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

Employee: Enrika Fox
Employer: Missouri Department of Corrections
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Injury No.: 08-121816

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

Introduction

The parties asked the administrative law judge to resolve the following issues:

- Whether the employee sustained an occupational disease arising out of and in the course of her employment with the Missouri Department of Corrections;
- Whether the alleged occupational disease was the prevailing factor in causing the employee's medical condition and disability;
- Employer's liability, if any, for permanent partial disability benefits;
- The Second Injury Fund's liability, if any for permanent partial disability.

The administrative law judge found that due to occupational disease sustained on November 3, 2008, consisting of plantar fasciitis, the employee sustained permanent partial disability of 12.5% of the right foot at the 150-week level and 5% permanent partial disability of the left foot at the 150-week level. The administrative law judge denied the claim against the Second Injury Fund in full, finding that "Claimant failed to establish that the bilateral plantar fasciitis and the preexisting condition of right knee patellofemoral syndrome, operated bilateral carpal tunnel syndrome, and headaches, combined synergistically to cause a great disability than the simple sum of the individual disabilities." ¹

The employee filed a timely application for review with the Commission alleging the administrative law judge erred in:

- Failing to determine the nature and extent of permanent disability of the employee's preexisting conditions;

¹ Award, p. 18.
Ignoring Dr. Volarich's testimony and medical opinion;
Ignoring the employee's testimony with respect to the issue of synergism;
Ignoring uncontradicted testimony of unimpeached witnesses and not granting the employee all reasonable inferences;
Not considering and applying testimony relating to pain caused by the employee's work injury and prior medical conditions.

For the reasons set forth below, we modify the award and decision of the administrative law judge.

Findings of Fact

The Primary Injury

The administrative law judge found that the employee's work "demonstrated a long history of significant walking and/or standing on concrete or other hard surfaces as a part of her job"; that the employee's employment caused her to suffer cumulative trauma to her feet; that this occupational exposure was the prevailing factor in causing the employee to suffer the resulting medical condition and disability of bilateral plantar fasciitis; that on or about November 3, 2008, the employee sustained an occupational disease as defined in Section 267.067, which arose out of and in the course of her employment, and as a consequence sustained permanent partial disability of 12.5% to the right foot, at the 150-week level (18.75 weeks) and permanent partial disability of 5% to the left foot, at the 150-week level (7.5 weeks). No party disputes the administrative law judge's determination of permanent partial disability attributable to the primary injury.

Preexisting Disabilities

Right Knee

The employee suffered an injury to her right knee in July 2004 as she experienced a "pop" in her right knee while getting out of a vehicle. The attending physician diagnosed this medical condition as patellofemoral syndrome and tendonitis. The employee testified she suffers achiness with weather changes and pain with walking. The residual effects of this medical condition cause her to walk with a limp or altered gait. The employee's work as a corrections officer involved "[w]alking up and down the wings, up and down stairs, checking on the offenders, conducting counts, [and] pretty much just walking the wings all day long."\(^2\) Because of her right knee condition, the employee walked carefully and more slowly than other guards did.

We find the employee's preexisting right knee condition constituted a hindrance or obstacle to employment because it had the potential to combine with disability from her primary injury to cause a greater degree of disability than would have resulted in the absence of the condition.

\(^2\) Transcript, 15.
Dr. David Volarich evaluated the employee’s preexisting industrial disability relating to patellofemoral syndrome as 20% permanent partial disability of the right lower extremity rated at the knee, stating that his rating accounts “for ongoing discomfort with prolonged weightbearing and any impact activities, stooping or squatting.”

Right and Left Wrists

The employee developed bilateral carpal tunnel syndrome in 2003. She underwent open right carpal tunnel release in March 2004 and open left carpal tunnel release in December 2004. The employee’s carpal tunnel syndrome has resulted in restrictions and limitations relating to activities that require sustained or heavy lifting.

The employee testified that prior to her 2008 injury, she had problems with gripping and using her hands when unlocking doors. She also acknowledged that these problems became less of an issue after her 2004 bilateral carpal tunnel release. Dr. Volarich evaluated the employee’s preexisting carpal tunnel syndrome as 20% in each wrist.

Headaches (Central Nervous System)

In 2006, the employee suffered paresthesias in the left face and experienced debilitating migraine headaches. Her attending physician diagnosed this condition as intractable vascular headaches and paresthesias and prescribed Topamax. Prior to a March 31, 2008, work injury (Injury No. 08-025433) the employee missed work about two days a month due to migraine headaches. She credibly testified that as a result of treatment for her migraine headaches in 2008 she “moved on to just the stress headaches, [and] it was a lot better, a lot more manageable.” After about a year, the employee discontinued taking Topamax. The employee testified that after her March 31, 2008, injury her migraine headaches ceased to persist. She currently takes over the counter medication for headaches about once a week.

Dr. Volarich assessed 5% preexisting permanent partial disability of the body as a whole relating to the employee’s central nervous system, taking into consideration recurrent migraine headaches that require treatment.

