

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

Injury No.: 06-014905

Employee: Peggy Humphreys
Employer: Fort Zumwalt R-II School District
Insurer: Self-Insured by Missouri United School Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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, 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 as corrected July 29, 2008.

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 Chief Administrative Law Judge Leslie E. H. Brown, as corrected July 29, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

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 should be reversed.

It is undisputed that employee sustained an ankle sprain when her ankle rolled as she descended a step while she was working. At the time of the accident, employee had her hands full with work materials she had to bring to her session. Employee did not slip, trip, or fall. There was nothing on the step that contributed to employee's fall and employee does not allege a defect in the step. In employee's words, "I misstepped and my ankle rolled." Employee admitted the materials she was carrying did not cause the misstep. In her non-employment life, employee descended stairs, including stairs in her own home leading to her garage and to her basement.

The Commission majority concludes that employee's ankle injury arose out of her employment. I disagree. The Missouri Workers' Compensation Law puts the burden on employee to show that there is a rational connection between the accident, the injury, and the employment. A statutory test for the connection is set forth in §287.020.2.3(2) RSMo:

An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Employee has shown that the accident was the prevailing factor in causing her ankle injury so the first prong of the test is satisfied. Employee failed to prove the second prong of the test. Employee failed to show that her ankle injury did not come from a hazard unrelated to her employment. Stated conversely, employee failed to show that her ankle injury came from a hazard related to her employment. The record reveals that employee is exposed to the risks inherent in descending stairs in both her employment and her nonemployment life.

The administrative law judge found employee was exposed to a unique employment risk because employee had her hands full with work materials she was required to bring to her session. Perhaps there are risks associated with walking down stairs with hands full, but those risks are not relevant to *this* case because employee testified that the carrying of the materials did not cause *this* misstep. Since the materials did not cause the misstep, employee's injury did not come from a hazard or risk related to the carrying of materials. I conclude employee's injury did not arise out of her employment.

I would reverse the award of the administrative law judge. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

TEMPORARY OR PARTIAL AWARD (CORRECTED)

Employee: Peggy Humphreys

Injury No. 06-014905

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: ---

Employer: Fort Zumwalt R-II School District

Additional Party: State Treasurer, as Custodian of
Second Injury Fund

Insurer: Self-Insured by Missouri United School
Insurance

Hearing Date: 02/21/08

Checked by: LEHB/cmh

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: March 1, 2006
5. State location where accident occurred or occupational disease contracted: St. Charles County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Working as a parent educator at home visit and slipped/misstepped
12. Did accident or occupational disease cause death? No Date of death? ---

- 13. Parts of body injured by accident or occupational disease: Right and left ankle/foot
- 14. Compensation paid to-date for temporary disability: \$0.00
- 15. Value necessary medical aid paid to date by employer/insurer? \$0.00
- 16. Value necessary medical aid not furnished by employer/insurer? \$7957.80 (See Award)
- 17. Employee's average weekly wages: \$566.15
- 18. Weekly compensation rate: \$377.43/\$365.08
- 19. Method wages computation: By Award

COMPENSATION PAYABLE

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20. Amount of compensation payable:

Unpaid medical expenses \$7957.80 (See Award)

12 days of temporary total disability (or temporary partial disability)..... \$647.04

Future Medical CareFuture Medical Care (See Award)

Total\$8604.84 (See Award)

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

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Colleen J. Vetter, Attorney for Claimant

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Peggy Humphreys

Injury No: 06-014905

Before the
DIVISION OF WORKERS'
COMPENSATION
 Department of Labor and Industrial Relations of Missouri
 Jefferson City, Missouri

Dependents: ----

Employer: Fort Zumwalt R-II School District

Additional Party: State Treasurer, as Custodian of
Second Injury Fund

Insurer: Self-Insured by Missouri United
School Insurance

Checked by: LEHB/cmh

This is a hardship hearing in Injury Number 06-014905. The Claimant is seeking a Temporary or Partial Award, but if the evidence warrants that there be a finding of no compensability or a finding of the Claimant being at maximum medical improvement a Final Award could be issued in either one of those cases . The claimant, Peggy Humphreys, appeared in person and by counsel, by Attorney Colleen J. Vetter . The Employer/Insurer, Fort Zumwalt R-II School District/self-insured by Missouri United School Insurance, administered by Gallagher Bassett Services, appeared by and through counsel, Attorney Elizabeth S. Shocklee. The claim against the Second Injury Fund is to remain open, and the Second Injury Fund was not present at this hearing.

The parties entered into certain stipulations, and agreements as to the complex issues and evidence to be present in this hearing.

STIPULATIONS:

On or about March 1, 2006: a. the Claimant was in the employment of Fort Zumwalt R-II School District in St. Charles County, Missouri; b. the Employer and Employee were operating under and subject to the provisions of the Missouri Workers' Compensation law; c. the Employer's liability was self-insured by Missouri United School Insurance and administered by Gallagher Bassett Services. d. The Employer had notice of the injury. e. A claim for compensation was filed within the time prescribed by law. f. No temporary total disability benefits have been paid. g. No medical aid has been provided.

ISSUES:

This is a hardship hearing in Injury Number 06-014905. The Claimant is seeking a Temporary or Partial

1. Whether or not the Claimant suffered an accident arising out of and in the course of her employment
2. Medical causation
3. Liability of past medical expenses
4. Future medical care
5. Rate
6. Nature and extent of the temporary total disability for a period of 12 days
7. Nature and extent of permanent partial disability

EXHIBITS:

The following exhibits were admitted into evidence:

Claimant's Exhibits:

No. A: Deposition transcript of Dr. David Volarich, D.O. taken on behalf of the claimant on February 11, 2008 and attached exhibits

No. B: Medical records from Unity Corporate Health (NOTE: On the front of this certification it says St. John's Urgent

Care Center, but when you turn the page it's a Unity Corporate Health record.)

No. C: Medical records and medical bills from Dr. Emil DiFilippo, M.D.

No. D: Records from Frontier Integrated Health Center, Inc.

No. E: Two-page exhibit showing billing for MRIs, one dated 4-19-06 and the next dated 5-4-06

Employer/Insurer's Exhibits:

No. 1: Original claim for compensation filed with the Division of Workers' Compensation

No. 2: Answer to the original Claim for Compensation filed with the Division of Workers' Compensation

No. 3: Report of Injury filed in this regard and filed with the Division of Workers' Compensation as well

No. 4: Answer filed to the oral Amended Claim for Compensation (Oral amendment to Claim For Compensation Claimant's Attorney Vetter placed on record at the beginning of the hearing)

No. 5: Copy of a wage statement of Ms. Humphreys spanning from 9/15/05 to 9/1/06

No. 6: Deposition transcript Dr. John Krause, M.D. taken on behalf of the employer/insurer on February 20, 2008, with attachments 1 and 2

No. 7: Letter from ACS Recovery Services indicating benefits that have been paid by Group Health Plan

FINDINGS OF FACTS AND RULINGS OF LAW

ISSUES: Whether or not the Claimant suffered an accident arising out of and in the course of her employment; Medical causation

Peggy Ann Humphreys, the claimant, testified that she lives in St. Peters, Missouri. My date of birth is 2-19-1958, Humphreys stated, and I am 50 years old. I am about 5-foot-3 inches tall, and I weigh about 180 pounds, the claimant said. Humphreys stated that on the date of injury, March 1, 2006, she weighed about 220 pounds. She agreed that her weight has gone up as well as gone down since the date of the injury.

The claimant testified about the type of work she was doing in regards to her claim for workers' compensation benefits related to the accident she had on March 1, 2006. On that date the type of work I was doing, I was a parent educator for Fort Zumwalt School District and I was doing a private home visit, Humphreys stated. She agreed that doing a private visit meant you went to someone's home.

Explaining about what her job entailed for a home visit, Humphreys testified - I would start out by going to the office, pulling the file, getting the paperwork prepared for that specific file. Then we keep all of our toys and work material, as far as that, not the paperwork, but the toys and that end of it, at our homes, she stated. I would go home and look at a file, Humphreys testified, we would call them phases because they're specific age appropriate toys for specific developmental tasks. That specific visit the age range I was addressing in the home was a three-year, Humphreys said. In my work there are very specific age ranges, Humphreys stated, for the lesson I took that day it was just 36 months. On that day the name of the people I was visiting was Wyman, Humphreys said. She agreed that it was a residence, a home that she went to. Present in the home that day was Debbie Wyman, the mother, and her two children - her daughter and her son, Humphreys said. Her son was right around three years of age, and her daughter was 4, four-ish, Humphreys stated. Explaining her plan for the visit that day, Humphreys testified it's called the three-year birthday party. We use that as a final visit because regular family home visits stop at three years, she explained. She was asked if she had been there to visit the mother and/or the two children. Just the mother and the 3-year-old, Humphreys answered. She agreed that the 4-year-old was there, too. When I arrived at the home I parked in their driveway, Humphreys stated. She was asked to describe what she remembered about going from her car up to the front door. There's a concrete sidewalk up to the front porch and a step up onto the front porch that was approximately three or four steps to the front door, Humphreys stated. She agreed that she went inside the house and did her visit.

This concrete porch went across the entire front of the house, she said. Humphreys was asked if she remembered if there had been a railing when she stepped off onto the porch. No, she answered. I brought my bag of toys, their personal file and my car keys into the house with me, Humphreys stated. She was asked what was in the file; how many pages, how thick was it. It wasn't very thick, Humphreys answered, there was probably about 10 to 15 pieces of paper. She agreed that she was also holding her keys. Describing the bag she was carrying, Humphreys stated it was about 16 by 16 width and it had hold handles on it. You couldn't put it over your shoulder, she said, it wasn't long enough straps to put it over your shoulder, you could only carry it. In the bag was one box that I have decorated like a birthday cake that kept supplies on the inside - paper plates,

stickers, napkins, birthday candles; things to decorate the cake with, Humphreys stated. Then there was another box in there that carried markers, scissors, and thicker paper for the child to cut, Humphreys testified. There was a bag that had a soft crown with different jewels and things to decorate the crown, she said. There was a game, I can't remember what game it was now, Humphreys stated, and balloons. There was puzzles, which was the game probably, Humphreys stated. I know there's just something else in there for them to do, I just can't remember, she said.

The visit lasted approximately one hour, Humphreys testified. She was queried if she had said goodbye inside or outside the house when it was time to leave. Well, it was our final visit because the child was going to be turning 3, Humphreys responded, so there was just a lot of chatting to the door. Debbie opened the front door for me, Humphreys stated. When I went out onto the porch I think the kids were right behind me, Humphreys said, and Debbie stood at the door with the door open as we continued to talk and the kids were just playing. It was a beautiful day, Humphreys said. She was asked how she was holding the things she was carrying out. I had the bag in my right hand, and in my left hand I held the file and my keys, Humphreys answered. As I stepped off the porch the mother was standing right over my left shoulder at the door, Humphreys said, and the children at that time were out on the porch. I believe they were playing down towards the left, just kind of running, she stated. At the time I stepped down off of the porch I was looking back at Debbie, Humphreys said, and we were talking as I was stepping down. I stepped down with my right foot, Humphreys stated. When I stepped down I just put my foot down, and as I put it down I just -- it rolled out and I just instantly dropped everything in my hands and probably let out a yell, Humphreys testified. It was that my foot hurt that was causing me to yell and drop things, Humphreys stated. It felt like my foot broke off at that moment, she said. I know it didn't, but it just was an excruciating pain shot through my foot, Humphreys said. Humphreys was asked what kind of shoes was she wearing that day. I was wearing sandals with a strap over the entire top of the foot and through my toe she answered.

Right after this I started crying, Humphreys testified, and Debbie came right out and grabbed my arm and helped me back to sit down on the step. She was asked how many times had she visited this home. That was my third visit that school year, Humphreys answered. I had never been to this home before when I was not working, Humphreys stated, and I have not been there since. She was asked if at any time up to the moment they had just got to did Humphreys see anything on the ground on the sidewalk. No, Humphreys answered. I was not looking to see anything, Humphreys said. She was asked - Were any of the things that you were carrying in your hands not related to the work you were doing? My keys are to my car but I needed my car to get there, so other than that, no, Humphreys answered. She was asked if she had fallen, and Humphreys answered - No.

Explaining what she had done once she was sitting down, Humphreys stated I asked Debbie to go to my car and get the file for my next visit, and I called my boss, Jane Harrer, and told my boss what happened and asked her if she would come and get me. Jane came and got me, Humphreys said. She stated that she went to Unity Medical Group (St. John's Urgent Care) for medical attention and was driven there by her boss, Jane Harrer. It was noted that in the records from Unity Corporate Health there was a page that looked like it had Humphreys' signature at the bottom, and Humphreys agreed. It was further noted that the page looked like somebody else wrote it and this page, a Patient Information Form, said - I was stepping off the step front porch onto the sidewalk of a home visit family and when I put my foot down I fell to the outside of my right foot, open parenthesis, stepped wrong, closed parenthesis, and then it says reported by Peggy Humphreys written by Jane Harrer. Humphreys stated that this was correct. When I was finished at Unity, Jane took me home, Humphreys stated. Explaining how she got her car home after her medical treatment, Humphreys stated my husband and my son went and picked it up later.

Humphreys agreed that she had turned one of her ankles once before in the past. It was about ten or eleven years ago, she said. Explaining what had happened, Humphreys stated I was downtown at a dance recital and I was walking out and someone right in front of me just stopped and caused me to try to stop quickly and I ended up falling down a couple of steps. Humphreys agreed that this was walking down some stairs. She was asked which foot was affected. I cannot remember, she answered. Discussing the medical treatment she had received, Humphreys stated I went to the hospital and they did an x-ray. They said it was just a sprain, and gave me some pain medicine, wrapped it in an ace bandage, and I went home, she stated. I did not go back and get any other treatment, she stated. I really don't remember how long this caused pain, Humphreys stated, maybe a couple days.

I have not had any slips, trips or falls since the accident I had on March 1, 2006, Humphrey testified.

On cross examination, Humphreys agreed that when she was hired at Fort Zumwalt she was hired to be a parent educator. She agreed that when she left Fort Zumwalt she did so on a voluntary basis. Explaining why she had left voluntarily, Humphreys stated to pursue doing my doula work. She agreed that that's something she had been starting while

she was in the employ of Fort Zumwalt. I am currently working, Humphreys testified, I am a private doula and I also recently started working for SSM DePaul Hospital on February 4, 2008 as a tech. At DePaul Hospital I'm a nursery tech, the claimant stated, which means I do everything the nurses don't want to do. I work two twelve-hour shifts a week, she said. As a private doula, I average about one to two deliveries a month, Humphreys stated. When asked how many private patients was she dealing with at any one time, Humphreys answered - Right at this moment I have 5 clients on the books. I have been doing private doula work for four years, starting in July of 2004, Humphreys stated.

The claimant was asked, during cross examination, which position was more physically challenging or required more standing, when she worked at the School District or when working as a private doula. Being a doula, Humphreys answered. Humphreys agreed that she does home visits as a doula. She agreed that she goes to these individuals who are pregnant and she goes to their homes and visits with them. I would say I do this less than when I did the home visits as a parent educator, she said. Explaining why it involves more standing, Humphreys testified when the mother is laboring, depending on how she wants to labor, it's not always more standing, but it can be more standing.

Humphreys agreed, during cross examination, that she still does her job as a doula along with another job she has taken at DePaul. She agreed that she would describe her job at DePaul as being a nursery tech. It was noted that Humphreys had said as a nursery tech she did everything the nurses didn't want to do; she was asked to be a little bit more specific about this. We transport babies between the nursery and the parents' room, their first baths after birth, charting, filling supply closets with clean linens, Humphreys stated. She agreed that she would describe this as a job that she is on her feet quite a bit. The percentage of my 12-hour shift that I would say I am on my feet or walking around is probably about 9 to 10 hours, Humphreys stated. The claimant was asked if she had said that working as a private doula she goes to the client's homes and visits them during, throughout their pregnancy. No, Humphreys answered, one prenatal visit and one follow-up visit after they come home from the hospital. She agreed that she is also with them at the hospital. Humphreys agreed that during the prenatal visit or the follow-up visit, she is required to enter their homes. She agreed that she is required on occasion to step up steps onto a porch.

Humphreys was asked about her home during cross examination. I have lived in my home in Janice I think it was four years this month, Humphreys aid. She was asked if she has any stairs in her home. Yes, she answered. She was queried if it was correct that she ascends them and descends them on a daily basis. Not on a daily basis, she answered, it's a ranch. She agreed that she has a basement. Concerning a front porch, it's not a step-off step-down porch, she said. She agreed that she has a garage, and agreed that there are steps going out of her garage. Humphreys agreed that she goes in and out of her garage.

It was noted, during cross examination, that the claimant described a typical day while she was in the employment of Fort Zumwalt, that she would leave her home and go to the office. I would then return to my home at the end of the day, Humphreys agreed. She agreed that, therefore, any toys that she described being at her house she would bring with her. I would take everything I needed for that full day, she added. She agreed that when she left her house and walked out she had the file and any toys or anything that she required for those visits. I was not required to wear a uniform as a parent educator for the Fort Zumwalt School District, Humphreys said. She was asked if she was free to wear anything she wanted within reason. Within reason, Humphreys responded. She agreed that she was free to wear the clothing and shoes that she would wear outside of work to work. It was noted that the shoes Humphreys had described she was wearing on March 1, 2006, were sandals with straps going over her foot and between her toes. It was one big strap that covered the top of my foot, she said, and up by my toe there was one piece went in between my big toe and the next toe. She agreed that these were her own shoes that she had purchased, and agreed that these were shoes that she has worn outside of work.

During cross examination, it was noted that on March 1, 2006 Humphreys had presented to the Wyman house and had her visit and then as she was leaving, the incident happened with her foot. Humphreys agreed. She agreed that she went into the house the same way that she left the house. Humphreys agreed that when she went into the house she walked down the sidewalk. She was asked if she had noticed anything on the grounds outside of the sidewalk. I didn't notice anything, she answered, I didn't pay attention to that. She was asked if she had noticed anything on the porch or the steps when she walked up the steps to the front porch. I did not, Humphreys answered. The claimant was queried if it was the same when she was leaving; was it correct that she had testified earlier that she did not recall anything being on the ground. That is correct, Humphreys answered. She agreed that it was a concrete porch and concrete steps, and concrete sidewalk. The claimant agreed that when she was taking the step down, she was stepping down onto the sidewalk. She agreed she was leading with her right foot, and agreed that it was the normal gait how she walked. Humphreys agreed she had said that her foot turned. My foot turned to the outside, she said. The claimant was asked about the bag she was carrying, would she describe it as a

tote bag. I honestly don't really know what a tote bag is, I hate to say it, Humphreys stated, it's like a beach bag type bag. She was asked if it was smaller than a shopping bag like a Macy's shopping bag. I would say probably about the same size, Humphreys answered, maybe not quite as deep. That bag that I was carrying weighed, I'd estimate, six pounds, she said. Humphreys agreed that she also had a thin folder and her car keys. She agreed that she was able to carry everything she needed to carry on one trip from her car into the house. Humphreys stated that when she came out she was carrying the same items she had carried in, less a paper plate and a few stickers. Humphreys agreed that she had testified that she put her foot down and it turned to the outside. She was asked if there was anything different about the way she was walking that day than when she was walking when she left her house that morning. I don't believe so, no, Humphreys answered. It was noted that in her opinion, Humphreys had described having this bag in her hand; she was asked if she had tripped over the bag. I don't believe so, she answered. She was asked if the bag played any part in her stepping down. I don't believe so, Humphreys answered. Humphreys agreed that she had testified that during the course of leaving she was talking with Debbie, the home owner. She was queried if she had stated that she believed she was looking back. Over my left shoulder, Humphreys responded. She was asked if in looking back and walking did it make her stumble or anything like that. I don't believe so, Humphreys answered.

