Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 09-064994

Employee: Richard B. Hafley

Employer: Missouri Department of Corrections

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund (Open)

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 is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 27, 2010. The award and decision of Administrative Law Judge Carl Strange, issued December 27, 2010, is attached and incorporated by this reference.

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 7TH day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be modified to award more permanent partial disability benefits to employee.

First, there is no question that employee's injury to his right ankle and foot is compensable under Missouri Workers' Compensation Law. However, it is my opinion, based upon employee's testimony and the medical evidence, that the ALJ's award as to the nature and extent of permanent partial disability attributable to employee's right foot and ankle injury did not accurately account for employee's ongoing problems. It is my opinion that employee sustained 20% permanent partial disability of the right lower extremity rated at the ankle.

The ALJ found that as a result of the August 4, 2009, injury, employee sustained 2.5% permanent partial disability of the right foot and ankle at the 155 week level. In arriving at this conclusion, the ALJ considered the independent medical evaluation reports of both Drs. Krause and Volarich.

Dr. Krause opined that there was no objective evidence of any permanent disability resulting from either the June 2009 alleged occupational disease or the August 4, 2009, right foot and ankle injury. The ALJ found that Dr. Krause's report is "clearly inconsistent since his own exam found mild left plantar fasciitis, right minimal tenderness around his plantar fascial insertion, left slightly limited hindfoot motion, left mild tenderness around his talonavicular joint, and left foot degenerative joint disease, but no permanent disability." Based upon Dr. Krause's inconsistencies, the ALJ found his opinions not credible.

Dr. Volarich, on the other hand, opined that employee suffered a work accident on August 4, 2009, causing an inversion injury to the right ankle, which is the prevailing factor in causing right ankle lateral compartment strain of the anterior talofibular ligament that required conservative treatment. The ALJ found that employer failed to offer sufficient evidence to discredit the opinions of Dr. Volarich and, therefore, found Dr. Volarich's opinions credible.

While the ALJ found Dr. Volarich's opinions credible in concluding that employee's August 4, 2009, injury arose out of and in the course of his employment, the ALJ inexplicably disagreed with Dr. Volarich's disability rating. Dr. Volarich found that as a result of the August 4, 2009, injury, employee sustained 20% permanent partial disability of the right lower extremity rated at the ankle. Without explanation, the ALJ found that the nature and extent of employee's permanent partial disability is much less than that opined by Dr. Volarich. The ALJ does not cite to or reference any evidence from the record to support his lower ratings of employee's nature and extent of permanent partial disability, nor does the ALJ state that he finds Dr. Volarich's ratings to lack credibility. With nothing more, it appears that it is simply his personal opinion that

employee's permanent partial disability sustained is less than that which Dr. Volarich found.

Deciding cases based upon personal opinions, unsupported by competent evidence, is not allowed under Missouri Workers' Compensation Law. In *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173 (Mo. App. 2004) (citations omitted), the court stated:

> The Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base their findings upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence.

In sum, the administrative law judge's award is not supported by the competent and substantial evidence. Dr. Volarich's opinion regarding the nature and extent of employee's permanent disability is supported by the medical evidence and employee's testimony.

For the foregoing reasons, I believe the ALJ's award should be modified and employee should be awarded 20% permanent partial disability benefits of right lower extremity rated at the ankle.

I respectfully dissent from the decision of the majority of the Commission.

_____
John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Richard B. Hafley Injury No. 09-064994

Dependents: N/A

Employer: Missouri Department of Corrections

Additional Party: Second Injury Fund (Left Open)

Insurer: Self-Insured

Hearing Date: November 22, 2010 Checked by: CS/rf

SUMMARY OF FINDINGS

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? August 4, 2009.

5. State location where accident occurred or occupational disease contracted: St. Francois 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: The employee was walking on floors and steps that had a considerable amount of condensation, causing twisting and the turning of his right foot.

12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: Right foot and ankle.

14. Nature and extent of any permanent disability: 2.5% of the right ankle.

15. Compensation paid to date for temporary total disability: $0.00

16. Value necessary medical aid paid to date by employer-insurer: $245.96

17. Value necessary medical aid not furnished by employer-insurer: N/A.

18. Employee's average weekly wage: Not calculated.

19. Weekly compensation rate:

    $368.77 for temporary total disability
    $368.77 for permanent partial disability

20. Method wages computation: By Agreement.

21. Amount of compensation payable:

    3.875 weeks of permanent partial disability: $1,428.98

22. Second Injury Fund liability: OPEN

23. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Gary Matheny.

FINDINGS OF FACT AND RULINGS OF LAW

On November 22, 2010, the employee, Richard B. Hafley, appeared in person and by his attorney, Gary Matheny, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Assistant Attorney General Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about August 4, 2009, Missouri Department of Corrections was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about August 4, 2009, the employee was an employee of Missouri Department of Corrections and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's rate for temporary total disability and permanent partial disability is $368.77.
6. The employer has furnished $245.96 in medical aid to employee.
7. The employer has paid no temporary total disability benefits.

ISSUES:

1. Accident/Occupational Disease.
2. Medical Causation.
3. Additional Temporary Total Disability.
4. Nature and Extent of Disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

A. Medical Records of Dr. Dennis Sumski;
B. Medical Records of Desloge Foot and Ankle;
C. Medical Records of Quality Health Care;
D. Quality Health Care Light Duty Slip;
E. Report of Dr. David Volarich;
F. Report of Dr. John Krause;
G. Work Status Report of Mineral Area Regional Medical Center;
H. Application for Leave;
I. Employee's Report of Injury; and

J. Plantar Fasciitis Risk Factors.

APPLICABLE LAW:

- The employee has the burden to prove all material elements of his claim. Melvies v Morris, 422 S.W.2d 335 (Mo.App.1968). The employee has the burden of proving not only that he sustained an accident that arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. Griggs v A B Chance Company, 503 S.W.2d 697 (Mo.App.1973).
- Section 287.020.3(1) RSMo. states "the term 'injury' is hereby defined to be an injury 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."
- Under Section 287.800.1 RSMo., "administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."
- Under Section 287.800.2 RSMo., "administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts."
- Temporary total disability benefits are intended to cover the healing period, and are not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after his condition has reached the point where further progress is not expected. *Brookman v Henry Transportation* 924 S.W.2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company* 694 S.W.2d 488,489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition. *Brookman Id.* at 290.

FINDINGS OF FACT & RULINGS OF LAW:

Issue 1. Accident & Issue 2. Medical Causation

Missouri Department of Corrections ("employer") has disputed the claim of Richard B. Hafley ("employee") that he injured his right foot and ankle on August 4, 2009 and that the injury was medically and causally related to his accident. In support of this contention, Employer offered the opinion of Dr. John Krause. After examining Employee and reviewing the records, Dr. Krause noted that Employee "is a very poor historian and reports that it was his left ankle that was injured in August of 2009" despite Dr. Volarich's report that clearly identifies it as the right ankle. Additionally, Employee's injury report states that it was his right ankle and foot (Employee Exhibit I). According to Dr. Krause, Employee had essentially a normal exam and no specific injury on the right, but has a history of plantar fasciitis with very little symptoms.

Finally, Dr. Krause opined that there was no objective evidence of permanent disability (Employee Exhibit F). Dr. Krause's report is clearly inconsistent since his own exam found mild left plantar fasciitis, right minimal tenderness around his plantar fascial insertion, left slightly limited hindfoot motion, left mild tenderness around his talonavicular joint, and left foot degenerative joint disease but no permanent disability. Based on the evidence, I find that Dr. Krause's opinions are not credible.

Employee offered the opinion of Dr. Volarich in support of his contention of a work related accident and medical causation. According to Dr. Volarich, Employee suffered a work accident on August 4, 2009 causing an inversion injury to the right ankle which is the substantial contributing factor as well as prevailing or primary factor causing the right ankle lateral compartment strain of the anterior talofibular ligament that required conservative treatment. Employer has failed to offer sufficient evidence to discredit the opinions of Dr. Volarich. Consequently, I find the opinions of Dr. Volarich are credible in this matter.

Based on the evidence, I find that Employee has satisfied his burden of proof on the issues of accident and medical causation. I therefore find that Employee has sustained an accident to his right ankle and foot arising out of and in the course of his employment and that his employment was the prevailing factor in causing the resulting medical condition and disability.

Issue 3. Additional Temporary Total Disability

Employee has requested an award of temporary total disability covering the time period from October 28, 2009 until February 22, 2010. Employer-Insurer has paid no temporary total disability benefits and denied coverage for Employee's injury to his right ankle and foot. The basis of Employee's claim is that Dr. Laurence Lum took him off work on October 28, 2009 and Dr. Volarich placed Employee at maximum medical improvement on February 22, 2010. According to Dr. Lum, Employee was taken off work beginning on October 28, 2009 due to bilateral feet pain and spurs (Employee Exhibit D). In this matter, Employee has claimed injury to just his right foot and ankle and not bilateral feet. Based on evidence, I therefore find that Employee has failed to meet his burden of proof that the basis of his temporary total disability was a result of the August 4, 2009 work injury. Employer is not required to pay and Employee is not entitled to receive any temporary total disability benefits in this matter.

Issue 4. Nature and Extent of Disability

Finally, Employee has requested an award for permanent partial disability benefits for injury to his right foot and ankle. Based on the evidence and my above findings, I find that the employee suffered a two and one-half percent (2 1/2%) permanent partial disability of his right ankle at the 155 week level for the injury to his right ankle and foot as a result of the August 4, 2009 work injury. The two and one-half percent (2 1/2%) disability of the ankle is equal to 3.875 weeks. Accordingly, the employer is therefore directed to pay the employee the sum of $368.77 per week for 3.875 weeks for a total of $1,428.98.

ATTORNEY'S FEE:

Gary Matheny, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

_____

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

_____

Ms. Naomi Pearson