Synergistic Interaction between Disabilities Related to Employee’s Primary Injury and Her Preexisting Medical Conditions/disabilities

Employee’s Testimony

When asked about increased difficulties related to her multiple injuries, the employee explained that pain in one area sets off pain in other areas. Her pain level is enhanced and more difficult to control due to concurrent pain from multiple injuries. In particular,

---

3 Transcript, Claimant’s Exhibit No. 22, 513.
4 The administrative law judge noted that the employee settled a workers’ compensation claim for 12.5% of each wrist in Injury No. 03-100593. Award, 15. As employee’s counsel notes in his brief, employee’s prior settlement does not constitute a stipulation or admission of specific disability. Seliner v. Treasurer of State-Custodian of the Second Injury Fund, 362 S.W.3d 59, 64 (Mo. App. 2012).
5 Transcript, 35.
the employee believes her altered gait “affected . . . the back and the neck and
everything, because without walking straight, it threw everything off.”

The employee further summarized the impact of her cumulative disabilities on her ability
to use proper body mechanics: “It’s extremely affected. You know, everything runs
together, so one thing is affected by the other. . . . if the knee hurts, the back hurts, and
if . . . I have an off gait, then that affects the back and the neck and everything else.” With
respect to her mobility she stated, “I’m really slow. I have to take caution of what I do
and how I do it.”

Because of the combination of problems resulting from her feet, back, knee, headaches,
and tailbone, the employee feels she is unable to perform even the simplest of tasks.
Addressing the synergistic effect of her disabilities, she stated, “It’s just hard to function
. . . when you have problems with everything. . . .”

**Dr. Volarich’s Expert Opinion**

Dr. Volarich evaluated the employee with respect to the November 3, 2008, injury on
March 1, 2010. On that date, he found the employee had 20% permanent partial
disability of the right lower extremity rated at the foot and 10% permanent partial
disability of the left lower extremity rated at the foot due to bilateral plantar fasciitis. He
found, based on treatment provided to that date that the employee had reached
maximum medical improvement. As noted, supra, Dr. Volarich evaluated the
employee’s pre-existing permanent industrial disabilities in addition to the permanent
partial disability sustained in connection with the November 3, 2008, work injury. He
opined that addition of a loading factor was appropriate in evaluating the employee’s
total disability because the combination of the employee’s disabilities create a
substantially greater disability than the simple sum or total of each separate
injury/illness.

Dr. Volarich specifically addressed the issue of synergistic/combination effects relating
to the employee’s primary injury and preexisting injuries in a January 9, 2017, Addendum following his March 1, 2010, report. Dr. Volarich described the human body
as a kinetic chain where “every joint depends on the joint proximal to it and distal to it to
accomplish movement... [and therefore] injuries to the back or neck are going to have
negative effects on movement of the arms and legs...[and] even simple things like
injury/problem [sic] with the forefoot can make it difficult to stand in a stationary position
and work on an assembly line all day.” Dr. Volarich noted that the employee
developed a slight limp after her 2004 right knee injury, which caused her low back and
neck to become misaligned. “With loss of range of movement and abnormal gait she
had to continue to be careful and move more slowly and deliberately.” “Because of
ongoing symptoms along her axial spine aggravated by right leg pain and loss of

---

6 Transcript, 31.
7 Id. 36-37.
8 Id. 36.
9 Id. 30.
10 Transcript, Claimant Exhibit No. 24, 526-527.
11 Id. 527.
movement as well as feet problems, Ms. Fox moved more slowly and had to be more
deliberate with all of her activities, particularly with lifting and during altercations..."12
Dr. Volarich noted that the employee was rarely asymptomatic. On some days, due to
her combined disabilities the employee was simply not able to give her employer 100%.
On other days, when “everything hurt” she was completely incapacitated from work.
Dr. Volarich concluded, "The interplay between her injuries/medical conditions, made it
more difficult to function efficiently at work and home."13

Our Findings

Disability Relating to Primary Injury

Noting no party has disputed this issue, we find the employee sustained permanent
partial disability relating to occupational disease sustained on or about November 3,
2008, in the amount of 12.5% to the right foot, at the 150-week level (18.75 weeks) and
permanent partial disability of 5% to the left foot, at the 150-week level (7.5 weeks).

Preexisting Disabilities14

Right Knee

Based on the employee’s testimony, especially regarding pain with walking and her
altered gait, and Dr. Volarich’s credible opinion we find the employee sustained a
preexisting, industrially disabling, disability in the amount of 20% of her right lower
extremity rated at the knee.15

Right and Left Wrists

Based on the evidence in the record, including the employee’s prior settlement relating
to bilateral carpal tunnel syndrome and Dr. Volarich’s evaluation, we find the employee
had preexisting permanent partial disability to her right and left wrists in the amount of
12.5% of each wrist.

Headaches (Central Nervous System)

Based on the employee’s testimony that, after appropriate medical treatment, her
migraine headaches ceased to be a problem prior to a March 31, 2008, work injury, we
find the employee’s preexisting permanent partial disability relating to the central

12 Id. 527-528.
13 Id. 528.
14 As noted in the administrative law judge’s award, injuries claimant sustained to her lumbar spine,
cervical spine, and right shoulder in a prior March 31, 2008, accident (Injury No. 08-025433) had not
reached maximum medical improvement as of November 3, 2008, and are therefore not preexisting
permanent disabilities for purposes of Second Injury Fund liability in this case. Award, 15.
15 We note the absence of any medical opinions regarding the employee’s preexisting disability other
than that of Dr. Volarich.
nervous system was not of such seriousness as to constitute a hindrance or obstacle to employment if the employee becomes unemployed. We assign no preexisting permanent partial disability to the employee's central nervous system.

**Synergistic Interaction between Disabilities Related to Employee's Primary Injury and Preexisting Disabilities**

We find that the employee's preexisting right knee condition has adversely affected and exacerbated the disability attributable to plantar fasciitis in her right foot sustained in the primary injury. We conclude that the employee sustained greater permanent partial disability than resulted from the primary injury alone due to synergistic interaction between her right foot plantar fasciitis and preexisting permanent partial disability of her right knee. In so finding, we rely on Dr. Volarich's expert medical opinion on the issue of "synergy". We also rely on the employee's credible testimony regarding increased difficulties related to her multiple disabilities, including an altered gait and pain with walking.

Dr. Volarich makes the case for a synergistic relationship between employee's disabilities across the board. While Dr. Volarich's testimony convinces us there is more likely than not some degree of synergy associated with the employee's disability to her left foot related to the primary injury as well as her preexisting bilateral carpal tunnel syndrome, we find insufficient evidence to quantify a specific degree of synergy associated with these conditions.

As we have found, the employee had no preexisting disability to her central nervous system.

We calculate the Second Injury Fund's liability for permanent partial disability attributable to synergistic interaction between disability to the employee's right foot of 12.5% rated at the 150-week level due to plantar fasciitis and preexisting right knee disability of 20% of the right lower extremity rated at the 160-week level, based on a loading factor of 10%.

**Law**

Section 287.220 RSMo creates the Second Injury Fund. Section 287.220.2 applies to injuries occurring prior to January 1, 2014, and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." *Id.* This section provides, in pertinent part:

...If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation, or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, ... receives a subsequent compensable injury resulting in additional permanent partial
disability so that the degree or percentage of disability, in an amount equal
to a minimum of fifty weeks compensation, if a body as a whole injury, or if
a major extremity injury only, equals a minimum of fifteen percent
permanent partial disability, caused by the combined disabilities is
substantially greater than that which would have resulted from the last
injury, considered alone and of itself, and if the employee is entitled to
receive compensation on the basis of the combined disabilities, the
employer at the time of the last injury shall be liable only for the degree or
percentage of disability which would have resulted from the last injury had
there been no preexisting disability. After the compensation liability of the
employer for the last injury, considered alone, has been determined by an
administrative law judge or the commission, the degree or percentage of
the employee's disability that is attributable to all injuries or conditions
existing at the time the last injury was sustained shall then be determined
by that administrative law judge or by the commission and the degree or
percentage of disability which existed prior to the last injury plus the
disability resulting from the last injury, if any, considered alone, shall be
deducted from the combined disability, and compensation for the balance,
if any, shall be paid out of a special fund known as the second injury fund,
hereinafter provided for (emphasis added). . .

Missouri courts have articulated the following test for determining whether a preexisting
disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition
has caused difficulty in the past; it is on the potential that the condition
may combine with a work-related injury in the future so as to cause a
greater degree of disability than would have resulted in the absence of the
condition.

_Knisley v. Charleswood Corp._, 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

To find liability of the Second Injury Fund for permanent partial disability benefits,

[T]he claimant must establish that the present compensable injury and his
preexisting permanent partial disability combined to cause a greater
degree of disability than the simple sum of the disabilities viewed
independently. This is referred to as the "synergistic effect." If a claimant
establishes that the two disabilities combined result in a greater disability
than that which would have occurred from the last injury alone, then the
Fund is liable for the degree of the combined disability that exceeds the
numerical sum of the preexisting disabilities and the disability from the last
injury, or the "synergistic effect" of the combined disabilities. In other
words, the Fund is liable only for the amount attributable to the synergistic
combination. Thus, the failure to prove a synergistic combination between
the primary injury and a preexisting disability is proper grounds for denying
Fund liability.

In order to prove a claim for permanent partial disability against the Second Injury Fund, an employee must demonstrate that her preexisting disability combines with a subsequent compensable injury "so that the degree or percentage of disability ... caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself."16

Simply put, the fund is liable only for the degree of the combined disability that exceeds the numerical sum of the pre-existing disabilities and the disability from the last injury. This excess for which the fund is liable is referred to as the synergistic effect of the combined disabilities (emphasis added).

Treasurer of Missouri-Custodian of Second Injury Fund v. Witt, 414 S.W.3d 455, 467. (Mo. 20150).

In Witt, the Supreme Court held that 287.220.1 imposes no numerical threshold for permanent partial disability from the employee's last injury. Id. at 467.

Witt further instructs that, for purposes of triggering fund liability based on preexisting disability, 287.220.1 does not allow combination of a major extremity disability with a body as a whole disability but instead "expresses the minimum thresholds only in terms of a singular injury to either the body as a whole or a major extremity." Id. 465. However, once the threshold of either fifty weeks of compensation for a body as a whole injury or fifteen percent permanent partial disability of a major extremity is met, pursuant to the statute’s plain an ordinary meaning, "all preexisting injuries, without the threshold limitation are to be considered" in the calculation of Second Injury Fund liability. Id. 467.

Conclusions of Law

As we have found, for purposes of Second Injury Fund liability, the employee sustained permanent partial disability attributable to the primary injury in the amount of 12.5% of the right foot, rated at the 150-week level.

In Treasurer of Missouri-Custodian of the Second Injury Fund v. Witt, 414 S.W.3d 455 (Mo. 2013) the Supreme Court instructed that for purposes of determining Second Injury Fund liability for permanent partial disability there is no threshold disability requirement for the employee’s last injury.

As we have found, based on the employee’s credible testimony and Dr. Volarich’s expert opinion, the employee had preexisting permanent partial disability consisting of 20% of her right lower extremity, rated at the 160-week level. This preexisting disability satisfies the single preexisting 15% permanent partial disability of a major extremity

---

16 Section 287.220.2 RSMo.
threshold required to trigger Second Injury Fund’s liability for permanent partial disability. Section 287.220 RSMo.

The Second Injury Fund argues that the employee had no preexisting right knee disability because she acknowledged that prior to a March 31, 2008, work injury she worked full duty and that her right knee condition, despite flare-ups, was not constantly an issue. The Second Injury Fund’s counsel reasons that, based on the foregoing testimony, the employee’s right knee disability did not constitute a “hindrance or obstacle to employment”, as required by 287.220. Pursuant to the test established in Kinsley, supra, the employee’s testimony minimizing the effect of her right knee condition prior to her March 31, 2008 injury does not preclude our finding that this condition constituted a hindrance or obstacle to employment. We find the Second Injury Fund’s argument on the point unpersuasive.

We further found, based on the employee’s credible testimony regarding the combined effects of her multiple disabilities in conjunction with Dr. Volarich’s uncontroverted expert medical opinion on the issue of “synergy”, that permanent partial disability the employee sustained in the primary injury in the amount of 12.5% to the right foot at the 150-week level combined synergistically with preexisting disability of 20% of the right lower extremity rated at the knee, resulting in disability that exceeds the numerical sum of the total disabilities.

Lay testimony alone can constitute substantial evidence of the extent of disability to an injury or medical condition. Goleman v. MCI Transporters, 844 S.W. 2d 463, 466 (Mo. App. 1993) (overruled on other grounds, Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003); Griggs v. A. B. Chance Co., 503 S.W. 2d 697, 704-705 (Mo. App. 1973). Also, the courts have held that the “testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause and extent of the disability when the facts fall within the realm of lay understanding.” Id.

As a factual matter, we have quantified the Second Injury Fund’s liability for permanent partial disability attributable to interaction between the employee’s right plantar fasciitis resultant from the primary injury and her preexisting right knee disability based on a loading factor of 10%. As we have found, there is insufficient evidence to enable us to quantify synergy related to the employee’s 5% disability of the left foot.

Award

Permanent Partial Disability Attributable to Employee’s November 3, 2008, Occupational Disease Claim:

Right Foot 12.5% x 150 week level = 18.75 weeks

Preexisting Permanent Partial Disability

Right knee 20% x 160 week level = 32 weeks
Employee: Enrika Fox

Injury No.: 08-121816

- 10 -

**Total Sum of Disabilities**  
50.75 weeks

Multiplied by Loading Factor  
x .10

**Total:**  
5.07 weeks

We modify the award and decision of the administrative law judge as to the issue of liability of the Second Injury Fund. Pursuant to 287.220, the Second Injury Fund is liable for weekly permanent partial disability at the stipulated rate of $379.23 for 5.07 weeks beginning on the date the employee reached maximum medical improvement, March 1, 2010.

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

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

The award and decision of Chief Administrative Law Judge Robert Dierkes, issued August 16, 2017, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 15th day of May 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

[Signature]
John J. Larsen, Jr., Chairman

[Signature]
Vacant
Member

[Signature]
Curtis E. Chick, Jr., Member

Attest:

[Signature]
Secretary
Employee: Enrika Fox
Injury No. 08-121816

AWARD

Employee: Enrika Fox
Injury No. 08-121816
Dependents: N/A
Before the
Employer: Missouri Department of Corrections
DIVISION OF WORKERS’
Compensation
Department of Labor and Industrial
Relations of Missouri
Insurer: Self-insured
Additional Party: Treasurer of Missouri
as the Custodian of the Second Injury Fund

Hearing Date: June 8, 2017
Checked by: RJD/cs

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: November 3, 2008.

5. State location where accident occurred or occupational disease contracted: Audrain 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 happened or occupational disease contracted: Employee engaged in employment with Employer for approximately 14 years, and while working as an employee of Employer, Employee was required to stand and walk repetitively and cumulatively on concrete or other hard surfaces in her employment with Employer. As a consequence of suffering repetitive and cumulative trauma to her feet Employee sustained an incident of occupational disease involving an injury in the nature of plantar fasciitis in both her left and right feet.

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

13. Parts of body injured by accident or occupational disease: Right & Left Feet.

14. Nature and extent of any permanent disability: 26.25 weeks - 12.5 percent to the right foot, at the 150-week level (18.75 weeks) and 5 percent to the left foot, at the 150-week level (7.5 weeks).
Employee: Enrika Fox  Injury No. 08-121816
15. Compensation paid to-date for temporary disability: None.

17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: $568.85.

COMPENSATION PAYABLE

21. Amount of compensation payable:

   26.25 weeks of permanent partial disability from Employer: ..................................................$9,954.79

22. Second Injury Fund liability: None.

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Allen, Nelson & Wilson, P.C.
Employee: Enrika Fox  Injury No. 08-121816

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Enrika Fox  Injury No. 08-121816

Dependents: N/A

Employer: Missouri Department of Corrections

Insurer: Self-insured

Additional Party: Treasurer of Missouri
as the Custodian of the Second Injury Fund

Hearing Date: June 8, 2017

Before the
DIVISION OF WORKERS’
COMPENSATION
Department of Labor and Industrial
Relations of Missouri

ISSUES DECIDED

The evidentiary hearing in this case was held on June 8, 2017, in Jefferson City, Missouri. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on August 8, 2017. The hearing was held to determine the following issues:

1. Whether Employee sustained an occupational disease arising out of and in the course of her employment with the Missouri Department of Corrections;

2. Whether the alleged occupational disease was the prevailing factor in the cause of the medical condition and disability;

3. The liability, if any, of Employer for permanent partial disability benefits;

4. The liability, if any, of Second Injury fund for permanent partial disability.
STIPULATIONS

For purposes of this hearing, the parties entered into a stipulation agreement as follows:

1. The Division of Workers’ Compensation has jurisdiction over this case;

2. Venue for the hearing is proper in Audrain County and adjoining counties; the parties agree to holding the hearing in Cole County;

3. The claim is not time-barred by Section 287.430, RSMo;

4. The notice requirement of Section 287.420 is not a bar to Claimant’s Claim for Compensation;

5. Both Employer and Employee were covered under the Missouri Workers’ Compensation Law at all relevant times;

6. That the average weekly wage was $568.85 with a compensation rate of $379.23 for temporary total disability benefits and permanent partial disability benefits;

7. Employer has paid no TTD or TPD benefits;

8. Employer paid medical benefits of $379.23;

9. Employer was self-insured for Missouri Workers’ Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Enrika Fox, as well as the narrative reports of Dr. David Volarich, the deposition and narrative reports of Dr. Craig Aubuchon, Stipulations of settlements and medical records.
The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

Facts

The evidence presented in this case established the following facts:

1. Claimant worked as a correctional officer for the Employer, Missouri Department of Corrections, for 14 years.

2. During this entire 14-year period of employment as a corrections officer, Claimant served in a utility position (or as a utility officer), except for approximately two years, when she worked in a sit-down job in the control center; and for approximately one year when she split her duties as a utility officer and a vehicle patrol officer.

3. As a utility officer, Claimant performed duties and served in multiple roles, including work as a yard officer, a wing officer, and a medical officer.

4. When working as a yard officer, Claimant was required to walk on sidewalks or stand on concrete for about 80 percent of her working day.

5. When working as a wing officer, Claimant was required to walk up and down the wings and stairs of the correctional facility monitoring inmates. This employment activity required her to be on her feet for approximately 80 percent of her working day, and the floors and stairs were hard concrete surfaces.
Employee:       Enrika Fox                Injury No.  08-121816
6. When working as a medical officer, Claimant was required to walk or stand, but regardless of whether she was walking or standing, she was required to be on her feet approximately 100 percent of the working day, as she ensured each inmate in the Clinic got in the right room for examination.

7. Work as a vehicle patrol officer involved splitting her time between this position and the utility officer position. As a vehicle patrol officer, Claimant spent four hours riding in a car. This work provided the least amount of occupational exposure causing injury to her feet. Yet, this work involved only four hours of the work day. The rest of the work day, when working with vehicle patrol, involved working as a utility officer, which provided four hours each day of occupational exposure-relating to four hours of walking and/or standing on hard concrete surfaces.

8. Regardless of her assigned position, working as a correctional officer required Claimant to wear a uniform, which consisted of wearing bulky, inflexible boots that contributed to her right and left foot pain.

9. In 2002, while treating with her primary care provider, Dr. Peter Ekern, Claimant presented with complaints that her feet hurt. The complaints of pain related primarily to her right foot, laterally. An x-ray was done that showed some soft tissue swelling but no evidence of a heel spur. Dr. Ekern prescribed Vioxx for the foot pain. Dr. Ekern did not offer a specific diagnosis for the foot pain, and he did not identify or discuss the cause of the foot pain.

10. On October 8, 2007, Claimant presented to Dr. Ekern for multiple health concerns, including complaints of having right foot and heel pain, particularly when walking at work. Dr. Ekern diagnosed right foot pain with plantar fasciitis and prescribed Celebrex and stretching exercises. Although a discussion was held that Claimant was experiencing this foot pain while walking at work, and that she
Employee: Enrika Fox

Injury No. 08-121816

is required to wear boots when she works, Dr. Ekern did not provide an opinion or explanation as to the cause of the foot pain.

11. In August 2008, Claimant noticed a pop in her right foot causing immediate pain which worsened with walking. She continued to have problems with right foot pain.

12. In 2008 and during August 2008, Claimant’s employment as a correctional officer involved primarily working in the position of a medical officer, which required her to be on her feet essentially 100 percent of her work shift. During this period, she developed right foot pain, which became progressively severe.

13. On October 24, 2008, Claimant presented to Dr. Ekern for complaints of right foot pain. The examination performed by Dr. Ekern revealed a bone spur on the calcaneus of the right foot, which he identified as a possible cause of her chronic right heel pain complaint and plantar fasciitis. An x-ray taken of the right foot on that date revealed evidence of a bone spur on the calcaneus, which Dr. Ekern noted, "could be the cause of her chronic right heel pain complaint and plantar fasciitis."

14. In diagnosing the condition as plantar fasciitis and evaluating the cause of this medical condition, in his medical record dated October 24, 2008, Dr. Ekern notes the following: "She has worked on a concrete floor for many years and most recently has been on light duty working in the mail room which she should continue until she is evaluated by an orthopedic surgeon to see if more management needs to be done for her plantar fasciitis which dates back for the many years on the concrete floor and the footwear that she is required to wear."

15. Dr. Ekern recommended that Claimant wear tennis shoes to help with the plantar fasciitis, and noted that Claimant had found her Nike Cross Trainer Tennis Shoes to help her in responding to her plantar fasciitis. Thus, on January 30, 2009, Dr.
Employee: Enrika Fox  Injury No. 08-121816

Ekern released Claimant to return to work regular duty, with the added prescription and medical allowance that Claimant return to work with the ability to wear her tennis shoes. Thereafter, Claimant wore tennis shoes at work for the duration of her employment. (Claimant is not presently working. She is disabled from MS.)

16. On November 10, 2008, Claimant reported her right foot complaints to Employer. The Employer sent Claimant to Rebekah Hudson, a nurse practitioner, who diagnosed the presenting foot pain as plantar fasciitis, and causally related this medical condition to Claimant’s employment—Claimant continually walking on concrete for 8 hours a day.

17. In providing treatment for the plantar fasciitis, Nurse Practitioner Hudson prescribed exercises to help improve the pain, and placed Claimant on “light duty”. Shortly after seeing Nurse Practitioner Hudson, Claimant developed similar left foot complaints.

18. On January 8, 2009, Employer sent Claimant to Dr. Aubuchon for examination and evaluation. Dr. Aubuchon agreed with Nurse Practitioner Hudson’s diagnosis of plantar fasciitis, but denied any relationship to work because there was no acute trauma. Additionally, Dr. Aubuchon noted as part of the reason for Claimant presenting with plantar fasciitis, Claimant was overweight and had a high instep in her foot. At this visit, Dr. Aubuchon did not address Claimant’s left foot.

19. On January 27, 2011, Employer sent Claimant back to Dr. Aubuchon for examination and evaluation of her left foot. He again diagnosed plantar fasciitis and testified that he would have provided the same diagnoses of plantar fasciitis in January 2009, if he would have been asked by Employer.
The underlying issue presented in this case is whether the employee sustained an incident of occupational disease in the nature of bilateral plantar fasciitis, referable to her right and left feet, in her employment with the employer, Missouri Department of Corrections. The parties are in agreement that the presenting medical condition and disability is in the nature of bilateral plantar fasciitis. The parties, however, offer differing and competing medical opinions as to the cause of this injury. The medical testimony is discussed below:

Independent Medical Examinations

David T. Volarich, D.O.

David T. Volarich, D.O., a physician practicing in the specialty of occupational medicine, testified by submission of his complete medical report dated March 1, 2010. Dr. Volarich performed an independent medical examination of Claimant on March 1, 2010. At the time of this examination, Dr. Volarich took a history from Claimant, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Claimant, Dr. Volarich propounded multiple medical opinions in regard to Claimant’s multiple medical conditions.

In addressing specifically Claimant’s medical condition relating bilaterally to her right and left feet, Dr. Volarich testified that Claimant suffers from bilateral foot pain, which he diagnosed as bilateral foot plantar fasciitis. In recognizing that this condition exists bilaterally, Dr. Volarich notes that the right foot is worse than the left foot. Further, Dr. Volarich opined that Claimant’s bilateral plantar fasciitis was caused by the conditions of her employment—“the repetitive impact activities, prolonged weightbearing and walking performed by [Claimant]” in her employment as a correctional officer for the extended tenure of her employment. He further noted that the occupational exposures leading up to November 3, 2008, were “the substantial contributing factors as well as the prevailing or primary factors” causing the resulting injury in the nature of plantar fasciitis.
In addition, Dr. Volarich opined that the nature and severity of this occupational injury necessitated receipt of conservative medical treatment, and has caused Claimant to experience difficulties bilaterally with prolonged weightbearing and impact activities. Additionally, Dr. Volarich notes, this occupational injury requires Claimant to wear orthotics on a daily basis, and places a restriction on the nature and type of shoes Claimant may wear. Further, Dr. Volarich opines that this occupational injury is a hindrance to her employment or re-employment.

In rendering an assessment as to the nature and extent of the permanent disability caused by this occupational injury, Dr. Volarich opined that as a consequence of having sustained a work injury in the nature of bilateral plantar fasciitis, Claimant sustained a permanent partial disability of 20 percent to her right lower extremity at the 150-week level and 10 percent to her left lower extremity at the 150-week level.

Craig Aubuchon, M.D.

Craig Aubuchon, M.D., an orthopedic surgeon, testified by deposition on behalf of the Employer. Dr. Aubuchon performed an independent medical examination of Claimant on January 8, 2009 and on January 27, 2011. At the time of these examinations, Dr. Aubuchon took a history from Claimant, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Claimant, Dr. Aubuchon provided the same opinion as to the right foot and left foot.

As with the earlier examination, Dr. Aubuchon diagnosed Claimant’s presenting bilateral feet condition as plantar fasciitis, and he continued to opine that the condition was not an occupational injury. In providing explanation for his opinion, Dr. Aubuchon noted that Claimant never sustained a specific injury; therefore, he did not feel her injury was related to her employment. Further, Dr. Aubuchon noted that Claimant’s foot structure “is the type of foot that is likely to have wear and tear types of problems such as plantar fasciitis.” (Depo. P. 17)
Employee: Enrika Fox  Injury No. 08-121816

In explaining his reference to "wear and tear", Dr. Aubuchon propounded the following testimony:

Well, I think upright locomotion is wear and tear. You know, people ---people---people get foot problems such as plantar fasciitis because they're up and walking. (Depo. p. 18) Hard surface causes increased symptoms, yes, but whether that develops it, I don't know that. (Depo. P.19)

Finally, in considering the nature and extent of any disability attributable to this medical condition, Dr. Aubuchon acknowledges that Claimant is continuing to experience pain in her heel. Yet, because he does not view this injury to be an occupational injury, he declined to issue a disability rating.

Present Complaints

Claimant continues to have pain and symptoms of plantar fasciitis about 1-2 times a month, lasting about 2-7 days when it flares. She has never had surgery on either foot. When flaring, the plantar fasciitis also affects her gait, causing her to limp when she walks.

Applicable Law

The term "occupational disease" is defined in Section 287.067, RSMo. In pertinent part, this statute states:

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must
Employee: Enrika Fox
Injury No. 08-121816

appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

After the 2005 amendments to the statutes, the definition of a compensable injury by occupational disease was changed to use the language "prevailing factor" in relation to causation. Specifically, section 287.067.2 states:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the
Employee: Enrika Fox

body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.020.3 defines "injury" using similar terms.


In this case, there is biological plausibility that the demands of the job in Claimant’s employment with the employer, Missouri Department of Corrections, caused her to suffer repetitive or cumulative trauma to her feet, which aggravated both her right and left feet condition and caused her to sustain an injury in the nature of bilateral plantar fasciitis. The prevailing factor in relation to causation is the demands of the job that required her to wear bulky boots and to stand and walk repetitively and cumulatively on the hard surfaces in her employment as a correctional officer for Missouri Department of Corrections for 14 years.

As a correctional officer for the Missouri Department of Corrections, Claimant was required to be on her feet for much of the workday. She was required to walk and/or stand constantly on hard concrete surfaces throughout the work period. She worked mostly on her feet and was required to wear bulky boots. In the performance of her work duties, she placed prolonged and repetitive stress on her feet during her 14 years as a correctional officer.

Claimant does suffer from a deformity in her feet, which causes her heel to go in, rather than out, as is normal; she also has arched feet, and she is overweight -- factors that render her susceptible to suffering injury to her feet. Simply stated, she has poor shock-absorbing feet. Yet, none of these factors, in and of themselves, cause plantar fasciitis. Rather, these factors simply predispose Claimant to suffering the presenting medical condition, plantar fasciitis. Without the occurrence of trauma to her feet, Claimant would not have suffered plantar fasciitis.

The parties offer four separate medical opinions. Three opinions- provided by Dr. Ekern, Dr. Volarich, and Nurse Practitioner Hudson- opine that the trauma caused by Claimant’s employment, wearing bulky boots and standing and/or walking repetitively, continuously, and
Employee: Enrika Fox  Injury No. 08-121816

cumulatively on the hard surfaces in her employment for 14 years is the prevailing factor in
caus[ing Claimant to suffer the occupational injury of plantar fasciitis in both her right and left
feet. Only Dr. Aubuchon, the fourth medical opinion, denies this conclusion.

Yet, Dr. Aubuchon provides testimony that contradicts and challenges his reasoning, and
his own opinion. In asserting his opinion, Dr. Aubuchon argues that being on one’s feet does not
cause plantar fasciitis. Yet, in describing Claimant’s preexisting condition, relative to the
structure of her feet, emphasizes that her feet are subject to suffering “wear and tear” and it is the
wear and tear that produces feet problems, such as plantar fasciitis. Dr. Aubuchon goes on to
state that “wear and tear” occurs when people are up and walking, and “hard surfaces causes
increased symptoms.”

Accordingly, all physicians are in agreement that plantar fasciitis is a medical condition
that may be caused by trauma to the feet. Further, all physicians are in agreement that such
trauma may be occasioned by the wear and tear associated with the walking and/or standing on
hard surfaces. Because of the nature of Claimant’s underlying foot structure, the trauma to
Claimant’s feet may not need to be as severe as might be required in other people for
development of plantar fasciitis; however, Claimant was required to be on her feet most of her
work days on hard surfaces during her 14-year employment.

Second Injury Fund claim

Regarding Claimant’s claim against the Second Injury Fund for permanent partial
disability, Claimant testified about a prior right knee condition, bilateral carpal tunnel syndrome,
and recurring headaches.

Claimant began complaining of right knee pain in July 2004 when she felt a pop in her
right knee when getting out of a vehicle. She testified that she was on light duty for a few weeks,
but eventually returned to full duty. There was no surgery. Claimant continued to perform her
job which, as detailed above, required prolonged walking and standing on concrete. Dr. Volarich
Employee: Enrika Fox Injury No. 08-121816
opined that Claimant sustained a permanent partial disability of 20% of the right knee due to patellofemoral syndrome.

Claimant developed bilateral carpal tunnel syndrome in 2003. She underwent open right carpal tunnel release in March 2004 and open left carpal tunnel release in December 2004. Claimant settled her workers’ compensation claim (Injury No. 03-100593) for 12.5% permanent partial disability of each wrist. Dr. Volarich opined that Claimant sustained a permanent partial disability of 20% of each wrist due to bilateral carpal tunnel syndrome.

Sometime around June 29, 2006, Claimant began experiencing recurring headaches. She was treated with Topamax, and, even after stopping the medication, she has not experienced a migraine since 2008. Claimant testified that she gets an occasional stress headache, but does not experience migraines anymore and her ability to perform her job duties was not affected by headaches. Dr. Volarich opined that Claimant sustained a permanent partial disability of 5% of the body as a whole due to migraines.

Claimant also sustained a work accident on March 31, 2008, causing injuries to her lumbar spine, cervical spine, and right shoulder. Claimant settled her workers’ compensation claim (Injury No. 08-025433) for 12.5% of the body as a whole related to the lumbar spine, 4.5% of the body as a whole related to the cervical spine, and 5% of the right shoulder. The evidence was clear that Claimant’s conditions from the March 31, 2008 accident had not achieved maximum medical improvement as of November 3, 2008, the date of the onset of Claimant’s bilateral plantar fasciitis. Claimant testified that she was still receiving treatment for her back, neck and shoulder on November 3, 2008. Thus, Claimant’s injuries from the March 31, 2008 accident cannot be considered preexisting permanent disabilities. The “level of permanent disability associated with an injury cannot be determined until it reaches the point of Maximum Medical Improvement.” *Hoven v. Treasurer*, 414 S.W.3d 678 (Mo. App. E.D. 2013).

To find liability of the Second Injury Fund for permanent partial disability benefits, Claimant must establish the last compensable injury – bilateral plantar fasciitis – and the
Employee: Enrika Fox  
Injury No. 08-121816


Claimant attempted to establish synergy through her testimony at hearing and the opinion reports of Dr. Volarich. Dr. Volarich provided a January 9, 2017 addendum to his earlier reports to attempt to explain synergistic effects. His conclusion is illustrative:

During a typical workday some body part hurt her, usually neck, low back, or right knee in particular. It was rare to be completely asymptomatic on a given day. There were days when everything hurt which caused her to miss work, particularly with headaches, or not being able to give her employer 100% which in my opinion is the best example of synergistic effect. (Exhibit 24, page 3.)

Dr. Volarich does not explain how Claimant’s injuries combined to create a greater degree of disability, but simply states that different body parts hurt on different days. There is no combination evidence whatsoever.

After consideration and review of the evidence, I find and conclude:

1. Claimant’s testimony was credible and consistent with the medical records, reports and other documents introduced into evidence, which demonstrated a long history of significant walking and/or standing on concrete or other hard surfaces as a part of her job.

2. This employment caused Claimant to suffer cumulative trauma to her feet, and this occupational exposure was the prevailing factor in causing Claimant to suffer the resulting medical condition and disability- bilateral plantar fasciitis.
On or about November 3, 2008, Claimant sustained an occupational disease as the term is defined in Section 287.067, RSMo. which arose out of and in the course of her employment.

To the extent there are differences in medical opinion, I find Dr. Ekern and Dr. Volarich more credible and persuasive than Dr. Aubuchon. I resolve the differences in favor of Drs. Ekern and Volarich, who I find credible, reliable and worthy of belief.

I find and conclude that wearing bulky, inflexible boots while standing and/or walking on hard surfaces for the length of time her job required was unique to Claimant's employment, and did not occur in her normal nonemployment life. This occupational exposure did not constitute a risk factor shared by the general population.

Claimant continues to have pain and symptoms associated with the condition about 1-2 times a month, lasting about 2-7 days when it flares. She has never had surgery on either foot. When flaring, the plantar fasciitis also affects her gait, causing her to limp when she walks. Further, she is limited in the shoes she is able to wear, without causing aggravation or increased pain in her lower extremities.

As a consequence of the occupational injury of November 3, 2008, Claimant sustained a permanent partial disability of 12.5 percent to the right foot, at the 150-week level (18.75 weeks); and she sustained a permanent partial disability of 5 percent to the left foot, at the 150-week level (7.5 weeks).

On March 31, 2008, Claimant injured her neck, low back and right shoulder. Those conditions had not achieved maximum medical improvement as of November 3, 2008, and, therefore, cannot be considered as preexisting
Employee: Enrika Fox
Injury No. 08-121816

disabilities for purposes of Second Injury Fund liability for permanent partial disability benefits.

9. Claimant failed to establish that the bilateral plantar fasciitis and the preexisting condition of right knee patellofemoral syndrome, operated bilateral carpal tunnel syndrome, and headaches, combined synergistically to cause a greater disability than the simple sum of the individual disabilities.

ORDER

Employer is ordered to pay Claimant, Enrika Fox, the sum of $9,954.79, which represents 26.25 weeks of permanent partial disability compensation, payable at the compensation rate of $379.23 per week.

The claim against the Second Injury Fund is denied in full.

An attorney's fee of 25 percent of the benefits ordered to be paid herein is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

I certify that on 8-16-17 I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

Made by: Robert Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation