

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

Injury No.: 05-112444

Employee: Debra Fowler
Employer: Compass/Chartwells
Insurer: New Hampshire Insurance

This workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo. Having reviewed the evidence 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 one minor correction.

Item number 20 on page 2 of the award is in error. It is corrected to read:

20. Amount of compensation payable:

35 weeks of permanent **partial** disability benefits: \$7,124.95

In all other respects, we affirm and adopt the award of the administrative law judge.

We approve and affirm 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.

The February 10, 2012, award and decision of Administrative Law Judge Suzette Carlisle is attached and incorporated by this reference, except as corrected herein.

Given at Jefferson City, State of Missouri, this 25th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Debra Fowler

Injury No.: 05-112444

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Compass Group/Chartwells

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: American Assoc. of Ind. Mgmt. WC Fund
c/o Cannon Cochran Mgmt. Services

Hearing Date: November 9, 2011

Checked by: SC

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, 2005
5. State location where accident occurred or occupational disease contracted: St. Louis City, 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 happened or occupational disease contracted: Claimant slipped and fell while walking up metal stairs at the direction of her supervisor.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right wrist
14. Compensation paid to-date for temporary disability: 0
15. Value necessary medical aid paid to date by employer/insurer? \$0
16. Value necessary medical aid not furnished by employer/insurer? \$6,234.33

Employee: Debra Fowler

- 17. Employee's average weekly wages: \$305.36
- 18. Weekly compensation rate: \$203.57/\$203.57
- 19. Method wages computation: Stipulated

COMPENSATION PAYABLE

20. Amount of compensation payable:

35 weeks of permanent total disability benefits: \$7,124.95

21. Second Injury Fund liability: N/A

TOTAL: \$7,226.74¹

22. Future requirements awarded: None

Each of said payments to begin and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% which is awarded above as costs of recovery of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kerry I. O'Sullivan

¹ The total disability includes ½ week of disfigurement which totals \$101.79.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Debra Fowler	Injury No.:	05-112444
Dependents:	N/A		Before the
Employer:	Compass Group/Chartwells		Division of Workers'
Additional Party:	Second Injury Fund (N/A)		Compensation
			Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	New Hampshire Insurance Company c/o Cambridge Integrated Services Group		
		Checked by:	SC

STATEMENT OF THE CASE

The parties appeared for a hearing before the undersigned administrative law judge at the Missouri Division of Workers' Compensation (DWC) on November 9, 2011. Debra Fowler (Claimant) requested a final award to determine the liability of the Compass Group/Chartwells (Employer) and New Hampshire Insurance Company (Insurer), c/o Cambridge Integrated Services Group. Attorney Kerry O'Sullivan represented the Claimant. Attorney Rachel Brown represented the Employer.² The court reporter was Karen Rottmann. Venue is proper and jurisdiction lies with the DWC. The record closed after presentation of the evidence.

STIPULATIONS

The parties stipulate that on or about October 31, 2005:

1. Claimant worked for Employer and sustained an accident in St. Louis City;
2. The Employer and Claimant operated under the Missouri Workers' Compensation Law;³
3. The Employer's liability was fully self-insured;
4. Employer had notice of the injury;
5. A Claim for Compensation was timely filed;
6. Claimant's average weekly wage was \$305.36 resulting in benefit rates of \$203.57 for temporary total disability (TTD) and permanent partial disability (PPD);
7. Employer paid no TTD benefits; and
8. Employer paid medical benefits totaling \$6,234.33

ISSUES

Parties identified the following issues for disposition:

1. Did Claimant sustain an accident that arose out of and in the course of employment?

² All references in this award to the Employer also refer to the Insurer.

³ All statutory references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

2. If so, what is the nature and extent of the Employer's liability for PPD, if any?

EXHIBITS

The Claimant's Exhibits A through D were offered and received into evidence, and the Employer offered no exhibits. Any objections contained in the depositions or made during the hearing but not expressly ruled on in this award are now overruled. To the extent marks and highlights are contained in the exhibits they were made prior to becoming a part of this record and were not placed there by the undersigned administrative law judge.

FINDINGS OF FACTS

All evidence was reviewed but only evidence which supports this award is summarized below.

1. At the time of the hearing, Claimant had worked ten years for Employer as a barista, making specialty coffee. In the morning, she opens the business, sets up, lifts stock, and orders products. Occasionally she closes at the end of the day. About three years ago, Claimant became a barista supervisor.
2. In February 2005, Claimant developed right wrist pain and had difficulty holding a pen to write. Dr. Subbarao Polineni diagnosed de Quervain's tendonitis, and injected Claimant's wrist in February 2005. (medical records are not in evidence)
3. Employees were permitted to enter the building through the front door. However, public safety did not open the front door until 7:00 a.m. or later. Claimant began work at 7:00 a.m., but the Employer required her to report at 6:30 a.m. to set up. The front door was locked at the time Claimant was scheduled to arrive for work. When the front door was locked, the Employer instructed Claimant to walk to the back of the building and climb the metal loading dock stairs to enter the building.
4. On October 31, 2005 at approximately 6:30 a.m., Claimant exited her husband's vehicle and climbed the metal dock stairs to begin her shift. She fell up the stairs, extended her hands to break the fall, and reinjured her right wrist. At the time of the fall, Claimant had not clocked in.
5. No ice or other items or substances were on the stairs. Claimant did not trip over anything, and she was not carrying anything.
6. Before the accident, the old steps were replaced with metal ones. The old steps were made from a different type of material.
7. Claimant reported the accident to her supervisor, and received treatment at Concentra, including limited duty, medication, physical therapy, and splinting. Medical records show the accident occurred at 7:00 a.m. on October 31, 2005. Claimant was released on December 8, 2005.

8. Due to ongoing wrist complaints with lifting, Claimant sought additional right wrist treatment on October 31, 2006, and was referred to Dr. Rotman. On November 20, 2006, Dr. Rotman injected Claimant's right wrist.
9. On March 21, 2007, Dr. Mitchell Rotman surgically released Claimant's right de Quervain's. The last examination revealed decreased grip and pinch strength. Dr. Rotman released Claimant to return to work full duty on May 18, 2007, and rated 5% PPD of the right wrist. Claimant has received no further medical treatment for her right wrist.
10. Claimant has a scar on her right wrist, which measures a half inch to one inch in length.
11. Current complaints include difficulty lifting heavy items, inability to carry her grandson and inability to open soda. She wears a brace when lifting cases of milk, soda and other products. Claimant has wrist weakness and finger numbness with prolonged lifting.
12. **William B. Strecker, M.D.**, performed an Independent Medical Examination on August 28, 2008. Claimant gave a history of right wrist pain since April 2005 which she related to repetitive wrist twisting when she operated a coffee machine.
13. Dr. Strecker concluded Claimant's need for surgery was caused by the fall on October 31, 2005.
14. Dr. Strecker opined Claimant had achieved maximum medical improvement and rated 5% PPD.
15. **Shawn L. Berkin, D.O.**, examined Claimant on August 20, 2008, and issued an Independent Medical Evaluation at the request of Claimant's attorney. Dr. Berkin diagnosed traumatic right de Quervain's tenosynovitis, opined the fall caused de Quervain's tenosynovitis, rated 35% PPD of the right wrist, and restricted forceful hand movements on a repetitive basis.

ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW

Claimant asserts the fall on the dock steps arose out of and in the course of her employment. The Employer contends Claimant's injury did not come from a hazard or risk related to employment, as required by Section 287.020.3(2) (b).

Section 287.120.1 RSMo, provides:

“[E]very employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment.”

Claimant has the burden to establish that she sustained an injury by accident arising out of and in the course of his employment, and the accident resulted in the alleged injuries. *Choate v.*

Lily Tulip, Inc., 809 S.W.2d 102, 105 (Mo. App. 1991) (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo banc 2003)).⁴ Section 287.808 requires proof the facts are “more likely true than not true.”

Section 287.020.3 states in part:

3. (1) ...“Injury” is one which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
- (2) 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.

In *Pile v. Lake Regional Health System*, 321 S.W.3d 463 (Mo. App. 2010) the Court explained that the application of this subsection involved a two-step analysis:

The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such case, there is a clear nexus between the work and the injury *Id.* at 467.

Where the physical condition of the work environment creates the hazard or risk giving rise to an injury, the physical condition provides the nexus needed to show the injury came from a hazard or risk related to employment. *Id.*

Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life. *Id.*

The phrase “arising out of and in the course of employment” results in a two prong test, where the “arising out of” portion refers to cause or origin, and the “course of employment” portion refers to the time, place, and circumstances of the accident in relation to the employment. *Vickers v. Missouri Dept. of Public Safety*, 283 S.W.3d 287, 292 (Mo. App. 2009).

⁴ Several cases herein were overruled by the *Hampton* case on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

The parties do not dispute the accident was the prevailing factor that caused the injury and the need for surgery. The issue involves interpretation of Section 287.020.3(2) (b).

I find Claimant to be generally credible. Here, the risk involved the metal dock stairs Claimant climbed to start work. The Employer required Claimant to report for work at 6:30 a.m. and the front door did not open until at least 7:00 a.m. Employer instructed Claimant to use the dock stairs to report to work when the front door was locked. The dock stairs were the only way to enter the building before 7:00 a.m. Walking up the stairs to enter the building was an integral part of the performance of Claimant’s work.

I find the physical condition of the work environment created a hazard or risk related to Claimant’s employment, and gave rise to the injury. Walking up stairs was a condition of Claimant’s employment that contributed to her wrist injury. At the time of the injury, Claimant was climbing the approved, permitted, usual and accepted metal stairs, authorized by the Employer, to gain access to her work place and begin her shift. Employer instructed Claimant on the time and place to report for work, and she complied. The metal stairs were in the back of the building, and the record contains no evidence the general public had access to them.

For these reasons, I find Claimant’s travel up the stairs on metal steps was related to her employment.

Based on credible testimony by the Claimant and medical records, I find a nexus between her right wrist injury and the risk of walking up metal stairs. I find Claimant’s accident arose out of and in the course of employment.

Based on credible testimony by the Claimant, Dr. Berkin and medical records, I find Claimant sustained 20% PPD of the right wrist from the October 31, 2005 work injury. I find further find Employer is liable for one-half week for disfigurement.

CONCLUSION

Claimant sustained an accident which arose out of and in the course of employment. Employer shall pay permanent partial disability benefits pursuant to this award. The award is subject to a lien in favor of Claimant’s attorney for legal services rendered.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation