: 40% permanent partial disability of left leg above the ankle
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Karen Eichelberger Injury No.: 98-123431

17. Value necessary medical aid not furnished by employer/insurer? \$18,225.48
18. Employee's average weekly wages: \$241.20
19. Weekly compensation rate: \$160.64 TTD/PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$18,225.48

62 weeks of permanent partial disability from Employer

\$9,959.68

22. Second Injury Fund liability: No

TOTAL:

\$28,185.16

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and 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:

Norman Selner

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Karen Eichelberger	Injury No.:	98-123431
Dependents:	N/A	Before the	Division of Workers'
Employer:	Gateway Preventive Dental Group, LLC	Compensation	
Additional Party:	Second Injury Fund (previously settled)	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Uninsured	Checked by:	JHP

A hearing in this proceeding was held on April 26 and 27, 2004. The record was left open for the taking of additional deposition testimony. The deposition was filed on May 19, 2004. Both parties submitted proposed awards, the latter of which was received on June 20, 2004.

STIPULATIONS

The parties stipulated that on or about October 14, 1998:

1. Gateway Preventive Dental Group, LLC, alleged employer, was operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the liability of Gateway Preventive Dental Group, LLC was uninsured;
3. the alleged employee's average weekly wage was \$241.20;
4. the rate of compensation for temporary total disability was \$160.64 and the rate of compensation for

5. permanent partial disability was \$160.64; and
the employee sustained an injury by accident occurring in St. Louis City, Missouri.

The parties further stipulated that:

1. the alleged employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. no medical expenses have been paid.

ISSUES

The issues to be resolved in this proceeding are:¹¹

1. whether Karen Eichelberger, claimant herein, was an employee of Gateway Preventive Dental Group, LLC on October 14, 1998;
2. if claimant was an employee of Gateway Preventive Dental Group, LLC on October 14, 1998, whether the accident on that date arose out of and was in the course of that employment;
3. if employee sustained a compensable injury, whether she is entitled pursuant to Section 287.140 Mo. Rev. Stat. (1994) to be reimbursed for any medical expenses, which she may have incurred in obtaining treatment for his/her injuries;
3. if the employee sustained a compensable injury, whether he/she should be provided with any additional medical treatment for the injury; and
4. if employee sustained a compensable injury, whether and to what extent employee sustained any permanent partial disability which would entitle her to an award of compensation.

EMPLOYMENT

Claimant alleges that she was an employee of Gateway Preventive Dental Group, LLC (hereinafter referred to as "Gateway") on the date of the accident. Gateway contends that claimant was an independent contractor on the date of the accident.

Section 287.060 Mo. Rev. Stat. (1994) provides that "every employer and every employee" are subject to the provisions of Chapter 287 except as otherwise provided therein. Claimant must prove that he or she is within the provisions of the Workers' Compensation Act. Claimant must show that he or she is an employee of an employer both of whom are within the provisions of the Workers' Compensation Act. Huff v. Belford Trucking Co., 809 S.W.2d 71 (Mo. App. 1991); Hinton v. Bohling Van & Storage Co., 796 S.W.2d 87 (Mo. App. 1990); Johnson v. Medlock, 420 S.W.2d 57 (Mo. App. 1967); Shireman v. Rainen Home Furnishers, Inc., 402 S.W.2d 64, 67 (Mo. App. 1966). The quantum of proof is reasonable probability. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Banner Iron Works v. Mordis, 664 S.W.2d 770, 773 (Mo. App. 1983). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Fischer at 198.

Section 287.020.1 Mo. Rev. Stat. (1994) defines employee as "every person in the service of any employer, as defined in this chapter, under any contract of hire expressed or implied, oral or written, or under any appointment or election, including executive officers of corporations." Employer is defined by Section 287.030.1(1) as "every person ... using the service of another for pay...." These definitions are to be construed broadly in order to effectuate the intent of the legislature to afford compensation to an employee. Howard v. Winebrenner, 499 S.W.2d 389, 394 (Mo. 1973); Specie v. Howerton Electric Company, 344 S.W.2d 314, 315 (Mo. App. 1961).

The Supreme Court has defined an "independent contractor" as "one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of his work. However, if the employer has the right to direct the details of how the job is to be performed or the manner in which the work is to be done, then the status of the one doing the work is that of an employe[e]. and this is true though the employer does not exercise that right." Vaseleou v. St. Louis Realty & Securities Co., 130 S.W.2d 538, 539-40 (Mo. 1939); Wilmot v. Bulman, 908 S.W.2d 139, 142 (Mo. App. 1995).

"[T]he law of master and servant and the relationship, duties, rights, and limitations arising out of the same" is applicable in construing and applying the statutory definition. Maltz v. Jackoway-Katz Cap. Co., 82 S.W.2d 909, 912 (Mo. 1934); Smith v. Thirty-Seventh Judicial Circuit, 847 S.W.2d 755 (Mo. 1993); Howard, *supra*. The focus of the statutory definition is on service, which the courts have judicially construed to mean "controllable service". Maltz at 912; Hinton v. Bohling Van & Storage Co., 796 S.W.2d 87, 89 (Mo. App. 1990). The most frequently applied test in determining the

existence of an employee-employer relationship is the "right of control" of the services of the alleged employee by the alleged employer. Lawson v. Lawson, 415 S.W.2d 313, 319 (Mo. App. 1967). Services has been defined as the "performance of labor for the benefit of another." Langley v. Imperial Coal Co., 138 S.W.2d 696, 698 (Mo. App. 1940). If the alleged employer has the right to control the means and manner of the performance of the services as distinguished from the results of the services, then an employee-employer relationship exists. Gass v. White Superior Bus Company, 395 S.W.2d 501, 504 (Mo. App. 1965); Hutchison v. St. Louis Altenheim, 858 S.W.2d 304, 305 (Mo. App. 1993). The central question is "whether the alleged employer had the right to control the employee's conduct of the work at the time of the accident." Huff v. Belford Trucking Co., 809 S.W.2d 71, 72 (Mo. App. 1991). In determining whether an employee-employer relationship exists, the courts have focused on the following factors: "the extent of control, actual exercise of control, duration of employment, right to discharge, method of payment for services, furnishing of equipment, whether the work is part of the regular business of the employer, and the contract of employment...." Though none of any of the foregoing factors is controlling, each is relevant to the question. Howard v. Winebrenner, 499 S.W.2d 389, 395 (Mo. 1973); DiMaggio v. Johnston Audio/D & M Sound, 19 S.W. 3d 185, 188-89 (Mo. App. 2000); Watkins v. Bi-State Development Agency, 924 S.W.2d 18, 21 (Mo. App. 1996); Dawson v. Home Interiors & Gifts, Inc., 890 S.W.2d 747, 748 (Mo. App. 1995); Hutchison at 305.

"The right of an employer to terminate a relationship without incurring breach of contract liability is an indication of an employer-employee relationship." Dawson v. Home Interiors & Gifts, Inc., 890 S.W.2d 747, 749 (Mo. App. 1995). A written agreement designating an individual as an independent contractor or an employee is not conclusive where there is other evidence overcoming that designation. White v. Dallas & Mavis Forwarding Co., 857 S.W.2d 278, 281 (Mo. App. 1993); Hinton v. Bohling Van & Storage Co., 796 S.W.2d 87, 89 (Mo. App. 1990); Miller v. Hirschbach Motor Lines, Inc., 714 S.W.2d 652, 656 (Mo. App. 1986). Payment of wages is a factor which may aid the determination; however, payment of wages alone is insufficient to establish who the employer is. It is a factor in determining who has the right to control the employee's services. Smith v. Thirty-Seventh Judicial Circuit, 847 S.W.2d 755, 758 (Mo. 1993); Hutchison, supra at 305; Hill vs. 24th Judicial Circuit, 765 S.W.2d 329, 331 (Mo. App. 1989); Ellegood v. Brashear Freight Lines, Inc., 162 S.W.2d 628, 634 (Mo. App. 1942). The furnishing of the equipment used by the employee is an indication of employer-employee relationship. State v. Turner, 952 S.W.2d 354, 358 (Mo. App. 1997). In summary, to establish an employee-employer relationship, a claimant must prove that he or she was "performing services for the alleged employer" and that the alleged employer had the right to control those services. Hill at 331; Lawson at 319.

Findings of Fact

Based on my observations of claimant's demeanor during her testimony, I find that she was a credible witness and that her testimony was generally credible. I find that the other witnesses were also generally credible. To the extent there was a conflict in the testimony of witnesses, I resolved the conflict consistent with the following findings of fact. Based on the credible testimony of claimant and the other witnesses, I make the following findings of fact.

Gateway Preventive Dental Group, LLC was formed in 1997 to continue to provide preventive dental sealants to school children through the State of Missouri. Prior to 1997 the State of Missouri provided the service. In 1997 the State of Missouri contracted with Gateway to provide prophylactic dental care (sealants) to school children in the St. Louis School District and other districts. The owners are Byron Duvall, Derrick Frye, and Joseph Erondy. Mrs. Issaquena Moore was its office manager and coordinator. (Testimony of Dr. Joseph Erondy) During the 4th quarter of 1998 Gateway employed 4 dental assistants. (Employer's Exhibit 6). Its office moved from 4414 Lindell Boulevard to 4210 Olive in the City of St. Louis on October 12, 1998. (Testimony of Dr. Joseph Erondy & Claimant's Exhibit F)

The services were provided at public schools during school hours. The State of Missouri provided the dental chairs and lights. The dental assistants did not provide any equipment, tools, or supplies. Gateway provided the fluoride, swabs, and other supplies to the dental assistants. The dental assistants picked up their supplies at the office of Gateway. Dental charts for the students were provided by Gateway. Dental assistants were required to deliver the charts to Gateway when they finished their services at a school. (Testimony of Dr. Joseph Erondy)

Issaquena Moore began working as the office manager for Gateway in September of 1996. She helped with staffing, payroll, ordering of supplies, and the coordination of school visits. She telephoned the schools to set up visits and then called the dental assistants at their homes to give them their school assignments. The dental assistants went from their homes directly to the schools. They took turns picking up the supplies from Gateway's office. They did not get paid for their time in picking up the supplies. The dental assistants delivered the patient charts to Ms. Moore once or twice a week. Ms. Moore prepared the checks for all of the dental assistants and dentists. She and Dr. Erondy reviewed the hours recorded by the dental assistants and dentists. (Testimony of Issaquena Moore)

Karen Eichelberger, claimant herein, began working in the dental sealant program as a dental assistant in the Fall of

1997. Claimant was told when and where to report to work by Issaquena Moore. She usually worked 5 days per week from 8:30 a.m. to 12:30 p.m. and 1:00 p.m. to 3:00 or 3:30 p.m. She functioned as an assistant to Gateway's dentists and was supervised by them in treating the students. She kept records of the hours when she worked and of the treatment which she provided to patients on forms provided by Gateway. She used supplies provided to her by Gateway. She picked up the charts and supplies at Gateway's office and returned the charts to Gateway's office. (Claimant's Testimony) Gateway paid Ms. Eichelberger an hourly rate for the number of hours which she worked; she was not paid according to the number of patients treated. (Claimant's Exhibits D & Employer's Exhibit 5) Ms. Eichelberger signed a written document indicating that she would take care of her own tax payments. (Employer's Exhibit 9)

On September 3, 1999 Dr. Erondu pleaded guilty in the Circuit Court of the City of St. Louis to a Class A misdemeanor of failing to have workers' compensation insurance for the period between October 1, 1998 and January 21, 1999 as required by Section 287.128.5. Mo. Rev. Stat. (1994). (Claimant's Exhibit N & Court's Exhibit 1) In doing so he admitted that Karen Eichelberger and the other dental assistants were employees of Gateway Preventive Dental Group. (Testimony of Dr. Joseph Erondu – re-cross examination)

Additional Findings

There was no evidence that Karen Eichelberger operated her own business as a dental assistant. There was no written document declaring her to be an independent contractor. There was only a document declaring that she would be responsible for paying her own taxes and insurance. All other facts in this case favor her being treated as an employee of Gateway. She was paid on an hourly basis rather than on the basis of the number of children treated. She furnished none of her supplies; Gateway furnished all of her supplies. Gateway retained custody of the patient dental charts. She was told when and where to work. She was not free to work her own hours or at her own pace. She was under the direct supervision of a dentist. Presumably Dr. Erondu could have discharged Ms. Eichelberger at will without incurring breach of contract liability. Most importantly, Dr. Erondu admitted that Karen Eichelberger was Gateway's employee on October 14, 1998 when he pled guilty to the Class A misdemeanor of failing to have workers compensation insurance.

Based on my prior findings and the foregoing analysis, I find that Gateway controlled the means and manner of claimant's services as distinguished from merely controlling the ultimate results of the service. Accordingly, I find that Ms. Eichelberger was an employee of Gateway Preventive Dental Group, LLC on October 14, 1998.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Claimant was injured when she slipped and fell on a loose board while visiting the apartment of Dr. David Moore, a dentist employed by Gateway in the dental sealant program, at about 3:45 p.m. on October 14, 1998. The apartment was located on the second floor of the building where Gateway and Dr. Erondu had their offices. Employer contends that the injury did not arise out of and was not in the course of her employment because claimant sustained her injury away from the premises of Gateway while she was paying a purely social visit to Dr. Moore. Employee contends that this visit was incidental to her employment because she had returned to the office of Gateway to drop off patient charts and to pick up a supplemental paycheck from Dr. Erondu, who was busy with a patient, and that Dr. Moore invited her to see his new apartment while she waited for Dr. Erondu.

A claimant must prove that his or her injuries resulted from an accident "arising out of and in the course of his employment". Section 287.120.1 Mo. Rev. Stat. (1994); Johnson v. Evans & Dixon, 861 S.W.2d 633 (Mo. App. 1993); Johnson v. City of Kirksville, 855 S.W.2d 396 (Mo. App. 1993); McClain v. Welsh Co., 748 S.W.2d 720 (Mo. App. 1988); Palmer v. H. E. Miller Oldsmobile, Inc., 731 S.W.2d 389 (Mo. App. 1987); Kunce v. Junge Baking Company, 432 S.W.2d 602 (Mo. App. 1968). The standard of proof is reasonable probability. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Banner Iron Works v. Mordis, 664 S.W.2d 770, 773 (Mo. App. 1983). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Fischer at 198.

Amendments made to Section 287.020 in 1993 have codified in part and modified in part prior caselaw concerning when an injury arises out of and in the course of employment. Subsection 2 of Section 287.020 provides that an injury is compensable if it is clearly work related and arises out of and in the course of employment. The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. 1999) that the foregoing language adopted the test enunciated in Wolfgeher v. Wagner Cartage Service, Inc., 646 S.W.2d 781 (Mo. 1983).

Subsection 3(2) of Section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in

causing the injury,^[2] and; (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]” In construing subsection (2)(d) the Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that “idiopathic conditions, those peculiar to the individual: innate” were among those hazards or risks which were “unrelated to the employment”. The court also stated that “common conditions which [are] exacerbated by employment requirements are not idiopathic.” The Supreme Court further held that falling while getting up from a chair at work, so long as the fall is not caused by an idiopathic condition, is not a risk which is unrelated to employment. In Drewes v. Trans World Airlines, Inc., 984 S.W.2d 501 (Mo. 1999) the Supreme Court appears to have held activities previously compensable under the “personal comfort doctrine” to be incidents of employment under the 1993 amendments. The court held that falling while carrying one’s lunch to a table in a break room open to all tenants of an office building is not a risk which was unrelated to claimant’s employment, even where the cause of the fall is unexplained.^[3] In further construing subsection (2)(d) the Supreme Court held in Wells v. Brown, 33 S.W.3d 190 (Mo. 2000) that slipping and falling on an icy parking lot, though not owned, controlled or maintained by employer, was a hazard which was related to an employee’s employment where the parking lot was “so situate, designed and used” by the employer and employees incidental to their work. Even though the weather was icy for miles around the building, the court found that the icy condition of the parking lot was a hazard related to the employee’s employment because she would not have walked on the lot had she not been going to work. The extent to which the 1993 amendments have modified prior caselaw will be determined by the appellate courts.^[4] However, some of the basic rules probably still apply.

Under prior caselaw the phrases “arising out of” and “in the course of” employment were two distinct tests; both had to be satisfied in order to establish compensability of injuries. The phrase “in the course of employment” refers to the time, place and circumstances under which the injury occurs. This requirement was satisfied if the accident occurred during the period of employment “at a place where the employee may reasonably be fulfilling the duties of employment.” “[A]n injury ‘arises out of’ employment if it was a natural and reasonable incident thereof.” Auto. Club Inter-Insurance Exch. v. Bevel, 663 S.W.2d 242, 245 (Mo. 1984); Kloppenber v. Queen Size Shoes, Inc., 704 S.W.2d 234 (Mo. 1986); Toole v. Bechtel Corporation, 291 S.W.2d 874, 880 (Mo. 1956); Mann v. City of Pacific, 850 S.W.2d 12, 15 (Mo. App. 1993); McClain v. Welsh Co., 748 S.W.2d 720 (Mo. App. 1988); Palmer v. H.E. Miller Oldsmobile, Inc., 731 S.W.2d 389 (Mo. App. 1987); Dillard v. City of St. Louis, 685 S.W.2d 918, 922 (Mo. App. 1984); Fingers v. Mount Tabor United Church of Christ, 439 S.W.2d 241 (Mo. App. 1969).

For an injury to arise “in the course of employment”, it must occur “within the period of employment at a place where the employee may reasonably be, while engaged in the furtherance of the employer’s business” or while the employee is “doing an act reasonably incidental to the performance of his duties of which his employer might reasonably have knowledge or reasonably anticipate.” Mann v. City of Pacific, 850 S.W.2d 12, 15 (Mo. App. 1993). For an injury to arise “out of employment”, there must be “a causal connection between the nature of the employee’s duties or the conditions under which he is required to perform them and the resulting injury.” Mann at 16-17. The particular injury does not have to be anticipated so long as it is a rational consequence of some hazard connected with work. Toole v. Bechtel Corporation, 291 S.W.2d 874, 880 (Mo. 1956); Dillard v. City of St. Louis, 685 S.W.2d 918, 922 (Mo. App. 1984). The injury must be a natural and reasonable incident of the employment, “a rational consequence of some hazard connected therewith or a risk reasonably inherent in the particular conditions of the employment.” In addition, the injury must result from “a risk peculiar to the employment or enhanced thereby.” Mann at 16-17. Examples of cases where injuries were held to be noncompensable because the causative agency was a hazard which was not connected with the employment include: Lathrop v. Tobin-Hamilton Shoe Manufacturing Co., 402 S.W.2d 16 (Mo. App. 1966) (automobile accidentally driven through the window of a building struck the employee) and Williams v. Great Atlantic & Pacific Tea Co., 332 S.W.2d 296 (Mo. App. 1960) (tornado caused wall to fall on claimant).

-
-
-
Findings of Fact

Based on my observations of claimant’s demeanor during her testimony, I find that she was a credible witness and that her testimony was generally credible. I find that the other witnesses were also generally credible. To the extent there was a conflict in the testimony of witnesses, I resolved the conflict consistent with the following findings of fact. Based on the credible testimony of claimant and the other witnesses, I make the following findings of fact.

On October 14, 1998 Ms. Eichelberger worked as a dental assistant from 8:30 a.m. to 12:30 p.m. and from 1:00 p.m.

to 3:00 p.m. (Employer's Exhibit 5)

Dr. Erondu worked with claimant all day on October 14, 1998. He left the school around 2:30 p.m. and returned to his new office at 4210 Olive. (Testimony of Dr. Erondu)

About the same time Ms. Eichelberger left the school where she was working and drove to Gateway's new office at 4210 Olive. Her purpose in driving back to Gateway's office, rather than going home, was to pick up a supplemental paycheck for 8 unpaid hours from September and to deliver patient charts to Ms. Moore. Dr. Moore told Ms. Eichelberger that Dr. Erondu had a check waiting for her. She gave Dr. Moore a ride back to the new office as he had recently leased the apartment above the office from Dr. Erondu.^[5] (Claimant's Testimony)

Though her normal hours were 8:00 a.m. to 4:00 p.m., Ms. Moore left the office at 3:30 on October 14, 1998 before Ms. Eichelberger had arrived. She had not prepared a check for claimant. Debra Green, Dr. Erondu's private dental assistant, was still at 4210 Olive and Dr. Erondu's office was still open. (Testimony of Issaquena Moore)

As Ms. Moore was not there when she arrived, Ms. Eichelberger decided not to leave the charts with Ms. Green as Ms. Green worked in Dr. Erondu's private practice. As Dr. Erondu was with a patient when Ms. Eichelberger arrived, she decided to wait until he was finished.^[6] Dr. Moore invited claimant to visit his new apartment while she waited for Dr. Erondu. She ascended the stairs to his second floor apartment. They did not discuss business while she was there. (Claimant's Testimony)

Dr. Moore told Ms. Eichelberger that he saw Dr. Erondu in the parking lot adjacent to the building. Ms. Eichelberger ran out onto the outside deck to call to Dr. Erondu. As he did not hear her, he left. Ms. Eichelberger tripped on a loose board and fell down. She experienced severe pain and immediate swelling in her left ankle. Dr. Moore helped her walk to her automobile. He drove her to St. Louis ConnectCare. (Claimant's Testimony)

Though he denied having a supplemental check for claimant on October 14, Dr. Erondu admitted that claimant had not been paid for 1 hour in September and that he had approved the payment for that hour on October 12. His memory was incorrect about the payment for only one hour; Gateway's records showed that it was for 8 hours. (Testimony of Dr. Erondu & Employer's Exhibit 5) The check was written on October 15. (Testimony of Dr. Erondu) He took the check to her home on October 16 where he picked up patient charts from claimant. (Testimony of Dr. Erondu & of Claimant)

Dr. Moore did not practice dentistry at Gateway's office. He was employed as a dentist for the dental sealant program. (Testimony of Issaquena Moore)

Dr. Moore invited everybody connected with Gateway to see his apartment. (Testimony of Issaquena Moore) Debra Green visited his apartment before he moved in. (Testimony of Debra Green)

Visiting Dr. Moore's apartment was not part of Ms. Eichelberger's duties. It was part of her duties to work with Dr. Moore at the schools. (Testimony of Dr. Erondu)

Additional Findings

Claimant had two purposes in making the trip to Gateway's office at 4210 Olive— delivering patient charts and picking up a supplemental paycheck. Delivery of patient charts was an activity which Ms. Moore and Dr. Erondu admitted was expected of the dental assistants. According to Ms. Moore dental assistants frequently picked up checks at Gateway's office. In Brooks v. Wal-Mart Stores, Inc., 783 S.W.2d 509 (Mo. App. 1990) the Court of Appeals affirmed the trial court's finding that it had no subject matter jurisdiction of a civil negligence suit where employee was injured when she went to her employer's premises to purchase some items and pick up her paycheck. The Court found that picking up a paycheck was an activity which was incidental to her employment, even though it was coupled with shopping, and consequently, her injury arose out of and in the course of her employment. A similar decision involving the picking up of a paycheck was reached in Elmer E. Stockman Jr., Const. Co. v. Industrial Com'n, 463 S.W.2d 610 (Mo. App. 1971).

It does not matter that the check may not have been ready for Ms. Eichelberger. Even if claimant had been mistaken in thinking that the check was ready, she had the right to go to the office and ask Dr. Erondu about it. Accordingly, I find that both of Ms. Eichelberger's reasons for driving to Gateway's office on October 14, 1998 were incidental to her employment.

Had Ms. Eichelberger waited in Dr. Erondu's office and the chair in which she was sitting collapsed, her injury

would have been compensable as her presence would have been incidental to her employment. If Ms. Eichelberger had fallen while walking out of Gateway's office, the accident would have been compensable under the rules allowing employees a reasonable margin of time and space for passing to and from the location of employment.^[7]

Had Ms. Eichelberger left Dr. Erondu's office, albeit with the intention of later returning, and gone shopping for personal items a few blocks away, an accident during that shopping trip would not have been compensable as she would have clearly left her employment. The question then is where does the visit to Dr. Moore's apartment fall on this continuum.

While the evidence is not clear as to who owned the building at 4210 Olive, Dr. Moore testified that he was renting the apartment from Dr. Erondu.^[8] Dr. Moore was employed by Gateway as a dentist in the dental sealant program. He was a supervisor over any dental assistant who worked with him. Prior to October 14, 1998 Dr. Moore had issued a general invitation to the employees of Gateway to visit his apartment. Under such circumstances should Gateway's premises be "extended" to include his apartment? Ms. Eichelberger's motives in going up to Dr. Moore's apartment was partly to socialize with a supervisor and partly to find a pleasant place to wait while Dr. Erondu finished with his patient. Had Ms. Eichelberger made a trip to Dr. Moore's apartment on a Saturday night for dinner or cocktails, then the relationship of the visit to her employment would become very attenuated. However, on October 14, 1998 Ms. Eichelberger only temporarily left Gateway's office.

A lengthy discussion of the "extended premises doctrine"^[9] is unnecessary given the Supreme Court's decisions in Drewes v. Trans World Airlines, Inc., 984 S.W.2d 501 (Mo. 1999) and Wells v. Brown, 33 S.W.3d 190 (Mo. 2000). In Drewes the Supreme Court held that falling while carrying one's lunch to a table in a break room open to all tenants of an office building is not a risk which was unrelated to claimant's employment, even where the cause of the fall is unexplained. In Wells the Court held that slipping and falling on an icy parking lot, though not owned, controlled or maintained by employer, was a hazard which was related to an employee's employment where the parking lot was "so situate, designed and used" by the employer and employees incidental to their work. If a break room in an office building and a shopping center parking lot can be the extended premises of tenants, then it is not much of a stretch to extend Gateway's premises to include Dr. Moore's apartment on this occasion. Dr. Moore extended an invitation to all of Gateway's employees to visit his apartment. Ms. Eichelberger accepted that invitation while she waited to see Dr. Erondu. While it is true that Dr. Moore's apartment was private and the break room in Drewes was open to all tenants in the office building, Gateway had through Dr. Moore, a supervisor of Ms. Eichelberger, more control over the condition of his apartment than TWA had over the break room. As members of the public were not exposed to the loose board on Dr. Moore's deck, employee would not have encountered this risk in her nonemployment life. If find under the circumstances of this case that Dr. Moore's apartment became the "extended premises" of Gateway on October 14, 1998.

While Ms. Eichelberger's purpose in visiting Dr. Moore's apartment was personal; she was looking for a comfortable place to pass a few minutes while she waited for Dr. Erondu. The personal comfort doctrine would also be applicable to the injury which she sustained while visiting Dr. Moore's apartment. "The inevitable acts of human beings in ministering to their personal comfort while at work, such as seeking warmth and shelter, heeding a call of nature, satisfying thirst and hunger, washing, resting or sleeping, and preparing to begin or quit work, are held to be incidental to the employment...." Kunce v. Junge Baking Company, 432 S.W.2d 602, 609 (Mo. App. 1968); Bell v. Arthur's Fashions, Inc., 858 S.W.2d 760 (Mo. App. 1993); Ford v. Bi-State Development Agency, 677 S.W.2d 899 (Mo. App. 1984). As these activities benefit the employee, they are deemed to indirectly benefit the employer. Yaffe v. St. Louis Children's Hospital, 648 S.W.2d 549 (Mo. App. 1982).

As previously noted^[10] the decision in Brooks v. Wal-Mart Stores, Inc., 783 S.W.2d 509 (Mo. App. 1990) is factually close to Ms. Eichelberger's claim. Other decisions involving injuries sustained during personal activities have been found to be compensable. E.g. Zahn v. Associated Dry Goods Corp., 655 S.W.2d 769 (Mo. App. 1983) and Yaffe v. St. Louis Children's Hospital, 648 S.W.2d 549 (Mo. App. 1982). In both of those case, employees were injured on their employer's premises after engaging in largely personal activities following the end of their workdays.^[11] In Zahn the employee was assaulted in the parking garage of her employer after spending about 20 minutes looking at clothing in the dress department. The Court of Appeals affirmed the trial court's finding that it had no subject matter jurisdiction of a civil negligence suit. The appellate court stated that the employee's 20-minute stop in the dress department was within a reasonable margin of time and space after leaving work and would not remove her claim from the exclusive jurisdiction of workers' compensation. In Yaffe a hospital volunteer/employee slipped and fell in the hospital's coffee shop after finishing her shift. She went there for something to eat prior to returning home. Employee was not scheduled to return to work for two weeks. The Court of Appeals affirmed the trial court's sustaining of employer's Motion for Summary Judgment barring employee's negligence action because the injury arose out and in the course of her employment. The appellate court stated that the reasonable time for leaving the employer's premises included having a meal.

Ms. Eichelberger was exposed to the hazard of the loose board in Dr. Moore's apartment as a consequence of her employment with Gateway. She would not been in that apartment but for Dr. Moore being her supervisor. Unlike the customers of the shopping center in Wells, the public was not exposed to the hazard of the loose board in Dr. Moore's apartment.

Based on my previous findings and the foregoing analysis, I find that personal comfort doctrine is applicable to claimant's visit to Dr. Moore's apartment and that the injury which she sustained during that visit arose out of and in the course of her employment with Gateway.

REIMBURSEMENT FOR MEDICAL EXPENSES

Employee is seeking reimbursement for medical and hospital bills incurred as a result of treatment provided for her left ankle fracture. The bills are included in Claimant's Exhibits J, K and L and total \$18,225.48.

Section 287.140.1 Mo. Rev. Stat. (1994) provides in part:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines as may reasonably be required after the injury or disability to cure and relieve [the employee] from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo. App. 1987); Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983); Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Hendricks at 709. The employer may also consent affirmatively to the selection of a health care provider by the employee or consent inferentially by failing to object to the employee's selection after having knowledge of that selection. Hendricks at 709-710.

Where an employer denies the compensability of the claim, it also necessarily denies liability for medical treatment. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Beatty v. Chandeysson Electric Co., 190 S.W.2d 648, 655-56 (Mo. App. 1945).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo. App. 1991); Jones v. Jefferson City School District, 801 S.W.2d 484 (Mo. App. 1990); Roberts v. Consumers Market, 725 S.W.2d 652 (Mo. App. 1987); Brueggemann v. Permaneer Door Corp., 527 S.W.2d 718 (Mo. App. 1975).

Employee must establish the causal relationship between the bills for medical services and the treatment provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989). It is not necessary to have testimony on the medical-causal relationship of each individual expense where the causal relationship can reasonably be inferred. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992). Employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence which relate to the services provided. Idem.; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo. App. 1992); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). In the absence of such proof, medical bills may be excluded. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo. App. 1997); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). Bills showing only a balance due may be excluded for lack of adequate foundation. Hamby v. Ray Webbe Corp., 877 S.W.2d 190 (Mo. App. 1994).

Findings of Fact

Based on my observations of claimant's demeanor during her testimony, I find that she is a credible witness and that her testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Dr. Moore drove claimant to St. Louis ConnectCare where she was given emergency care. She was transferred to the Barnes-Jewish Hospital Emergency Department that evening. X-rays were taken of her left ankle which revealed an oblique fracture of the distal fibula, a fracture of the posterior malleolus, a fracture of the medial malleolus, and displacement of the talus. A closed reduction was performed and claimant was placed in a short leg splint. She was told to follow up with the orthopedic clinic in a week, use ice, crutches and Percocet. (Claimant's Testimony & Exhibit B)

On October 21 claimant was examined at the Washington University Orthopedic Clinic. X-rays taken of claimant's left ankle continued to show the fractures with angulation and displacement. There was subluxation of the tibia and widening of the medial tibiotalar joint. He ankle was re-casted. She was told to return the following week for surgery. (Claimant's Exhibit C, Pages 8-10)

On October 29, 1998, claimant underwent an open reduction and internal fixation of her left ankle fracture by Dr. Joseph Borrelli at Barnes-Jewish Hospital. She was discharged the next day. (Claimant's Exhibit A)

Claimant returned to the Washington University Orthopedic Clinic on November 11, 1998. She was given a moon boot. (Claimant's Exhibit C, Pages 11-12) She returned to the clinic on December 9. X-rays were taken. (Claimant's Exhibit C, Pages 13-15) She returned to the clinic on January 6, 1999. X-rays revealed healing of the medial malleolar fracture; however the fracture line in the lateral malleolus was still apparent. The treating physician indicated that the fractures had healed. Claimant was told that she could ambulate without the moon boot and was discharged from care. (Claimant's Exhibit C, Pages 16-17)

Medical Opinions

Dr. Thomas F. Musich testified by deposition on behalf of claimant on December 16, 2003. He reviewed all of the medical records and examined claimant on November 4, 2002. Dr. Musich testified that she sustained a trimalleolar fracture of the left ankle as a result of the fall and that the medical treatment which she had received was necessary to cure her of the injuries which she sustained. (Claimant's Exhibit H, Pages 7-9 & depo ex 1, p. 3)

Additional Findings

Based on all of the evidence, I find that claimant sustained a trimalleolar fracture of the left ankle as a result of the October 14, 1998 work-related fall and that the treatment provided at St. Louis Connect Care, Barnes-Jewish Hospital, and the Washington University Orthopedic Clinic was reasonable and necessary to cure and relieve her left ankle fracture.

Proof of the fairness and reasonableness of the bills may be made by the testimony of the claimant alone. Identification of treatment covered by a bill and the relationship of the treatment to the employee's injury is sufficient. Proof of payment is not required. It is then up to the employer to show that the bills are not fair and reasonable. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992).

Claimant identified the bills which she received: \$597.10 from St. Louis Connect Care (Claimant's Exhibit L), \$2,987.24 from Washington University Physicians (Claimant's Exhibit K), and \$14,641.14 from Barnes-Jewish Hospital (Claimant's Exhibit J). She testified that he received the treatment shown on the bills.

Each item on the bills corresponds to an entry in the provider's medical records indicating that treatment was for claimant's left ankle.^[12] Employer introduced no evidence that the charges were not fair or reasonable. I have examined the specific charges and they appear to be fair and reasonable.

I further find that the charges totaling \$18,225.48 for such treatment were fair and reasonable. While some of the bills shows deductions, employer has the burden of proving that claimant's liability for any "write-offs and deduction" on medical bills has been extinguished. Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 823 (Mo. 2003). No evidence was presented that any of the providers had released claimant from liability for their bills. Bill entries of "charity admission" or "Missouri discount" are not equivalent to a release from liability. Such deductions could be reversed at any time.^[13] While a medical provider might not file suit against an impecunious patient, such as claimant, for the amount of its bill since it would incur legal expenses and thereby throw good money after bad money, such forbearance does not mean that the medical provider does not retain a legal and moral right to collect the amount of its charges. When a disputed workers' compensation claim has been determined to be compensable, medical providers have the right to be paid for the reasonable charges for medical treatment provided for the work-related injury. Section 287.140 Mo. Rev. Stat. (2000). They could at any time reverse their "write-offs and deductions" and demand payment from a formerly impecunious claimant. To suggest that the medical providers should ignore a legal determination that a claimant's injury is compensable and forbear from collecting

legitimate charges for treating a compensable work injury is ridiculous. The effect of such policy is to place the burden of medical treatment for work-related injuries on the general health care system which is already reeling from governmental and insurance industry reimbursement cuts. The purpose of Section 287.140 is to allocate to employers the medical costs of treating work-related injuries.

To allow Gateway a credit for “write-offs and discounts” amounts in the absence of definite proof that claimant’s liability has been forever extinguished would give Gateway a windfall for its refusal to accept this claim and provide medical treatment. Such an outcome would encourage other employers to deny claims and decline to pay medical bills. Allowing an employer to escape responsibility for such bills because a provider may have written off charges as uncollectable from a destitute patient would enable the employer to hide behind the tatters and rags of an impecunious injured worker. Such an outcome would constitute a perversion of the manner in which health care costs are allocated in the United States. The decision in Farmer-Cummings should not be used as a vehicle for allowing employers to evade their responsibilities under the Workers’ Compensation Law and shift the costs of treating workers’ compensation injuries to rest of our society.

While it would be equally wrong for a claimant to retain the monies from an award for medical bills and not pay those bills out of the proceeds which he or she receives, employers can prevent such a windfall by notifying the medical providers that the claimant is to be paid for medical bills pursuant to a workers’ compensation award and encouraging the providers to seek payment from the claimant. Another remedy would be for the employer to pay medical bills prior to the award and obtain a written release of liability from the medical providers of all parties. Another remedy would be for the legislature or the courts to authorize ALJs to order direct payment of the bills rather than reimbursement. Section 287.220.5 Mo. Rev. Stat. (2000) appears to allow a direct payment order for Second Injury Fund payments of medical bills where the employer was uninsured.

Based on my prior findings and the foregoing analysis, I find employer is liable for the claimant’s medical and hospital expenses totaling \$18,225.48.

-
-
-

PERMANENT DISABILITY

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Claimant’s Testimony

Claimant testified that her ankle throbs all day and that by the end of a day she experiences considerable pain. She takes Ibuprofen and elevates her left leg when she returns home. She still experiences constant swelling of the ankle and numbness, burning, throbbing and pain that increase with extended standing. When she goes shopping for any extended period of time, she is required to use a wheelchair. She had no problems with her left ankle prior to October 14, 1998. In her occupation of dental assistant she is required to stand a large portion of the time to perform various tasks.

Medical Opinions

Dr. Thomas F. Musich noted that on November 2, 2002 Ms. Eichelberger complained of throbbing, swelling, stiffness, and loss of mobility in her left ankle. She reported her ankle pain ranged between 2 and 9 on a scale of 0 to 10. And she told him that her pain was adversely affected by walking or standing in one position for over an hour, while wearing high heeled shoes, and during cold and damp weather. (Claimant's Exhibit H, Page 10)

On examination Dr. Musich noted that claimant's left ankle circumference was 2" greater than the circumference of the right ankle. He indicated that the difference represented a "tremendous" amount of swelling. He also noted a significant loss in mobility of the left ankle compared to the right. (Claimant's Exhibit H, Pages 13-14) He opined that the fall on the deck of Dr. Moore's apartment was the cause of her injury and that her complaints were consistent with the injury. (Claimant's Exhibit H, Pages 7-8) He further opined that Ms. Eichelberger sustained 50% permanent partial disability of the left lower extremity at the ankle as a result of the injury. (Claimant's Exhibit H, Pages 11-12) He also believes that claimant's duties as a dental assistant would aggravate her symptoms. (Claimant's Exhibit H, Page 35)

Findings

As a result of the injury claimant carries a considerable amount of orthopedic hardware in her lower left leg. (Claimant's Exhibit E) She still experiences constant swelling of the ankle and numbness, burning, throbbing and pain that increase with extended standing. In her occupation of dental assistant she is required to stand a large portion of the time to perform various tasks. At the end of each day she must take pain medication and elevate her left leg. She has difficulty with walking and standing for extended periods of time.

Based on all of the evidence, I find that claimant sustained 40% permanent partial disability of the left leg above the ankle as a result of the work-related accident of October 14, 1998.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder, including the medical bills, in favor of the employee's attorney, Norman A. Selzer, for necessary legal services rendered to the employee.

Date: _____

Made by: _____

John Howard Percy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Reneé T. Slusher
Director
Division of Workers' Compensation

[1] In her proposed award claimant sought an award of temporary total disability compensation. As this was not made an issue at the beginning of the hearing or during the hearing, it was waived. An administrative law judge lacks the power to make an award on a ground which was not an issue at the hearing. Lawson v. Emerson Elec. Co., 809 S.W.2d 121, 125-26 (Mo. App. 1991); accord, Boyer v. National Express Co., Inc., 49 S.W.3d 700, 705-06 (Mo. App. 2001).

[2] An injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. Injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial

factor" in causing the injury. Kasl, supra. A substantial factor does not have to be the primary or most significant causative factor. Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). An accident may be both a triggering event and a substantial factor in causing an injury. Id. Subsection 2 also provides that an injury must be incidental and not independent of employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment." There was no dispute that Ms. Eichelberger sustained an injury as a result of the accident.

[3] The court appears to have largely abandoned its decision in Abel v. Mike Russell's Standard Service, 924 S.W.2d 502 (Mo. 1996), where a claim was denied because a gas station attendant could not explain why he fainted while pumping gas, by consigning it to cases occurring before the effective date of the 1993 amendments.

[4] For a time there was speculation that subsection 3(2)(d) had revived the "greater risk or hazard" test which was largely abandoned in Ford Motor Co. v. Dickens, 700 S.W.2d 484, 486-87 (Mo. App. 1985) and Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 528-29 (Mo. 1993). The decisions in Kasl and Wells suggest that the Supreme Court intends to construe hazards unrelated to employment very narrowly.

[5] Dr. Erondu testified that Dr. Moore did not work at that school that day. There was no timesheet showing where Dr. Erondu worked on October 14. On being shown his timesheet for that period, Dr. Moore agreed that he worked at the LaFayette school on October 14. There was no evidence concerning the school where claimant worked on October 14. (Employer's Exhibit 13, Pages 14-16 & depo ex 1)

[6] Debra Green remembered Ms. Eichelberger returning to the office the afternoon of October 14, 1998 and asking for Dr. Erondu. Ms. Green testified that she told her that Dr. Erondu was out but would be returning to close the office. She testified that Ms. Eichelberger told her that she was going up to see Dr. Moore. Dr. Erondu testified that he left his office early that afternoon as he did not have any additional patients. I find employee's recollection of the events to be more credible.

[7] "Employment" has been construed to include, in addition to the performing of work, a "reasonable margin of time and space necessary" for passing to and from the location of employment. "If the employee is injured while passing with the express or implied consent of the employer, to or from work, by way over the employer's premises, the injury is one arising out of and in the course of employment as much as though it had happened while the employee was engaged in his work at the place of his performance." (emphasis added) Zahn v. Associated Dry Goods Corp., 655 S.W.2d 769, 773 (Mo. App. 1983); State ex rel. McDonnell v. Luten, 679 S.W.2d 278, 280 (Mo. 1984); Pulliam v. McDonnell Douglas Corp., 558 S.W.2d 693, 699 (Mo. App. 1977); Kunce v. Junge Baking Company, 432 S.W.2d 602, 607 (Mo. App. 1968). Arrival at or departure from work is part of the performance of an employee's duty and is accordingly in furtherance of the employer's business. Departure from work at the end of a workday is considered an incident of employment and a risk inherent thereto and consequently an injury sustained while leaving work arises "out of employment". Zahn, supra; Kunce, supra.

[8] The apartment lease was not introduced into evidence.

[9] Compensation benefits are provided where:

the injury-producing accident occurs on premises which are owned or controlled by the employer or on premises which are not actually owned or controlled by the employer but which have been so appropriated by the employer or so situate, designed and used by the employer and his employees incidental to their work as to make them, for all practicable intents and purposes, a part and parcel of the employer's premises and operation; and

if that portion of such premises is a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workmen to get to and depart from their places of labor and is being used for such purpose at the time of the injury. (emphasis added)

Cox v. Tyson Foods, Inc., 920 S.W.2d 534, 535-36 (Mo. 1996) quoting from Kunce v. Junge Baking Company, 432 S.W.2d 602, 607 (Mo. App. 1968). "Property is sufficiently 'appropriated' to make it a part of the employer's extended premises if it is used by employees as a route of access to the employer's premises, and such use is known to and acquiesced in by the employer." State ex rel. McDonnell at 280; Hunt, at 409; Cox, at 536. Acquiescence requires "some component of invitation [by the employer] to the employees which caused them" to use the route where the accident occurred. Hafner v. A.G. Edwards & Sons, 903 S.W.2d 197, 200 (Mo. App. 1995). The primary rationale for the implied extension of the employer's premises to include the site of the injury is that the place of injury lies on the only route or on the normal route which employees must take in traveling to the place of employment. The hazards of that route are deemed to be causally connected to employment. Hunt, at 409; Pulliam v. McDonnell Douglas Corp., 558 S.W.2d 693, 698 (Mo. App. 1977).

[10] See Page 11 supra.

[11] Also similar is Jones v. Bendix Corporation, 407 S.W.2d 650 (Mo. App. 1966), where an employee was injured when she sat down to drink a cup of coffee in the employer's cafeteria 15 minutes before her shift began. The injury was held to arise out of and in the course of her employment even though the activity was personal in nature.

[12] Though the records of the October 14, 1998 examination at St. Louis ConnectCare were not in evidence, the itemized charges appear to be for reasonable and necessary emergency care.

[13] Claimant's statement that she did not owe anything on the Barnes-Jewish Hospital bill is based on an incorrect understanding of the law and deemed irrelevant. Her statement will not insulate her from liability should she be sued by Barnes-Jewish Hospital after this award becomes final.