

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 08-035163

Employee: Rachel Hannan

Employer: David L. Kaelin, D.M.D., P.C. d/b/a Kaelin Dental Group

Insurer: American Family Mutual Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated October 6, 2009.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Carl Strange, issued October 6, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: Rachel Hannan

Injury No. 08-035163

Dependents: N/A

Employer: David L. Kaelin, D.M.D., P.C. DBA Kaelin Dental Group

Additional Party: N/A

Insurer: American Family Mutual Insurance Company

Hearing Date: August 30, 2009

Checked by: CS/kh

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? March 27, 2008
5. State location where accident occurred or occupational disease contracted: Cape 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 (See Findings)
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 was going down the stairs and her Croc caught on the carpet causing her to fall and injure her right upper extremity

12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right Upper Extremity
14. Compensation paid-to date for temporary total disability: \$2,731.81
15. Value necessary medical aid paid to date by employer-insurer? \$22,402.06
16. Value necessary medical aid not furnished by employer-insurer? \$6,239.00 (See Findings)
17. Employee's average weekly wage: \$331.36
18. Weekly compensation rate: \$220.91
19. Method wages computation: By Agreement
20. Amount of compensation payable:
 - Unpaid medical expenses: \$6,239.00 (See Findings)
 - Additional Medical Aid: Awarded (See Findings)

This award is only temporary and 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.

FINDINGS OF FACT AND RULINGS OF LAW

On August 30, 2009, the employee, Rachel Hannan, appeared in person and by his attorney, Boyd Green, for a temporary or partial award. The Employer appeared by its representative David L. Kaelin. The employer-insurer was represented at the hearing by their attorney, J. Bradley Young. At the time of the hearing, the parties agreed on certain undisputed facts and identified the facts 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 March 27, 2008, David L. Kaelin, D.M.D., P.C. DBA Kaelin Dental Group was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by American Family Mutual Insurance Company.
2. On or about March 27, 2008, the employee was an employee of David L. Kaelin, D.M.D., P.C. DBA Kaelin Dental Group and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about March 27, 2008, the employee sustained an accident.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$331.36, her rate for temporary total disability is \$220.91,
7. The employer has furnished \$22,402.06 medical aid to the employee.
8. The employer has paid temporary total disability benefits for 17 2/7 weeks at a rate of \$220.91 per week for a total of \$2,731.81.

ISSUES:

1. Arising Out Of
2. Medical Causation
3. Previously Incurred Medical Aid
4. Additional Medical Aid

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

A. Medical Records

1. Community Health and Emergency Services, Inc.,
2. Orthopaedic Associates- Dr. James Edwards,
3. The Hand Center of Orthopaedic Associates, PC,
4. The Orthopedic Center of St. Louis- Dr. David Brown,
5. St. Francis Medical Center (5-23-08 3-phase bone scan),

6. Pain Treatment Center, Inc.- Dr. James Graham,
 7. Neurological and Electrodiagnostic Institute, Inc.- Dr. David Peeples,
 8. Orthopedic Specialists- Dr. Richard Howard,
 9. Rush University Medical Center- Dr. Timothy Lubenow,
 10. Mid America Rehab,
 11. Imaging Partners of Missouri, and
 12. Pain Rehab Products, Inc.
- B. Medical Bill of University Anesthesiologist S.C.;
- C. Deposition of Dr. Timothy Lubenow; and
- D. Employee's Termination Letter.

Employer-Insurer's Exhibits

1. Photograph of Top of Stairwell;
2. Photograph of Stairwell;
3. Photograph of Break Room;
4. Photograph of Bottom of Stairwell;
5. Deposition of Dr. John Graham EXCEPT Exhibit A Subpart 1, 3, and 5 (said documents are not admitted into evidence but are retained in the file);
6. Deposition of Dr. David Brown;
7. Employee Time Card For Rachel Hannan March 27, 2008; and
8. Kaelin Dental Group Policy Manual.

FINDINGS OF FACT:

Based on the testimony of Rachel Hannan ("employee"), the testimony of Dr. David L. Kaelin, and the medical records and evidence admitted, I find as follows:

At the time of the hearing, the employee was 26 years old and currently a resident of Ullin, Illinois. The employee is a high school graduate and has also earned an associate's degree in dental technology from Southern Illinois University-Carbondale in May of 2005. Her past work experience includes employment at Donnell Dental Lab in St. Louis, Missouri in 2006 and at Community Health and Emergency Services, Inc. in Cairo, Illinois in 2007.

In August 2007, the employee was hired as a dental assistant by David L. Kaelin, D.M.D., P.C. DBA Kaelin Dental Group ("employer"). As dental assistant for the employer, the employee's duties included sterilizing instruments, setting up rooms for patients to be seen, assisting the doctor in procedures, tearing down rooms post-procedure, and doing lab work such as making retainers and crowns. Additionally, she was expected to do general daily tasks of maintaining the office, taking out the trash, vacuuming, and cleaning.

The employer's office building has a main floor on the ground level and a basement downstairs. On the main floor are the treatment rooms, a conference room, a sterilization room, two office rooms, front desk and patient lobby. In order to get to the basement, there is a set of stairs (Employer-Insurer Exhibits 1, 2 & 4). The stairway is divided into two different sections by a small landing area halfway down. After the landing, the stairway changes direction but continues with steps down to the basement. In the basement of the office, there are two locker

rooms with bathrooms, a conference room, a break room with a kitchenette, and a storage room. The stairway leading down to the basement is covered in commercial-type carpet (Employer-Insurer Exhibit 2 & 4). It is the same carpet that is throughout the ground floor of the office. It is a short hair carpet that is not looped, with individual fibers attached to the mat. At the time of the hearing, the employee testified that it is well known by the employees of the employer that the carpet has a tendency to catch one's foot. In the past, the employee and other employees have stumbled and stubbed their toes when the carpet caught their shoes.

All employees are expected to store their personal belongings in their assigned locker in order to keep them out of sight and their workplace clean during employer's working hours. The employer's policy specifically prohibited personal items, such as purses, from being upstairs on the main floor on an employee's desk or at their work station. Additionally, the employee would bring her lunch and eat in the break room on busy days in order to keep a constant flow of patients. The employee would reduce her lunch hour to less than thirty minutes on these days. Although not specifically required by the employer, bringing a lunch and taking an abbreviated lunch break in the break room was allowed and even encouraged by the employer. The employer even notes in its employee handbook that employees may receive a paid lunch break "if the nature of the work makes it impossible for you to be released for a lunch" (Employer-Insurer Exhibit 8, Page 6). On non busy days, the employee was permitted to eat out or bring her lunch. She testified that whether or not she left for lunch or ate in depended on each day's office schedule, which was checked the day before.

In order to assure compliance with most of its policies, the employer also provided each employee with a copy of "General Office Policies" (Employer-Insurer Exhibit 8). Each employee was required to review and sign the back page. In addition to addressing many other issues, the employer's policy with regard to uniforms on page 21 required them to be maintained according to OSHA regulations and prohibited wearing "T-shirts, blue jeans, sandals, open-toed shoes, and shorts". The employer's office manager, Angie Kaelin, also specifically told the employee that she was required to wear Crocs or tennis shoes and no flip flops, sandals, dress shoes, high heels, or open toed shoes. During OSHA training, the employee was told the prohibited shoes were susceptible to infection and injury for instruments. As a result of this policy, the employee wore Crocs during her employment with the employer. At the time of the hearing, the employee further testified that she did not wear Crocs outside of her employment.

In addition to all its other policies, the employer required the employees to attend a morning meeting at 6:50 a.m. which was ten minutes before patients were seen. At these meetings, they would discuss the day's agenda and items of concern. Employees were expected to clock in prior to the meeting. On March 27, 2008, the employee arrived at the employer's office prior to the morning meeting. She had a key to the door and the alarm code as contemplated on page 22 in the Office Security section of Employer's "General Office Policies" (Employer-Insurer Exhibit 8). According to the employee, she arrived that morning at her typical time around 6:45 a.m. and other employees arrived just about the same time. She then unlocked the doors, turned off the alarm and turned on the lights. According to the Dr Kaelin, he arrived around 6:00 a.m. turned off the alarm, turned the lights on, and turned on the computers.

The employee then turned on the light to the stairway and proceeded down the stairs to turn on the basement lights, put her purse in her locker, and her insulated lunch bag and drinks in the refrigerator in the break room. On the day of the accident, the employee was wearing medical scrubs with Croc shoes as directed by the employer. The employee was in a hurry to make the meeting on time since Dr. Kaelin was adamant about punctuality and even had a discipline policy for tardiness (Employer-Insurer Exhibit 8, Page 30, No. 24). Just two or three steps before the employee reached the landing as shown in Employer-Insurer Exhibit 4, the toe of her Croc caught the carpet causing the employee to fall forward. Her chin contacted the wall and her right side contacted the stairs and the landing trapping the items she was carrying between her right arm and body. She had the immediate onset of pain up and down her right side, including her ankle, knee, hip and right shoulder and arm including her wrist and hand. No one witnessed the accident other than the employee. The employee sat on the landing for a minute, gathered her items, and continued on down into the basement to put her items away. The employee then clocked in at 6:49 a.m. (Employer-Insurer Exhibit 7). At the hearing, the employee testified that she told employer's office manager, Angie Kaelin about the fall following the morning meeting. Ms. Kaelin offered no treatment, but told her she should use a hot tub for the soreness. The employee then returned to work for the rest of the day. At the hearing, Dr. Kaelin testified that he heard the commotion when the employee fell and came out and met her in the hallway and asked her if she was alright. According to Dr. Kaelin, the employee responded she was alright and did not need medical attention. The employee further testified that later that day or the next day she was limping, and Dr. Kaelin asked if her about it. According to the employee, he made a face and moved on. The employee worked with the pain all day Friday also.

On Saturday, March 29, 2008, the employee's right arm was hurting worse and it was beginning to swell. Ms. Hannan also noticed that some of her nails were beginning to turn purple. The employee called Angie Kaelin prior to going to the doctor and asked who was going to pay for it since she did not have insurance. Mrs. Kaelin referred her to Dr. Kaelin's cell phone. While speaking with Dr. Kaelin, he informed the employee he would pay for the medical bill to get her fixed and back to work. So, the employee went to Community Health & Emergency Services in Cairo, Illinois, for treatment where she saw Dr. Wong. The records clearly reflect the history of falling down 2-3 steps at work, the employee reporting pain of 9 to 10 with pain and tenderness in the right upper extremity and tenderness in the right hip, and the Doctor noting the right hand was swollen and discolored and cold. X-rays were done on the right shoulder, elbow, wrist, and hip which revealed no bone fracture. Dr. Wong prescribed pain medicine and applied an ACE bandage. On her next visit, Dr. Wong referred the employee out for evaluation (Employee Exhibit A1).

On April 17, 2008, the employee went to Dr. James Edwards of Orthopaedic Associates in Cape Girardeau, Missouri. Dr. Edwards examined her, noted her symptoms including mild glossiness of the skin with some numbness and burning, and diagnosed her with right upper extremity regional pain syndrome. He recommended physical therapy for Regional Sympathetic Dystrophy (RSD) [now referred to as complex regional pain syndrome (CRPS)] symptoms including desensitization and ordered no use of the limb (Employee Exhibit A2, Pages 1-2). The employee took her physical therapy at The Hand Center of Orthopaedic Associates, P.C. Over the next few weeks, the physical therapist noted sub maximum effort due to discomfort, her right hand was very edematous and shiny, her right hand was slightly larger than the left, had

numerous active trigger point areas around her shoulder area, lacked sensation in light touch for all fingers but could identify one and two pin points on all fingers, and the employee complained of varying symptoms from burning, cold, tingling, throbbing (Employee Exhibit A3, Pages 1-10). On May 8, 2008, Dr. Edwards noted that her complaints were continuing and ordered an MRI Arthrogram. Following the MRI, Dr. Edwards noted it showed a partial tear of the scapholunate ligament and recommended that the employee be referred to a hand surgeon. Further, he continued with his RSD diagnosis and treatment (Employee Exhibit A2, Page 9).

On May 21, 2008, the employee's care was transferred to a hand surgeon, Dr. David Brown, in St. Louis, Missouri. At that time, Dr. Brown noted the employee's complaints which were consistent with her past history and then examined her. Upon examination, he observed "some clear visible difference between the right hand and left hand", "the right hand has some mild diffuse swelling around the fingers compared to the left", "the right hand was noted to be cooler to the touch compared to the left", and "she did have some clinical signs of RSD in the right hand". As a result, he recommended she use a splint for comfort, continue physical therapy, undergo a bone scan, and get an evaluation by a pain management specialist (Employee Exhibit A4, Pages 7-8). The bone scan was completed on May 23, 2008, and found that the right wrist was normal with increased flow, blood pool activity as well as bone activity in the region of the left wrist which could be due to RSD (Employee Exhibit A5).

The employee saw pain management doctor, John Graham, in St. Louis, Missouri, on May 28, 2008. On physical exam, Dr. Graham noted positive findings of the right hand being somewhat cooler than the left hand with some mild swelling of the right hand when compared to the left. He also noted her complaints which were consistent with her past complaints, read the three-phase bone scan report as normal, and concluded that he did not have sufficient findings of RSD to give that diagnosis based on AMA Guide to Permanent Impairment. After stating that her self-administered psychologic test showed an elevation into clinical range of her somatization and depression scales, He opined that it is consistent with a patient has subjective complaints out of proportion to objective findings and the subjective complaints may be recalcitrant to treatment. Finally, he recommended she take an anti-inflammatory as well as Neurontin, and that she continue in therapy (Employee Exhibit A6, Pages 15-16). Later that day, the employee returned to see Dr. Brown who explained that Dr. Graham does not believe she has RSD and that the bone scan reading is not consistent with RSD. He then recommended that she continue in therapy and continue under the care of Dr. Graham (Employee Exhibit A4, Page 13).

On June 25, 2008, the employee returned to see Dr. Graham who continued with his prior opinion, but noted that since the employee's complaints were spreading into her face and left upper extremity that she would need a nerve conduction study (NCS) (Employee Exhibit A6, Page 20). Dr. Peoples performed the NCS and found that it was normal for the right and left upper extremity (Employee Exhibit A7). Later that day, she returned to Dr. Brown's office noted that the NCS was normal and ordered a repeat MRI Arthrogram to assess the scapholunate ligament injury (Employee Exhibit A4, Pages 18-19). The MRI was completed on July 2, 2008, and found a small central defect within the scapholunate ligament, but no evidence of tear or widening of the scapholunate space (Employee Exhibit A11). The employee then returned to Dr. Brown who noted the findings of the MRI and explained that "with regard to any diagnosis of possible RSD or a complex regional pain syndrome I would defer to the pain management specialist for their opinions". Dr. Brown concluded by stating that he had nothing further to

offer from a hand surgeon perspective and recommended a second opinion from another board certified hand surgeon to make sure he wasn't missing something (Employee Exhibit A4, Pages 25-26).

The second opinion came from Dr. Richard Howard of St. Louis, Missouri on July 14, 2008. After reviewing the records and examining the employee, he noted that "the patient's diffuse pain pattern and the absence of objective findings are not consistent with any orthopedic pathology. He then recommended a transition over the next 8 to 10 days to full duty without restriction which would place her at maximum medical improvement (MMI) (Employee Exhibit A8, Pages 6-8). That same day, she was seen again by Dr. Graham who opined that the employee was at MMI from a pain management perspective and released her with a finding of no permanent partial disability (Employee Exhibit A6, Page 25). Following these reports, the employer informed the employee that they were not treating her anymore. The employee returned to work and was subsequently fired on August 28, 2008 since "her work performance and overall attitude for your work has not improved although you have been fully released by your doctors" (Employee Exhibit D).

The employee then sought treatment on her own with Dr. Timothy Lubenow of Rush Pain Clinic at Rush University Medical Center in Chicago, Illinois. On November 5, 2008, Dr. Lubenow reviewed the employee's history, examined her, and reviewed the film of the three phase bone scan and the report. With regard to the bone scan, he noted that the previous reading has a difference in labeling of between the left and right upper extremity, appears to fail to note the decreased profusion to the right upper extremity in the initial phase of the test that he has found, and fails to note the increased periarticular uptake symmetrically throughout the right hand that he found. Additionally, he noted the employee's complaints which were consistent with her history and upon examination observed decreased grip strength, decreased temperature in the distal forearm, a cooler right palm of 1.4 degrees Fahrenheit compared to the left palm, allodynia up to the right elbow, and tenderness from hand and wrist with edema in the fingers. Following a quantitative sudomotor axonal reflex test (QSART) which tests for sweat levels and a psychological examination, Dr. Lubenow opined that the employee has CRPS of the right upper extremity and recommended a series of stellate ganglion blocks with medication of Cymbalta and Ultram (Employee Exhibit A9, Pages 1-3).

On January 14, 2009, the employee returned to Dr. Lubenow with continued complaints of burning pain in the right hand and fingers, coolness of the right arm, increased sweating, fingernail changes, edema, and decreased range of motion. His physical examination revealed allodynia, tenderness and edema, a shiny appearance to the skin, and decreased range of motion. Following his review of the positive QSART test for significant increase in sweat production of the right upper extremity, Dr. Lubenow performed a stellate ganglion block which gave the employee complete relief of her arm pain. Finally, he recommended the series of the stellate ganglion blocks coupled with physical therapy and home exercises (Employee Exhibit A9, Page 11). The employee received the second stellate ganglion block on January 22, 2009, and the third on January 29, 2009 (Employee Exhibit A9, Pages 15-18).

Dr. Lubenow next saw the employee on February 12, 2009 and noted that she had less response to the second and third stellate ganglion block as compared to her first one. Following his examination, Dr. Lubenow recommended an increase the dosage of Cymbalta, a 5-day

continuous epidural infusion, a more aggressive physical therapy, and one IV regional sympathetic block. He continued with his diagnosis that the employee has persistent CRPS (Employee Exhibit A9, Page 19). On March 11, 2009, the employee returned to Dr. Lubenow who noted her complaints which were consistent with her past ones and maintained his diagnosis of CRPS with the recommended treatment plan as described on February 12, 2009 (Employee Exhibit A9, Pages 23-24). An itemized billing for Dr. Lubenow's treatment has been admitted as Employee Exhibit B.

On March 12, 2009, Dr. Timothy Lubenow gave his deposition with a copy of his Curriculum Vitae (CV) being incorporated as Deposition Exhibit A. A brief review of his CV indicates that since he began practicing pain management, he has published two chapters in two different books, published three original publications, published six abstracts, given twenty-seven lectures, and has a current research project specifically on the topic of CRPS (Employee Exhibit C, Deposition Exhibit A, Pages **5**; **6** #s 15-16; **7** #s 17-18; **8** #21; **10** #43; **11** #s 43-45, 51-52; **12** #63; **13** #19; **14** #s 33-34, 41-42, 46; **15** #s 61-62; **16** #s 72-73, 75-78, 80-81, 83, 86; **17** #s 87-88, 92, 97, 100; **18** #s 111, 113, 122, 125). Additionally, Dr. Lubenow is currently the vice-president of the International Research Foundation for RSD/CRPS and has participated in a national task force (Employee Exhibit C, Deposition Pages 6-7). Dr. Lubenow is on public record as being critical of the AMA Guides to Permanent Impairment because he has not been provided with the evidence that the AMA relied upon to make the guide concerning requiring eight of eleven factors of CRPS/RSD, rare in his practice to find someone who has that many findings, and that a task force called the International Association for the Study of Pain (IASP) in the mid 1990's came up with new diagnostic criteria (Employee Exhibit C, Deposition Pages 34-37). Based on the employee's complaints and his objective observations, Dr. Lubenow opined that the employee meets the IASP diagnostic criteria and the AMA guidelines for CRPS (Employee Exhibit C, Deposition Pages 38-39). After noting that CRPS can cause symptoms in the opposite extremity and in the face, he opined that the employee's work injury of March 27, 2008 was the prevailing factor in the cause of CRPS and the employee's need for further treatment (Employee Exhibit C, Deposition Pages 43-44). Finally, Dr. Lubenow testified that he has seen similar cases like the employee's case in the thousands of CRPS patients that he has treated and feels like he can help her if he continues to treat her (Employee Exhibit C, Deposition Page 122).

Following Dr. Lubenow's testimony, Dr. Graham reviewed his deposition and issued a subsequent letter on April 3, 2009. His letter provides his basis for not believing Dr. Lubenow since he found two articles critical of IASP criteria, irregular examination findings, unclear understanding of his interpretation of the bone scan, and studies showing a lack of evidence to prove any benefit from sympathetic blockade (Employee Exhibit A6, Pages 26-28).

On April 6, 2009, Dr. David Brown gave his deposition. At that time, he testified that he did not feel she has RSD/CRPS since her hand looked better than the week before, the bone scan was not consistent with the diagnosis, and the pain management physician did not feel she met the criteria (Employer-Insurer Exhibit 6, Deposition Page 18).

On April 16, 2009, Dr. John Graham gave his deposition with a copy of his CV being incorporated as Deposition Exhibit 1. A brief review of his CV does not indicate any participation in the education of CRPS to the medical community. At his deposition, he testified

that he sees between 30 and 50 RSD patients per year (Employer-Insurer Exhibit 5, Deposition Page 7). Further, Dr. Graham admits that the employee may have had seven of the eleven AMA criteria at different times but opines that she does not have CRPS since she doesn't meet those criteria (Employer-Insurer Exhibit 5, Deposition Page 85-88). Finally, Dr. Graham notes that he has seen literature that suggests that CRPS can migrate from one extremity to another but has never seen it in a patient.

At the time of the hearing, the employee still complains of daily changes in her right upper extremity's symptoms that include pain, swelling, temperature fluctuations, numbness, tingling, hypersensitivity, discoloration, decreased range of motion, increased sweating, and nail bed changes. During the hearing, the employee's arm was pale and purplish and noticeably cooler than her left arm. While she was testifying, the employee also kept her right arm close to her body rested on the chair with very little to no movement.

APPLICABLE LAW:

- 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.”
- Section 287.020.3(2) RSMo. states “an injury shall be deemed to arise out of and in the course of 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 Bivins v. St. John's Regional Health Center, 272 S.W.3d 446 (Mo. App. 2008), the Court of Appeals affirmed the Industrial Commission's award denying compensation and held that where an injury was the result of an unexplained fall, it was unable to determine that the employee's injury 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 Miller v. Missouri Highway Commission, 287 S.W.3d 671 (MO en banc. 2009), the Missouri Supreme Court held that an injury was not compensable where the employee was injured while at work but the injury was not due to any condition of employment. Further, the Court noted that an injury will not be deemed to arise out of employment if it merely happened to occur while working.
- Under the Mutual Benefit Doctrine, “an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee it is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and totally unrelated to his employment. Accordingly, an injury resulting from such an act arises out of and in the course of the employment; and this rule is applicable even though the advantage to the employer is

slight”. Whamhoff v Wagner Electric Corporation, 190 S.W.2d 915,919(Mo. banc 1945).

- In Blades v Commercial Transport, Inc., 30 S.W.3d 827(Mo. banc 2000), The Missouri Supreme Court refused to extend benefits under the Mutual Benefit Doctrine to an employee who slipped and fell on ice while appearing as a witness for a co-employee in an union grievance proceeding. The Supreme Court held that “when an employee’s injury occurs off the employer’s premises, when the employee is not exposed to any special hazard associated with employment, where the employer has not by words or conduct encouraged the employee’s act and has no knowledge of the employee’s act, and where the benefit to the employer is speculative, remote and attenuated, the Mutual Benefit Doctrine is inapplicable”. The Supreme Court added “the test is not whether any conceivable benefit to the employer can be articulated no matter how strained, but whether the act that resulted in the injury is of some substantive benefit to the employer. That is not to say the benefit needs to be tangible or great. But the benefit cannot be so remote that it deprives the Mutual Benefit Doctrine of meaning”. *Id.* at 831.
- 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).
- 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.”
- Under Section 287.140.1 RSMo., “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 from the effects of the injury”. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. Emert v Ford Motor Company, 863 S.W. 2d 629 (Mo.App. 1993); Shores v General Motors Corporation, 842 S.W. 2d 929 (Mo.App.1992) and Hendricks v Motor Freight, 520 S.W. 2d 702, 710 (Mo.App.1978).
- Under Section 287.140.2 RSMo., “if it be shown to the division or the commission that the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or the commission may order a change in the physician, surgeon, hospital or other requirement.”

RULINGS OF LAW:***Issue 1. Arising Out Of***

At the time of the hearing, American Family Mutual Insurance Company (“employer-insurer”) denied liability for the employee’s accident claiming that the employee’s injury did not arise out of and in the course of her employment. The employer-insurer’s argument was three-fold. First, the employee was attending to personal matters and not work related matters. Second, the employee’s accident occurred before she clocked in and therefore occurred outside working hours. Third, catching her Croc on the carpet is not sufficient to support a finding that the injury arose out of and in the course of employment. The employer-insurer argues that Bivins v. St. John’s Regional Health Center and Miller v. Missouri Highway Commission supports this position.

With regard to the first two arguments, the determination partially depends on the credibility of the employee and Dr. David Kaelin. It was clear from his demeanor, attitude, and responses at the hearing that Dr. Kaelin’s testimony was self-serving and not credible. Dr. Kaelin even testified that turning off the alarm, unlocking the door, and turning on the lights are personal matters. Further, he noted that the employee’s assigned duties do not include unlocking the door or turning off the alarm. On the other hand, the employee has had continual consistent complaints throughout this entire process. Further, the evidence clearly supports the employee’s version of accident, injury and treatment. Consequently, I find that that the testimony of Dr. David Kaelin is not credible and the testimony of the employee is credible. Since the employee testified she unlocked the door, turned off the alarm, and turned on the lights, the employee was clearly engaged in work related activities prior to her accident. At the time of the accident, the employee was clearly complying with the employer’s policies of maintaining a clean workspace and consistent patient flow by placing her purse in the locker and lunch in the refrigerator at the time of the accident. Therefore, I find that the employee’s work related activities began when she unlocked the door. According to the employer’s General Office Policies, this represents time worked (Employer-Insurer Exhibit 8). The employer-insurer’s first two arguments are therefore found to be unpersuasive. Even without my above findings, the employer-insurer’s argument would still fail because of the mutual benefit doctrine. The employee was clearly complying with the employer’s policies of maintaining a clean workspace and consistent patient flow by placing her purse in the locker and lunch in the refrigerator at the time of the accident. I would then still have to find that the accident arose out of an in the course of employment based on the mutual benefit doctrine.

The basis of the employer-insurer’s final argument is that the rulings in Bivins and Miller support a finding that the injury did not arise out of and in the course of employment. Both of those cases are distinguishable from the present case. In each case, the employee suffered an unexplained accident. Neither claimant could link any characteristic of work that could have caused or contributed to their injury. Thus, each court denied compensation since it merely occurred at work, and it could not determine that the injury did 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 the present case, the employee was told by the employer to wear Crocs or tennis shoes. The employee wore her Crocs only

during work. Crocs had been known to catch the carpet in the past at work which had caused tripping and stubbing toes. At the time of the accident, the employee was wearing her employer directed Crocs which snagged on the carpet causing her to fall. Based on the evidence, I therefore find that the accident is the prevailing factor in causing the employee's injury and 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. Thus, I find that the employee's injury arose out of and in the course of her employment.

Issue 2. Medical Causation

The employer-insurer has disputed that the employee has CRPS and that it is medically and causally related to the employee's accident of March 27, 2008. In support of its position, the employer-insurer has offered the records and testimony of Dr. David Brown and Dr. John Graham. The employee has offered the records and testimony of Dr. Timothy Lubenow to support her position that she has CRPS from the accident. The issue of medical causation really breaks down to the credibility of Dr. Graham vs. Dr. Lubenow since Dr. Brown acknowledges that he defers to the pain management specialist for the diagnosis of CRPS/RSD.

When comparing the two doctors, Dr. Lubenow is clearly more qualified to provide a diagnosis of CRPS than Dr. Graham. Dr. Lubenow has treated thousands of CRPS patients, published numerous CRPS articles, given numerous CRPS lectures, participated on CRPS task forces, is board certified in anesthesiology and pain medicine, and is currently performing research on CRPS. Dr. Graham treats 30 to 50 CRPS patients a year, does not publish CRPS articles or give CRPS lectures, has not participated in any CRPS task forces, is not board certified, and has not done any CRPS research projects. While Dr. Lubenow actually reviewed the films of the three phase bone scan and found consistencies with CRPS that were misread in the report, Dr. Graham based his opinion on the bone scan report. A review of the evidence makes it clear that Dr. Lubenow's experience and understanding of CRPS cannot be matched by Dr. Graham. Based on the evidence, I find that the opinions of Dr. Lubenow are credible and the opinions of Dr. Graham are not credible.

With regard to Dr. Brown, he clearly defers to the pain management specialist for the diagnosis of CRPS/RSD and acknowledges that he is not an expert in the field. Additionally, Dr. Brown did not review the films of the three phase bone scan, but merely relied on the report. Consequently, I find that Dr. Brown's opinions are not credible. Since Dr. Howard based his evaluation on the records and opinions of Dr. Brown and Dr. Graham, I find that his opinions are therefore not credible.

At his deposition, Dr. Lubenow opined that the employee's work injury of March 27, 2008 was the prevailing factor in the cause of CRPS and the employee's need for further treatment (Employee Exhibit C, Deposition Pages 43-44). Based on the evidence, I therefore find that the employee's work injury of March 27, 2008 was the prevailing factor in causing her CRPS and resulting need for treatment. Further, I find that the employee's injury to her right upper extremity and the need for medical treatment for CRPS is medically causally related to the work accident.

Issue 3. Previously Incurred Medical Aid

The employee has requested an award of medical bills totaling \$6,239.00 for treatment for CRPS. The employer-insurer has disputed these bills on the basis of medical causation and necessity. The bills submitted by the employee are charges from Dr. Timothy Lubenow. Based on my above rulings regarding causation, the evidence also supports a finding that the charges were reasonable and the treatment was causally related to the employee's CRPS. The employer-insurer is therefore directed to pay to the employee the sum of \$6,239.00 for the Dr. Lubenow bills related to the treatment of the employee's CRPS.

Issue 4. Additional Medical Aid

The evidence clearly supports a finding that the employer-insurer, after notice of the employee's need for additional treatment for her CRPS, continually refused and neglected to provide appropriate treatment, and therefore waived its right to select the authorized treating physician.

The evidence also indicates that, as a result of the employer-insurer's decision not to provide treatment for the employee's CRPS, the employee has been deprived of completing the reasonable treatment necessary to cure and relieve her of the effects of her injury. Based on the evidence and my rulings above, I further find that under Section 287.140.2, the requirements of Section 287.140 have been furnished in such a manner that there is reasonable ground to believe that the health and recovery of the employee has been endangered thereby. The Division may therefore order a change in the treating physician.

The employer-insurer is therefore ordered to provide additional medical treatment in accordance with Section 287.140, and the provisions of this award. Based on the finding of a waiver and the necessity for an order to change the treating physician, I further order that the employer-insurer provide the additional treatment with Dr. Timothy Lubenow as the authorized treating physician. If Dr. Lubenow is not available or refuses to accept the position, the employee's treatment may be transferred to another mutually agreeable orthopedic surgeon or specialist.

ATTORNEY'S FEE:

Boyd Green, 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.

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Date: _____

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Naomi Pearson