During cross examination, Humphreys agreed that these peoples' homes that she would visit as a parent educator, that was strictly business, she wasn't going back to these peoples' homes outside of business. I do go other peoples' homes outside on my own on my own time off from work, Humphreys agreed. She agreed that she visits with relatives and friends and so forth. Humphreys agreed that she didn't fall.

Humphreys agreed, during cross examination, that she had testified earlier that when she went to Unity Health that first visit she told them what she believed had happened. She agreed it sounded accurate if they had said in their records that it was indicated that she stepped down off a porch and she felt a pop in her right foot and ankle. Agreeing that she had told Jane Harrer what had happened, Humphreys testified I believe I told her I stepped off the porch and when I put my foot down my foot rolled to the outside. I don't recall if I mentioned to her that I was carrying the bag or file or anything of that nature, Humphreys stated. She agreed that when she went to see Dr. DiFilippo she gave the doctor a history of what had happened. It was noted that Dr. DiFilippo had in his records that Humphreys had indicated that she turned her ankle at a friend's home. I do not recall giving Dr. DiFilippo that history, Humphreys said. I would disagree that I told Dr. DiFilippo that, Humphreys said. The claimant stated that she recalled her deposition being taken in April of 2006. It was noted that in her deposition testimony Humphreys had stated that she had misstepped and her foot rolled. I believe that is accurate, Humphreys responded.

Humphreys was queried, during cross examination - You talked about the bag that you were carrying with the toys and your keys and the folder; would you agree that you did not tell the School District that those items had anything to do with your misstep? It was not discussed at all, Humphreys responded. I don't believe it was discussed with Dr. DiFilippo, Humphreys said. It was discussed with you in your deposition, Humphreys stated at the hearing.

On redirect examination, Humphreys was asked if at her deposition was she asked if she had had anything in her hands. No, Humphreys answered

During redirect examination, Humphreys was asked if Dr. DiFilippo asked her if she was carrying anything. No, Humphreys answered. Humphreys agreed that when Dr. DiFilippo asked her how it happened and the doctor wrote in his notes leaving a friend's home, she had told the doctor she was leaving someone's home. I do not know why Dr. DiFilippo put friend instead of parent, Humphreys said. I may have said family's home and he --, Humphreys added. She was asked if she had discussed being a parent educator and what kind of job she does. Yes, Humphreys answered. She was asked if Dr. DiFilippo understands what kind of work (she does). Probably not, Humphreys responded. The claimant was asked - Considering what you were doing at the time that you left that home, you had just finished a visit, and what you had in your hands, and that the Mom was standing over your left shoulder and the children were there, when you stepped down you were looking back, do you think you were distracted at that time? Probably a little, Humphreys responded.

On further cross examination, it was noted that Humphreys said that she thought she was distracted; she was asked if she could say that for certain. I can for certain say I wasn't really paying attention to how I was walking or stepping, Humphreys answered. She was queried - But you agree that you were walking in your normal gait, right foot in front of the other? To the best of my knowledge, yes, Humphreys answered. Humphreys agreed that she didn't fall off the side of the step, she didn't tumble, Miss Wyman didn't push her down the steps or anything like that. She was queried - You were just descending the step and your foot rolled? Humphreys agreed.

Medical records from **Unity Corporate Health** (No. B) began with a 03/01/2006 entry which noted the following in the History section:

The patient states she was working as a parent educator doing a home visit when she stepped down off of a porch step and felt a pop in her right foot and ankle. Afterwards she saw a bump on her right foot. She complains of pain in her lateral right foot and lateral ankle.....She says a long time ago she twisted the ankle and she has no recent history of injury of problem to the affected area.

In the Observation section was written:

There is tenderness and edema of the right lateral foot and ankle. The patient is unable to bear weight at all. She appears to have full range of motion with some discomfort on range of motion maneuvers. Neurovascular appears to be intact.

The record included reports of x-rays taken on 03/01/06 of the right ankle and the right foot, and both reported impressions of – negative. The written assessment on 03/01/06 included: Sprained right foot, right ankle.

In a New Injury Worksheet completed by a Dr. Fischer dated 03/01/06, the following was written about the history of injury – “Stepping down a step, felt a pop in Rt foot/ankle, afterwards saw a bump on her foot. Parent education, does home visits. Says a long time ago she twisted the ankle.”

A Patient Information Sheet was in the record, dated 03/01/06. The form instructed the patient to, in her own words, give a brief statement of how the accident/injury occurred: “I was stepping off the step (front porch) onto the sidewalk at a home visit family and when I put my foot down, I fell to the outside of my right foot (stepped wrong).” The form noted that this was reported by Humphreys and written by Jane Harrier.

Medical records of **Dr. Emil A. DiFilippo, M.D.** (No. C) began with a 03/02/06 treatment entry in which the doctor wrote: “Peggy Humphreys has an ankle sprain on the right. She turned her ankle at a friend’s home. She has moderate swelling of the lateral aspect of the ankle, lateral aspect of the foot.” In a subsequent treatment entry of 04/17/06 the doctor wrote that it was 1 ½ months post ankle sprain and Humphreys was still symptomatic.

David Volarich, D.O. testified by deposition on behalf of the claimant (No. A) Board certified in occupational medicine, independent medical examiner and nuclear imaging, Dr. Volarich stated that he has been performing occupational type evaluations “going on about 17 or 18 years now”. (Volarich Dp. pg. 6) Dr. Volarich stated that it is common in his practice to evaluate people for injuries to their lower extremities and feet. Dr. Volarich stated that he evaluated Humphreys on September 10, 2007 at the claimant’s request. The doctor testified as to his understanding of how Humphrey’s injury occurred: ”Ms. Humphreys told me that she was exiting a home. She stepped on a step with her right foot and her heel slid off the step because she was wearing some sandals, and she twisted or inverted her ankle.” (Volarich Dp. pg. 7) The doctor agreed that in that relayed history he had been told that Humphreys was carrying something. Dr. Volarich testified as to the kind of injury Humphreys had sustained:

“The primary injury was to her right ankle lateral compartment or the outside part of the ankle joint. She sustained partial tears of two of the ligaments, the talofibular ligament and calcaneofibular ligament, and also developed tendonitis of the peroneal tendons. And then subsequently after that developed what’s called plantar fasciitis.” (Volarich Dp. pp. 7-8)

Dr. Volarich was questioned, during cross examination, about the mechanism of Humphreys’ March 1, 2006 injury, and the following testimony occurred:

1. Okay. Doctor, you agree that Ms. Humphreys injured her right ankle on March 1st, 2006, when she stepped on her foot and it twisted?
1. Yes.
1. Okay. Would you agree that she was in the act of walking when this occurred?
1. Yes.

1. Now, you took a history directly from her when you saw her back in September, is that correct?

1. Yes.

1. And she told you she stepped down off the step with her right foot and her heel slid off the side of her ankle – or side of her sandal and her ankle twisted, correct?

1. Yes.

1. This was an inversion injury?

A. Yes.

1. Most common type of ankle injury, ankle sprain?

1. Typically, it is, yes.

1. Besides the direct history she gave you, did you have any additional evidence, either from medical records or perhaps her deposition transcript, as to how the injury occurred?

1. No, I didn't see anything else. (Volarich Dp. pp. 19-20)

Dr. Volarich stated that Humphreys did not give him a history that she had fallen on March 1, 2006. When asked if Humphreys had relayed a history to him about tripping on anything, Dr. Volarich responded – “No, she said her foot slid”. (Volarich Dp. pg. 21) The doctor was asked if Humphreys had relayed to him any history to suggest she stumbled over an object or anything. “No, she was carrying some things, but she didn't tell me she tripped over anything”, Dr. Volarich answered. (Volarich Dp. pg. 21) The doctor stated that Humphreys did not give him any specific information of the step she was stepping down or the sidewalk she was stepping onto.

Dr. John Krause, M.D. testified by deposition on behalf of the employer/insurer (No. 6). A board certified orthopedic surgeon specializing in lower extremity and foot and ankle work, Dr. Krause stated that he evaluated Humphreys on November 5, 2007. Dr. Krause discussed the history relayed to him from Humphreys about an incident that occurred in March of 2006:

“She told me that she was a parent educator in the Fort Zumwalt School District and that this involved going to the homes of students and evaluating them. The incident that she described to me was on March 1st of '06, when she was leaving with things in her arms and she stepped off a porch onto a sidewalk and rolled her ankle or misstepped and injured her ankle.” (Krause Dp. pg. 7)

The doctor was asked if the misstep Humphreys had described to him was in the course of walking. “It was in the course of leaving the home, yes, and walking”, Dr. Krause answered. (Krause Dp. pg. 8) The doctor was asked if Humphreys had given him a history of a fall. “She said she tripped, Dr. Krause responded. (Krause Dp. pg. 8) The doctor was asked if Humphreys had actually told him whether or not she tripped over anything that might have been on the step. “I got the impression she had just misstepped and there was nothing in her way”, the doctor answered. (Krause Dp. pg. 8) Dr. Krause agreed that Humphreys had told him when she misstepped off the front porch and twisted her ankle, it was her right ankle.

Dr. Krause was asked how common are ankle sprains. The doctor answered: “They're very common. It's the most common injury that most emergency rooms see.” (Krause Dp. pg. 9) Dr. Krause agreed that he was aware of the course of treatment that Humphreys received for the ankle sprain, and agreed that he would characterize the treatment as appropriate course of treatment, including wearing the boot for a period of time, and the MRI ordered by Dr. DiFilippo. Stating that he had the opportunity to review the MRI, Dr. Krause further testified: “And it showed evidence of tears of the lateral ankle complex, which is the ligaments you tear when you sprain your ankle.” (Krause Dp. pg. 9) The doctor agreed that these are the most common findings. Dr. Krause noted that the MRI report said it was partial tears. “I don't recall specifically noting it was complete or partial but the report says partial”, Dr. Krause stated. (Krause Dp. pg. 10) The doctor was asked to comment on the significance of these findings:

“They confirmed she had an ankle sprain. The most important significance of an MRI after an ankle sprain is that there aren’t other injuries. You don’t need an MRI to diagnose an ankle sprain. You get them to rule out other pathology.” (Krause Dp. pg. 10)

Dr. Krause agreed that in Humphrey’s case, the only thing the MRI confirmed was the ankle sprain.

On cross examination by the claimant, Dr. Krause agreed that he had reported Humphreys’ accident as occurring when she was leaving the student’s home and while carrying a lot in her arms she misstepped off the front porch and injured her ankle. Dr. Krause indicated that if the records showed Humphreys went on the same day of the incident to Urgent Care in O’Fallon, she was diagnosed with a sprained right foot and ankle. The doctor admitted that in regards to how the March 1, 2006 incident happened, he did not have any independent knowledge as far as the steps Humphreys fell on, and he did not have any record in his notes or anywhere as far as whether there was a handrail on the porch. The doctor was questioned if he had any record or any information as to whether there were people on the porch at the time. Dr. Krause answered: “I vaguely can picture. She said the client was at the door, or I don’t know that for a fact.” (Krause Dp. pg. 34) The doctor agreed it was his understanding the materials Humphreys was carrying in her arms were related to the work she was performing.

On redirect examination, Dr. Krause agreed that the history regarding the incident, including the fact that Humphreys was carrying something, this was given to him directly from Humphreys.

The definition of a compensable accident and injury were changed by legislation in 2005. The definitions are set forth in Section 287.020.2 and 3 RSMo, and are as follows:

2. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter 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.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

It is found, considering the evidence, that the claimant, Peggy Humphreys, was a credible witness offering consistent testimony. It is found that there is no dispute that at the time the claimant suffered the injury to her right ankle on March 1, 2006, the nature of her employment was such that she was at a place where she could reasonably be expected to be and was within the time period of her employment engaged in the furtherance of the employer’s business; in other words, the second prong of the two-prong test, whether the injury arose “in the course” of employment, has been met.

The issue is whether or not the March 1, 2006 right ankle injury meets the first prong, “arising out of”, test. Humphreys, testified that when the right ankle injury happened on March 1, 2006 she was leaving her parent educator visit at private home, and when she put her right foot down from the concrete porch to the concrete sidewalk her ankle rolled out. Humphreys further testified – I just instantly dropped everything in my hands and probably let out yell. Historically for an injury such as this to be a compensable accident the Courts have held that both the accident and the injury must arise out of the employment, or that there is a causal connection between the conditions under which the work is performed and the

resulting injury, that the injury came from a hazard or risk related to the employment. In 2005 the legislature, in Section 287.020.10, specifically abrogated as compensable injuries where it was difficult to determine how the injury was the result of the employee's job duties or difficult to find that the employee's job duties subjected them to a hazard different or greater than any person would experience in everyday life. In this case, it is found, the undisputed evidence establishes a risk in the claimant's employment that exposed her to a hazard or risk not common to the public, that being the requirement to bring age specific equipment as the basis or center point of her work as a parent educator to the home of the child and parent being trained. Humphreys testified that she would bring all of the toys and work material for the specific phase, and explained they called them phases because they're specific age appropriate toys for specific developmental tasks. She gave further undisputed testimony that on March 1, 2006 she was addressing the age range of a three-year, and, in addition to carrying their specific file for the case (which was 10-15 pages thick), she was carrying in her other hand the bag of the age specific materials which consisted of one box that she had decorated like a birthday cake that kept supplies on the inside such as paper plates, stickers, napkins, birthday candles. Additionally in the bag, the claimant said, was another box in there that carried markers, scissors, and thicker paper for the child to cut, and also in this bag was a bag that had a soft crown with different jewels and things to decorate the crown, and there was a game/puzzles and balloons. Humphreys stated that the bag was about 16 by 16 width and it had hold handles on it so you couldn't put it over your shoulder, it wasn't long enough straps to put it over your shoulder, you could only carry it. The claimant, again a credible witness, admitted that this bag did not cause her to fall. It is found, though, that the conditions of her employment - the obligation of having to make home visits to perform her job and having to bring the paperwork for the specific case as well as having to carry the training equipment - exposed the claimant to a risk unique to her job of having her hands full and thus more prone to or unable to prevent a mishap or misstep such as what happened. There is substantial and undisputed evidence that this misstep event on March 1, 2006 caused objective signs of injury to the claimant's right ankle (i.e. a medical treatment record in evidence indicated objective signs of injury of swelling in the area of the claimant's right ankle); this March 1, 2006 event was the prevailing factor in causing injury to the claimant's right ankle. It is found that the claimant satisfied her burden of proof as to the first prong that the injury arose out of her employment. It is found that the competent and substantial evidence establishes that the claimant sustained a compensable accident on March 1, 2006.

ISSUE: Rate

It was agreed and stipulated to that on March 1, 2006, the claimant, Humphreys, was in the employment of Fort Zumwalt School District. Humphreys gave undisputed testimony that on that date she was working as a parent educator for Fort Zumwalt School District and was doing a private home visit. She agreed that doing a private visit meant you went to someone's home. Humphreys testified about how she was paid for this work. I averaged 32 ½ hours a week, Humphreys said. She was shown an exhibit marked as Employer/Insurer's Exhibit 5, which Humphreys described as showing paychecks twice a month; it was noted that the paychecks were from 9/15/05 through 9/3/06, and thus it showed that she was paid twice a month for doing this job, and Humphreys agreed. I actually started working for the 2005-2006 school year the first week of September of 2005, Humphreys said. I showed up the first day as a parent educator on or around the 22nd of August, she said, and agreed that this was when she essentially had to show up to start working. She was asked if she then started her home visits the first week of September. Normally we use the first few days to start scheduling our visits and get our calendar going for the year, get our paperwork together, Humphreys answered.

I believe it was on about June 2nd was the last date of the 2005-2006 school year that I had to work, she said, which was a Friday. Humphreys stated that she had to work 186 contract days for Fort Zumwalt for 2005-2006 School District. Those 186 days, those were the days I worked, Humphreys stated, and those 186 days did not include weekends or winter break or spring break or holidays. Humphreys was asked to explain why she was paid from 9/15/05 through 9/3/06 and paid twice a month. Well, we get paid all year round for the nine months that we physically work, she stated. Humphreys agreed that therefore her last day of work, whatever that 186th day was when she was finished, even though she's getting paychecks June 15th, June 29, July 14, August 1, August 15, September 1, she has already essentially done the work to earn that money. If I had worked the next school year, I would just be showing up the next end of August, Humphreys agreed. She agreed that when they talked about 32 1/2 hours per week she was working about five days a week. Typically we worked five days; we did set our own schedules, Humphreys explained. She agreed that there was an understanding that she was available all five days of the week to keep working.

Humphreys agreed that she retired at the end of that school year. Discussing the kinds of benefits she is paid upon retiring, Humphreys said you would receive payment for all the sick days that you had saved in the sick bank. She agreed that those 12 days were subtracted from her sick bank and she did not get paid for those at the time she retired at the end of that spring.

During cross examination, Humphreys was questioned about how she was paid by the School District. She was queried if it was correct that she was paid on an annual basis yearly. We were really hourly paid but we are paid the same amount on every pay period, Humphreys answered. And our pay is, I don't know the right word, spread out so that we're paid on a yearly basis for nine months of work, the claimant said. I don't know if it is nine months exactly, Humphreys stated, from the end of August to the beginning of June. She agreed that she had said that she started work approximately August 22, 2005. The claimant was asked if she had done any work before that date for preparation, coming from a family with teachers and educators. I did do some work during the summer if there was a new toy I wanted to make, Humphreys answered, but normally we start working three days before the kids go to school and we go two days longer than the kids after they get out of school. She agreed that at the end of the school year she has to wrap up her work and file reports. The claimant was asked if she was finished doing this on June 2, 2006 or did she had any additional work after that day. I'm not 100 percent positive that that was the exact last day, Humphreys answered, but whatever day we deemed to be the last day I was done. She was asked if she did any work in the evenings for preparation. Well, sometimes I worked in the evening, the claimant answered. We had families that we had to see at night, she answered. And, yes, every night you would prepare your files, Humphreys stated, get your files and stuff ready for the next day. Humphreys was queried, you said there were 186 contract days, in your opinion is that all you worked is 186 contract days for the 32 1/2 hours a week? Yes, the claimant answered. She was queried if there was nothing in addition, such as nothing in the evening, nothing like that? Well, I did work in the evenings and that, but it was all counted in as part of our 32-1/2 hours, Humphreys answered. In other words, Humphreys agreed, she wouldn't get additional pay if she put in additional time. She was queried if as of June 2, 2006 or around about there, she was then unemployed. I was self-employed, Humphreys responded. She was queried just taking the 2002 to 2003 school year, for instance, during those summer months did you consider yourself unemployed? Yes, Humphreys answered. She stated that she did not collect unemployment. Humphreys explained it was because I continued to be paid through the summer months from the School District. She was asked when did the School District let her know whether they wanted her back or not. I believe in February or March we received a letter asking if we intended to return the following year, Humphreys answered, and then in April or May we would sign a contract that we were coming back the following year. Humphreys agreed that she had said the contract days she had talked about do not include holidays. She was asked if they factored in sick time. No, Humphreys answered. What we got at the beginning of the school year on our first paycheck in September, we would get three personal days and I believe two sick days; I could be wrong, I can't remember exactly, Humphreys testified. And then in January we would receive the same thing again, she said, so it was up to you to use your time or it would carry over. Humphreys was queried - Let's hypothetically say that you used all six personal days that you were given in a school year and all four sick days; does that mean you only worked 176 days that year? Yes, Humphreys answered.

On redirect examination, Humphreys was queried - I know you're contracted to work for 186 days and you said you do not work in the summer; could you work during the summer if you wanted to? Not on home visits, Humphreys answered. She agreed that she could get a job at Hardee's, that she could earn money at a job and the school district would not stop paying her that money. Humphreys was asked if it was her understanding that by the time she finished on June 2nd she had earned all the money they would pay her. Yes, I have, Humphreys answered. She agreed that she didn't start in the '06-'07 school year because she had retired, but that money continued to be paid to her because she had already earned it. They paid me through the whole summer, Humphreys said.

In evidence was a copy of a wage statement of Ms. Humphreys (No. 5) showing bi-monthly payments of \$877.53 for a time period of 9/15/05 to 9/1/06. The wage statement reflected a total gross pay for the 09/15/05 through 09/01/06 period of \$21,060.72. The wage statement reflected no sick leave or personal leave; the statement indicated consistent payments of \$877.53 bimonthly for the time period of 09/15/05 through 09/01/06. Also in evidence was a copy of the Report of Injury form in this case (No. 3). The Report of Injury form reflected in the Rate section - "\$17.42 Hourly", and there were a series of boxes that could be checked - Day, Week, Month or Other - "Other" was checked.

Section 287.250 RSMo sets forth methods of determining the rate in a workers' compensation case, and stated, in pertinent part:

1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

(1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;

(2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;

(3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

(5) If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage;

(6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;

(7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.

As noted by both the claimant and the employer/insurer in their Memorandums (i.e. the claimant's memorandum):

“In determining the applicable weekly wage rate under (Section) 287.250, it is necessary to begin with the first subsection and then descend in numerical order under the other subsections until the wage rate provision is found that applies to the particular facts of the case. *Adamson v. DTC Calhoun Trucking, Inc.*, 212 S.W.3d 207 (Mo.App. 2007). *See also Cross v. Crabtree*, 364 S.W.2d 61 (Mo.App. 1962), *Bewig v. Schnucks Markets*, 809 S.W.2d 461 (Mo.App. E.D. 1991), and *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.1989). At the same time, the provision of the chapter must be construed strictly. (Section 287.800, RSMo (2005).”

In this case, the claimant argues:

“...she worked for Employer during a normal school year of around August 22, 2005 until around June 2, 2006. She testified she worked 186 contract days. She was expected to work 32.5 hours per week, during a five day week, however she set her own schedule of appointments with parents at their home and occasionally had meetings and appointments at school. She scheduled appointments during the day and into the evenings when necessary and sometimes worked on files in the evenings. Claimant was paid the same amount each week and received no different pay if she worked more or less than 32.5 hours in a week. Although pay was spread out over a calendar year her work was completed within nine months and she could have worked another job in June, July, and August if she had wanted to with no effect on the paychecks she received from Employer during those months....

Here, average weekly wage should be calculated based upon the time claimant earned her wages rather than the date she received them. Claimant testified she was hired as a Parent Educator for the 2005-2006 school year for 186 days of employment. The Employer's wage statement at Exhibit 5 shows the annual salary was \$21,060.72 with Claimant paid a set amount every two weeks. Thus, it cannot be said Claimant's wages were fixed by the week or the month, which are the first two sections.

Subsection (3) applies to cases where wages are paid by the year. However, it is not reasonable here to conclude that a school year of 186 days is considered the equivalent of a calendar year when all wages have been earned within the first nine months of a twelve month year.

In addition, Claimant's wages were not fixed by the day or the hour or the output as discussed in subsection (4). Although the Report of Injury shows Claimant was paid hourly, Claimant testified that she was not paid more or less for actual hours worked in a week. The wage statement does not show a column reflecting actual hours worked. Instead, it shows that every two week she received exactly the same amount of gross pay. Also, Claimant did not actually perform any work for the school after June 2, 2006 so the money she was paid following that date through 9/3/06 pay check had already been

earned. (Section) 287.250.1(7).

Therefore, none of the specific subsections of (Section) 287.250.1 apply in this case and, consequently, (Section) 287.250.4 applies.....

The most fair method of determining average weekly wage in this case is to divide Claimant's annual wage (\$21,060.72) by the number of days Claimant was expected to work during the 2005-2006 school year (186) resulting in a daily wage rate (\$113.23). Claimant testified she worked 5 days per week, therefore the daily rate multiplied by 5 results in an average weekly wage of \$566.15. [$(\$21,060.72/186 = \$113.23) \times 5 = \text{AWW } \566.15]."

The employer/insurer in this case argues:

"We know from the testimony of Claimant the typical school year spans from approximately 8/22/05 to 6/2/06. We also know Claimant was contracted to work 186 days during the 2005-2006 school year....

Section 287.250.1 (1) provides guidance on the calculation of AWW if wages are fixed by the week. This section does not apply as Claimant is not paid by the week but rather bimonthly on a 12 month basis.

Section 287.205.1 (2) provides the proper guidance for Claimant's case. Pursuant to her testimony and the wage statement entered into evidence, Claimant is paid bimonthly from 9/15/05 to 9/1/06. (Employer Exhibit 5). The wage statement proves she is paid \$877.53 twice a month for a full year. Subsection (2) instructs us to calculate her AWW as follows: "monthly wage so fixed multiplied by twelve and divided by fifty-two". Therefore, Claimant's monthly rate of \$1,755.06 ($\877.53×2) should be multiplied by 12, leaving a yearly earning of \$21,060.72 (as evidenced by the wage statement). We then divide this by 52 which yields an AWW of \$405.01. Two-thirds of this amount results in a proper TTD rate of \$270.01.

Claimant will argue she was only employed by Fort Zumwalt School District for 186 days. She will argue she only earned money from 8/22/05 to 6/2/06. She will argue she should get the benefit of having her full salary utilized over the course of 186 days. This is a school district, the number of days is the number of school days the school must be in session.

The statute did not intend on employers having to break down when an individual actually is at work and 'earns' his or her salary. In that case, anyone with an annual salary with 2 weeks of vacation could claim they only work 5 days per week each year with 2 weeks of vacation, or a total of 250 days. Or an individual who is salaried but only works 4 days a week could argue she is only 'earning' her salary over 200 days. Under this scenario, one could clearly benefit greatly by twisting the meaning of the statute.

In Claimant's case, she will argue her daily rate is \$113.23 (salary of \$21,060.72 divided by 186 days), thereby making her average weekly wage equal to \$566.15 and her TTD rate \$377.43....

.....We know, from the wage statement, Claimant took home \$954.08, after taxes, in March of 2006. (Employer Exhibit 5) At the Employer's calculated TTD rate of \$270.01 per week, Claimant would be taking home \$1080.04, tax free, for a 4 week period of time. It is clear the comparison between her actual wages and the TTD amount is very similar under Employer's rate.

Conversely, at Claimant's argued rate of \$377.43, she would take home \$1509.72, tax free, over a period of 4 weeks. Obviously this would result in bonus pay compared to the \$945.08 she takes home while working...

Claimant will argue all of her pay was earned by June and simply paid out over 12 months. Claimant will then argue Subsection (7) instructs us only to use the weeks in which labor is actually performed. However, Subsection (7) also instructs us to use only the weeks in which wages are 'actually paid' by the employer. Claimant is not paid her full wages until 9/1/06."

It is found, considering the evidence, that the evidence establishes that the claimant was employed with Fort Zumwalt School District, working approximately 5 days a week, 32 ½ hours a week for 186 days during a time period of approximately August 22, 2005 through June 2, 2006. It is found that the evidence reveals that for this applicable time period the claimant was a full-time employee of Fort Zumwalt School District, and was paid a salary under contract. Additionally, the evidence allows the claimant's salary to be discernable by hour, week, month and/or year, thus subdivision (1) to (4) of

Section 287.250 could be used in computing the claimant's wages, and thus, further, subsection (7) applies in this case. However, with strict construction of Section 287.250.1(7) [pursuant to Section 287.800.1 RSMo 2005], it is further found that this subsection does not apply, in light of the facts in this case; it is found that the evidence in this case establishes inconsistent facts for the application of this section in that the claimant was only actually employed with Fort Zumwalt School District, or "those weeks labor is actually performed", from approximately August 22, 2005 through June 2, 2006, while "wages are actually paid by the employer as compensation for such labor" for a period of 09/15/05 through 09/01/06. It is found that the facts of this case do not fit the parameters of subdivision (7) of Section 287.250, and thus it is found that subsection 4 of Section 287.250 is applicable in this case. It is found that the evidence establishes that the claimant was under contract to actually work for Fort Zumwalt School District for the period of 186 days, or from approximately August 22, 2005 through June 2, 2006, with contract provisions to pay the wages for actual work over a period of 12 months. There is undisputed evidence that after June 2, 2006, the claimant was no longer performing the duties for or under the control of Fort Zumwalt School District and could have worked or done as she pleased subsequent to June 2, 2006. The undisputed evidence reveals that the claimant had not signed a new contract to be employed with Fort Zumwalt School District after June 2, 2006. The evidence reveals that notwithstanding contract terms to pay the claimant's salary of \$21,060.72 over a year period of 09/15/05 through 09/01/06, in actuality, the claimant worked 186 days for that salary, so in actuality Humphreys' salary as a parent educator for Fort Zumwalt School District was: \$21,060.72 divided by 186 days = \$113.23/day. Thus, it is found that based on the evidence and findings, the average weekly wage for this claimant is: (\$113.23/day x 5 days/week = \$566.15. And thus her rate, pursuant to Sections 287.170 and 287.190, is: (\$566.15/week x 66 2/3% = \$377.43), therefore \$377.43/\$365.08, respectively.

ISSUE: Medical causation

It is the claimant's allegation that she suffered injury to her right foot and ankle as a result of the March 1, 2006 event, and subsequent suffered further injury to her right foot and left foot as a result of the medical treatment for the March 1, 2006 injury

Discussing the medical treatment she had received due to the March 1, 2006 event, Humphreys stated I went to the hospital and they did an x-ray. They said it was just a sprain, and gave me some pain medicine, wrapped it in an ace bandage, and I went home, she stated. I did not go back and get any other treatment there, she stated, I next went to Dr. DiFilippo..

I told Dr. DiFilippo about the pain that developed in my left foot after my injury in 2006, Humphreys stated, and Dr. DiFilippo had me go get an MRI on my left foot. Humphreys agreed that she had already had an MRI on her right foot on 4/19/06. My understanding of what that MRI showed on the left foot was that I had tendonitis and plantar fasciitis, Humphreys said. She agreed that the MRI did not show a torn ligament. The doctor ordered treatment for my left foot of physical therapy, she said, which was done at the Frontier Integrated Hospital starting in May of 2006. She agreed that this was while she was still wearing a cast on her right foot, and further agreed that while she still had a boot on the right foot for two weeks she continued to do physical therapy on her left during that time. Humphreys was queried - And then you were finished with the cast and finished with your boot, so when you started walking with no cast on the right how did your right foot feel? It was very sore from no mobility for a long time, Humphreys answered, so it took quite a few days to loosen it up. She agreed that the doctor ordered physical therapy on her right foot. It was noted that Humphreys had had physical therapy through the summer, the last date in mid-August.

Humphreys testified about how her feet felt after therapy ended and after she last saw Dr. DiFilippo; about how her feet were feeling through the fall of 2006. They bothered me a lot, Humphreys said. It was hard for me to walk, she stated. It was very painful when I would get up in the morning, Humphreys testified, I would have to lay in bed for a few minutes and stretch my feet out before I could even step down. When I first started walking at the beginning of the day I would primarily walk on my front part of my foot because it was so uncomfortable to put my heel down, she said. She was asked what kinds of things has she done on her own to try to get her feet to feel better. I stretch every morning before I get up, Humphreys responded. I still do the exercises that they taught me to do at physical therapy, she said, and I bought really good shoes. I also had bought some inserts, she stated, at one point we went to the foot store and I bought inserts made of real hard plastic to see if those would help. Also pads that you put over the top; like the things that go in your shoes; I don't know what they're called, Humphreys further stated. I bought these the beginning of February, she said, and the last day I wore them was April 10, 2007. In the very beginning I felt some relief from my pain, Humphrey testified, then I don't know what happened with the inserts, if over time they flattened, I don't know, but that they became very, very uncomfortable to wear and I had to remove them out of my shoes. She agreed that she has not worn them since April of 2007, and agreed that these were not prescribed, they were something she bought at the foot store.

Humphreys was asked to testify about her understanding regarding the condition she has in her feet presently. I have plantar fasciitis, she answered. This was told to me by the physical therapist, Dr. DiFilippo, Dr. Volarich who evaluated me on my own behalf, and the doctor I saw for the insurance company, Dr. Krause, Humphreys stated. The plantar fasciitis is in both feet, she said. Humphreys added that in regards to Dr. DiFilippo, I know he said that I had plantar fasciitis on my left foot; I can't tell you absolutely that he said it on my right. Humphreys was asked about her visit with Dr. Krause on behalf of her Employer, that she saw one time in November, 2007. She stated that Dr. Krause spent about a total of 5 to 6 minutes talking to her about both of her feet and ankles. Dr. Krause just asked me how did it happen and he asked me what I do basically, she said. I believe I talked to Dr. Krause about the boot that I had worn, Humphreys stated, and I believe I told him that my right foot was casted in a boot for an extended period of time. She was asked if she had had a lot of conversation about the boot for six weeks and then an elastic brace. I don't believe there was a lot of conversation, no, Humphreys responded. Dr. Krause did ask me about how my feet feel now, she said. She was asked if Dr. Krause had asked questions about what kinds of things she does or how she is limited now. I know we talked about walking, Humphreys responded, and I told him that walking for extended periods still really hurt my feet.

I have not had any slips, trips or falls since the accident I had on March 1, 2006, Humphrey testified.

During cross examination it was noted that Humphreys had stated it was her understanding that when Dr. DiFilippo sent her for an MRI on her right foot it showed she had some torn ligaments and tendonitis, and Humphreys agreed. She was queried - isn't it true that Dr. DiFilippo told you you had an ankle sprain. I can't say yes or no, Humphreys answered, I don't really remember. It is my impression that I had something other than an ankle sprain, Humphreys stated. This is because of where the pain was in my foot, she explained, because the pain ran along the outside of my foot and into my heel and up the back of my ankle. Humphreys agreed that she didn't have a fracture or anything like that. Humphreys agreed that the boots she had described and the casts that she had described had kept her ankle stable. I was on crutches for a couple weeks but then after that I did not have to use crutches again, Humphreys said. She was queried - when you were given the boot by Dr. DiFilippo, were you able to walk with the boot on? After the two weeks, yes, Humphreys answered. She was asked to describe how she would walk in the boot, was it one foot in front of the other. Yes, Humphreys answered. She was then queried - explain how you didn't put your full weight down on the foot with the boot if you were walking one foot in front of the other. Well, you walk a little faster, I guess, on the opposite side so you're not as much weight bearing on the one side, Humphreys answered. She was asked - When you rolled your foot when you were stepping down on that porch, you didn't injure your left foot in any way; is that correct? That's correct, Humphreys responded.

Medical records from **Unity Corporate Health** (No. B) began with a 03/01/2006 entry which noted the history from the claimant of the event when she was doing a home visit as a parent educator and stepped down off of a porch and felt a pop in her right ankle; it was noted that Humphreys relayed that a long time ago she had twisted the ankle but had no recent history of injury or problem to the affected area. The 03/01/06 entry included exam findings as well as reports from a x-ray performed which was negative. The written assessment on 03/01/06 included: Sprained right foot, right ankle. The written treatment plan included an ankle splint/post op shoe, medication, and also written was - crutches if needed. Medical records from **Dr. Emil A. DiFilippo, M.D.** (No. C) began with a 03/02/06 treatment entry in which the doctor wrote that Humphreys had an ankle sprain on the right, that she had turned her ankle. Dr. DiFilippo noted that Humphreys had a cast boot and also had an air cast to use later. Crutches with weight bearing as tolerated, the doctor wrote. In the next treatment entry of 03/23/06 it was written that Humphreys was generally improved; it was written that she was to continue to wear a boot and return in three weeks, and if she had increasing difficulties an MRI might be required. In the next treatment entry of 04/17/06 the doctor wrote that it was 1 ½ months post ankle sprain and Humphreys was still symptomatic. It was written that an MRI was to be scheduled. Further noted was: "She has a wrap around elastic brace."

A report of an MRI of the right lower extremity performed on 04/19/06 was in Dr. DiFilippo's record and noted the following impression:

IMPRESSION: Partial tear of the anterior talofibular ligament. Partial tear of the calcaneal fibular ligament. Mild deltoid ligament sprain.

Edema in the subcutaneous tissues overlying the lateral malleolus related to the prior ankle sprain.

There is a moderate amount of fluid along the flexor hallucis longus tendon which is a nonspecific finding as this tendon sheath can communicate with the ankle joint.

In the next treatment entry of 05/01/06 it was noted that the MRI showed partial tear of the collateral ligaments. It was written that Humphreys had good clinical stability. The doctor wrote that a cast was applied on the right ankle, and the cast was split; further written was that Humphreys was to return in three weeks for removal of the cast and then repeat stress x-ray and then repeat casting for another three weeks. Dr. DiFilippo further wrote: "She also has some discomfort about the posterior aspect of the left ankle and points to the retro calcaneal area. There is no gross swelling. X-rays are negative." The doctor wrote of his impression in the 05/01/06 entry: 1. Suspected tendonitis of the left ankle (negative Thompson test and no defects in the tendon). Rule out retro-calcaneal tendonitis on the left; 2. Partial tear of the collateral ligaments on the right.

A report of an MRI of the left lower extremity joint performed on 05/04/06 was in Dr. DiFilippo's record. The noted history was: 48 year old with left ankle pain. The written impression was:

IMPRESSION: Abnormal fluid collection surrounding the tendon of the flexor hallucis longus. This may represent an injury to the musculotendon junction. No overt muscle retraction or abnormal signal centrally within the tendon itself. Correlate with the patient's symptoms and mechanism of any possible injury. Alternatively this could represent tenosynovitis.

Suggestion for some increased signal involving the deltoid ligament, correlate with any mechanism of strain or injury.

In the next treatment entry of 05/16/08 it was written that Humphreys was seen for resolving ankle sprain on the right, and that she was to return in a week for a cast change. On the left, she has ankle discomfort posteriorly, Dr. DiFilippo wrote. The written treatment recommendations included: "To attend physical therapy for her left ankle. Return next week for a cast change on the right." The impression on 05/16/06 was: Ankle sprain on the right. Achilles tendonitis on the left. To have ultrasound on the left." In the next treatment entry of 05/23/06 it was written that Humphreys' sprain on the right had improved after three weeks casting, and a new cast was applied. It was noted that the achilles tendonitis on the left was generally improved with physical therapy, but therapy would be continued. The doctor further wrote: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." In the next entry of 05/31/06 it was noted that Humphreys was approximately one month in a cast on her right ankle for ankle sprain. "The cast was deteriorated and she wishes to have this cast discontinued", the doctor wrote. Dr. DiFilippo again noted: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." The next entry of 06/19/06 included: "Peggy Humphreys is generally improved with ankle sprain right and left"

The record finally contained two letters by Dr. DiFilippo to the claimant's attorney, dated October 4, 2006 and November 24, 2006. In the first letter, the doctor wrote that he was not aware that the injury he had been treating "was under some type of workman's comp injury" and he did not have an opinion in regards to any type of workers' compensation claim and would have to see Humphreys again to discuss this with the patient. In the November 24, 2006 letter, Dr. DiFilippo wrote:

It is difficult to determine with any certainty as to whether the symptoms on the left lower extremity were in some way related to her right ankle injury. It is possible to argue that this was an overuse symptomatology related to favoring the right lower extremity and that is certainly possible.

To answer this with any degree of certainty, however, is difficult to say in my opinion, although it is certainly possible.

David Volarich, D.O. (No. A) evaluated Humphreys on September 10, 2007 at the claimant's request. The doctor testified as to his understanding of how Humphrey's injury occurred, noting that Humphreys had "...twisted or inverted her (right) ankle." (Volarich Dp. pg. 7) Dr. Volarich testified as to the kind of injury Humphreys had sustained:

"The primary injury was to her right ankle lateral compartment or the outside part of the ankle joint. She sustained partial tears of two of the ligaments, the talofibular ligament and calcaneofibular ligament, and also developed tendonitis of the peroneal tendons. And then subsequently after that developed what's called plantar fasciitis." (Volarich Dp. pp. 7-8)

Dr. Volarich agreed that this response was directed to only Humphreys' right lower extremity. The doctor was asked to explain his understanding of what had occurred on the left side. Dr. Volarich responded: "Because of the right ankle and foot injury and abnormal weight-bearing from being in a cast, et cetera, she put additional stresses on the left ankle and foot, caused plantar fasciitis in the left foot." (Volarich Dp. pg. 8)

Dr. Volarich was asked to testify about his diagnosis pertaining to the injury occurring on or about March 1, 2006

after conducting a physical examination. The doctor answered:

“My diagnoses included right ankle lateral compartment strain/sprain with partial tears of the anterior talofibular ligament and calcaneofibular ligament with persistent peroneal tendonitis and plantar fasciitis. Second was abnormal weight-bearing favoring the right ankle and foot causing the left ankle and foot pain consistent with plantar fasciitis.” (Volarich Dp. pp. 8-9)

Dr. Volarich agreed that it was his opinion within a reasonable degree of medical certainty that Humphreys’ work-related accident of March 1, 2006 was the prevailing factor in causing these injuries and diagnoses. The doctor was again asked to explain how the injury which originally affected the right side eventually caused problems on the left:

“Yes, as I mentioned briefly a minute ago when you asked me about the left foot and ankle, as a result of treatment for the right ankle and foot injury, that being immobilization and wearing a different cast apparatus, the boots and so forth, she favored the right side, right lower extremity, and did not walk normally.

More of the stresses, more of the weight-bearing was on the left side. And after several weeks of that type of weight-bearing activity, she began to develop problems with the left ankle and foot because it was carrying the majority of her weight.

Any stresses to the ankle arch and the sole of the foot or prolonged weight-bearing standing on that side alone, for example, is going to stress and inflame the fascia in the foot. The fascia is the fibrous tissue or gristle, if you want to think of it that way. It kind of holds the arch together. It provides the arch support of the bones of the arch of the foot and the mid foot. That is easily inflamed with trauma, a direct blow, maybe a fracturing of the calcaneous, surgical repair of the foot. Abnormal weight-bearing can cause it. All of those things will cause pain in the sole of the foot and arch of the foot. That developed on the left side.

Then when all the casts and the immobilization apparatus came off the right side, and when she’s trying to regain her normal gait, she put similar stresses on the right ankle and foot, and that caused the ankle and foot -- or the plantar fasciitis to occur on the right side as well.” (Volarich Dp. pp. 9-10)

Agreeing that what he was describing could cause Achilles tendonitis, as the treatment records of Dr. DiFilippo reflected had happened on the left side, Dr. Volarich explained:

“Again, any of those stresses, you know, when you’re bearing more of your weight or if you’re standing upright and you have a cast on one leg, the good leg is going to support almost all of the weight.

And in that case, the way you’re moving, the way you’re walking, the way your foot will pivot a little bit, it can cause all of those problems to occur.”(Volarich Dp. pp. 10-11)

Further testimony by Dr. Volarich on the issue of causation occurred as follows:

1. Now, Ms. Humphreys is a woman and was 230 pounds at 5’ 4’ tall at the time that you examined her. Some medical literature may say those things right there mark her more likely to develop plantar fasciitis. And, also, Dr. Krause, who evaluated Ms. Humphreys for the employer and insurer, is of the opinion that the injury at work is not the prevailing factor in causing her continued complaints on the right and none of the complaints on the left.

Can you please explain to the judge why you believe the injury at work is the prevailing factor for these conditions you diagnosed?

1. Well, I think it’s based on her history and based on the medical records I had to review. There was no symptoms and no problems beforehand. She was still 230 pounds before she got hurt and had no problems with her ankles or feet.

If it’s female gender, if it’s obesity, if it’s some other medial problem, for example, diabetes that can cause some of these types of fasciitis conditions to occur, I would suggest those problems to be present beforehand.

It would be very much a coincidence that they develop after an injury when we know we had abnormal stresses that I described earlier, abnormal weight-bearing, just to develop spontaneously on its own. I think that the work injury is the reason why she developed all these problems.

1. If it is actually found that she had about a 20 pound weight gain after the injury, would that be of any significance or change the answer you just gave?

1. Twenty pounds in a 230 pound person is, you know, maybe 5 percent body weight. I don't think it's a whole lot of --a 5 percent change, I should say. Maybe 10 percent change, if I calculated correctly. That's a significant weight gain, there's no question about it, but I don't think that that's going to account for it in and of itself, no. (Volarich Dp. pp. 11-12)

On cross examination, Dr. Volarich agreed that among the materials he had reviewed, he had seen was the claimant's Claim for Compensation for the March 1, 2006 work-related accident; the doctor agreed that the Claim alleged injury to Humphreys' right foot and ankle alleging she stepped off a porch and twisted her right foot and ankle; Dr. Volarich agreed that there was no mention of an injury to Humphrey's left foot in the Claim for Compensation.

Dr. Volarich agreed, during cross examination, that in his personal practice, it is not centered on the treatment of lower extremity foot and ankle injuries. The doctor stated that he sees a fair amount of lower extremity injuries "everything from broken bones to knee injuries to foot injuries, tarsal tunnel syndrome, plantar fasciitis".(Volarich Dp. pg. 17) Dr. Volarich admitted that he only had a couple of his own patients that he was treating for foot or ankle injuries, and admitted that he does not perform surgeries. The doctor stated that he would treat a patient with immobilization and pain control for injuries such as a twisted ankle, but if in a couple of weeks they were not getting better or their symptoms progressed or they developed new symptoms "absolutely, I would send them to a foot and ankle specialist". (Volarich Dp. pg. 18)

Dr. Volarich stated, during cross examination, that in the records of initial treatment, the initial evaluation at Unity and Dr. DiFilippo's records there were no immediate complaints in Humphreys' left foot or ankle. Dr. Volarich agreed that Humphrey's initial diagnosis was ankle sprain. Dr. Volarich stated that he had a copy of the MRI report, he did not review the actual MRI; the doctor agreed that it showed a partial tear of the anterior talofibular ligament. The doctor agreed that Humphreys did not have a full tear and there was no frank disruption of the tendons. Dr. Volarich agreed that this would put Humphreys' injury in a grade one ankle sprain. Agreeing that a grade one ankle sprain is mild in nature, Dr. Volarich further testified: "Yes, three is the worst, when they're completely torn, so it would be mild or mild to moderate". (Volarich Dp. pg. 25)

During cross examination, Dr. Volarich agreed that there is an increased risk in middle-aged individuals to develop plantar fasciitis. The doctor agreed that with an individual just being overweight they have an increased risk to develop this condition. The doctor agreed that being flatfooted is a known increased risk for the development of plantar fasciitis. Dr. Volarich agreed that Humphreys is, in fact, middle-aged, overweight and flatfooted. The doctor was queried if he believed the abnormal weight-bearing was the offending factor in developing plantar fasciitis on the left side. "Yes", Dr. Volarich answered. (Volarich Dp. pg. 29) Dr. Volarich agreed that he is familiar with the condition of plantar fasciitis, and stated that it is a "very common" condition. (Volarich Dp. pg. 29) The doctor was asked – if this abnormal weight-bearing was the offending factor when you take away that offending factor, would you expect her condition to improve? "Not once it develops, no, not with all the risk factors that she has", Dr. Volarich answered. (Volarich Dp. pg. 29) The doctor agreed, though, that the condition can improve. The doctor was queried – taking away the abnormal weight-bearing that you found that she had, do you feel these other factors are what's causing the condition to stick around? Dr. Volarich answered:

"I think they're contributing to it, sure, because the risk factors have been there all along. As I mentioned earlier, if it was just the risk factors of the overweight, the female, middle-aged woman – or middle-aged woman, and the flat feet, I would have expected her to have some problems sometime over the years. You know, she's 47 years old or 49 years old when I saw her, about 47 when she had the accident. Most people that have problems with plantar fasciitis are going to develop it, you know, usually in the mid 30s and up to mid 50s or 60s. Again, she had no problems with either foot before this accident. So I think the accident was the prevailing factor causing it, but she has all the other risk factors that have been present for many years that didn't give her any trouble." (Volarich Dp. pg. 30)

The doctor was queried that it was to his knowledge Humphreys' feet didn't give her any trouble. Dr. Volarich responded: "There's nothing in the records that I saw that talked about prior difficulties with her feet or prior treatment with her feet. And she didn't give me a history either." (Volarich Dp. pg. 31)

During cross examination, it was noted, that Dr. Volarich's opinion that the abnormal weight-bearing caused the left side plantar fasciitis; the doctor was asked what, in his opinion, caused the right side. Dr. Volarich answered:

“The original injury plus trying to regain normal gait. It’s the same sort of stresses on -- she’s still favoring the right side more than the left. And now without having a cast on it to immobilize it or to pad it, it’s the same sort of scenario for the right foot as what caused the left foot.” (Volarich Dp. pg.31)

The doctor was further queried – So when Humphreys is out of the cast, she’s then abnormal weight-bearing on the left side which is causing the right? Dr. Volarich answered:

“Well, I don’t know that I would say it that way. I think what I would say is now she’s trying to regain normal gait, trying to walk normally again, and she’s not doing that because of the injury to the lateral compartment. And there’s different stresses on the right foot now from the primary injury.” (Volarich Dp. pg. 31)

Dr. Volarich agreed, during cross examination, that he had noted upon examination of Humphreys that her gait was normal, she was able to walk barefoot and flatfoot across his examination room without foot drop, limp or ataxia. The doctor was asked if Humphreys’ gait then back to normal. Dr. Volarich answered:

“No. She still had trouble. The rest of my gait exam shows that. She could toe walk, but she had difficulties trying to heel walk because she couldn’t put full weight on her heels. She had poor balance when she was trying to tandem walk. Again, that’s typical with people with foot trouble or ankle trouble. She could squat without too much trouble. But it was the balance issues that she had more trouble with.” (Volarich Dp. pg. 32)

Dr. Volarich, during cross examination, stated that he had reviewed Dr. DiFilippo’s, the treating orthopedist’s, letter of November 24, 2006 in which Dr. DiFilippo had indicated he was unable to say with any degree of certainty that Humphreys’ symptoms on the left foot were related to her right ankle injury. Stating that he disagreed with Dr. DiFilippo, Dr. Volarich further stated: “I think that the reason was the abnormal weight-bearing causing the left foot.” (Volarich Dp. pg. 34)

On redirect examination, Dr. DiFilippo’s November 24, 2006 letter was again referred to, and it was noted that in the second paragraph Dr. DiFilippo had talked about the symptoms on the left lower extremity having in some way being related to the right; Dr. Volarich was questioned if Dr. DiFilippo had said it is possible to argue that this was an overuse symptomatology related to favoring the right lower extremity and it is certainly possible. “Yes, that was my opinion as well”, Dr. Volarich responded. (Volarich Dp. pg. 35) Dr. Volarich admitted, during further cross examination, that Dr. DiFilippo went on in the second paragraph of the November 24, 2006 letter to say that to answer this with any degree of certainty, however, is difficult to say in his opinion.

Dr. Volarich agreed that during the time that Humphreys was adjusting to having the cast or the boot off of her right, she had developed plantar fasciitis on the left by then. The doctor agreed that is also something that could account for the weight-bearing difficulties Humphreys was having walking with her right, having pain on her left.

Dr. John Krause, M.D. (No. 6) testified that he evaluated Humphreys on November 5, 2007. Dr. Krause discussed the history relayed to him from Humphreys about the incident that occurred in March of 2006; the doctor agreed that Humphreys had told him when she misstepped off the front porch and twisted her ankle, it was her right ankle. When asked if Humphreys had relayed to him a history of injuring her left ankle during that misstep, Dr Krause answered that he did not recall such a history of that, and he found no evidence in the records that Humphreys had an injury to the left ankle during the misstep.

Dr. Krause agreed that he was aware of the course of treatment that Humphreys received for the right ankle sprain, and agreed that he would characterize the treatment as appropriate course of treatment, including wearing the boot for a period of time. Stating that he had the opportunity to review the MRI, Dr. Krause further testified: “And it showed evidence of tears of the lateral ankle complex, which is the ligaments you tear when you sprain your ankle.” (Krause Dp. pg. 9) The doctor agreed that these are the most common findings. Dr. Krause noted that the MRI report said it was partial tears. “I don’t recall specifically noting it was complete or partial but the report says partial”, Dr. Krause stated. (Krause Dp. pg. 10) The doctor was asked to comment on the significance of these findings:

“They confirmed she had an ankle sprain. The most important significance of an MRI after an ankle sprain is that there aren’t other injuries. You don’t need an MRI to diagnose an ankle sprain. You get them to rule out other pathology.” (Krause Dp. pg. 10)

Dr. Krause agreed that in Humphrey's case, the only thing the MRI confirmed was the ankle sprain. The doctor was asked if the partial tearing of these ligaments heal with time. Dr. Krause answered:

"The ligaments are in the capsule of the joint. The joint is two bones that come together. It's surrounded by tissue called a capsule, and the ligaments are in that capsule, and they're outside the joint and they heal routinely. The treatment is to make the patient comfortable while they heal and make sure they heal appropriately so they don't end up with a loose ankle or instability-type problems." (Krause Dp. pg. 10)

The doctor explained how the boot helps in the healing: "The boot positions the ankle appropriately to allow the ligaments to be opposed and heal, and allows her to weightbear without re-rolling the ankle." (Krause Dp. pg. 10)

Dr. Krause testified about what his physical exam of Humphreys revealed:

"She had full motion. She had a negative anterior drawer which means the ligament had healed and healed appropriately. She did have some tenderness over her plantar fascia and some diffused tenderness around the back of her leg." (Krause Dp. pg. 11)

The doctor was asked if he had found any objective evidence of ongoing problems from the ankle sprain in his physical examination. "I did not", Dr. Krause answered. (Krause Dp. pg. 11)

It was noted that the doctor had also examined Humphreys for a condition known as plantar fasciitis. "I examined her left and she had symptoms consistent with plantar fasciitis", the doctor responded. (Krause Dp. pg. 11) The doctor was asked if Humphreys had had symptoms on the right or just on the left. "She had mild tenderness on the right of her plantar fascia but more so on the left." (Krause Dp. pg. 11) Dr. Krause explained what plantar fasciitis is:

"The plantar fascia is a ligament on the bottom of the foot that goes from the toes back to the heel bone called the calcaneus, and it spans the arch and it gets inflamed and painful after impact activities; such as running and repetitive pounding type activities. And it generally goes away with a stretching program." (Krause Dp. pp. 11-12)

The doctor was asked if this, in his opinion, would be a common condition. "Absolutely", Dr. Krause responded. The doctor agreed that it is a treatable condition. Dr. Krause was asked if there were any increased risks associated with plantar fasciitis. The doctor answered: "Most people who have plantar fasciitis are in their middle ages, 30 to 50. Heavier patients will have more problems because we think it's due to impact. I rarely see it in lighter patients." (Krause Dp. pg. 12) Dr. Krause was asked if there was any significance when an individual is flat footed. The doctor answered: "Not generally", Dr. Krause answered. (Krause Dp. pg. 12) It was noted that Humphreys is 49 years old, and Dr. Krause agreed that she would at least be within the age range of an increased risk for plantar fasciitis. Dr. Krause stated that he did not recall anything about Humphreys' weight, but if it were shown that Humphreys was obese it would slightly place her at an increased risk for plantar fasciitis. The doctor further stated: "Although, that's not one of the big risk factors that we tell people to lose weight to cure plantar fasciitis, but the book answer says yes, slightly." (Krause Dp. pg. 13)

Dr. Krause agreed that he had reviewed a report of Dr. David Volarich who believes that Humphreys developed plantar fasciitis as a result of the treatment she received for the ankle sprain. Dr. Krause noted that Dr. Volarich's indicated that as a result of this accident in favoring the right leg Humphreys developed left foot plantar fasciitis as well. Dr. Krause was asked to explain the mechanics involved in wearing the boot that Humphreys wore as far as the weightbearing that is involved:

"The boot comes just shy of the knee. It's like a cast, like a ski boot. It immobilizes the ankle so the ankle can't move. She doesn't have a boney injury so it's ideal for an ankle sprain. Generally they have a little bit of a sole built onto them so a lot of people don't like them because the ankle doesn't move but they take care of the pain you have in your ankle from the ankle sprain." (Krause Dp. pg. 14)

Dr. Krause was asked to explain how generally the weight is worn out when wearing the boot:

"Generally you're walking normally in normal gait, you bear weight on -- you have single leg stance at a certain time, so while you're in the single leg stance, you're bearing all your weight on that side. Because it elevates you a little bit, some

people may suggest you bear more weight on that side relative to the other side. We know if you've got a leg discrepancy and one leg is longer, you end up bearing more weight on the long leg and the boot kind of makes you longer. Although, nobody would put a boot on your bad side to make it longer than your -- to treat the contralateral side, but in theory you could buy that argument." (Krause Dp. pp. 14-15)

So generally speaking, the doctor was further asked, the boot, if anything, could cause more weight on the leg that has the boot on it, is that correct? Dr. Krause answered: "If you're walking with the boot without crutches or a walker, you would bear at least as much weight on that side as the other side. It would be equal or more so on the boot side, correct." (Krause Dp. pg. 15) Dr. Krause agreed that in his course of treating patients with ankle sprains he has prescribed a boot. The doctor was asked if he recalled seeing a patient develop plantar fasciitis as a result of wearing a boot for an ankle sprain. Dr. Krause answered:

"I don't recall ever tying it to the boot. I see a lot of plantar fasciitis. I see a lot of ankle sprains, but I don't recall ever saying, oh, it must have been the boot that caused this or tied them together necessarily." (Krause Dp. pg. 15)

Dr. Krause was asked, to his knowledge, had Humphreys had an active treatment for her plantar fasciitis. "She had some physical therapy mainly for the achilles tendonitis but that would potentially help the plantar fasciitis", Dr. Krause answered. (Krause Dp. pg. 16)

Dr. Krause was asked to testify as to his diagnosis he related to the incident of March 1, 2006 when Humphreys misstepped from his evaluation of Humphreys and his review of the medical records. "I diagnosed her with ankle sprain", Dr. Krause answered. (Krause Dp. pg. 17)

Dr. Krause agreed that he had also diagnosed bilateral plantar fasciitis for Humphreys. The doctor was asked his opinion whether or not the 03/01/06 incident when Humphreys sprained her ankle was the prevailing factor in the development of her bilateral plantar fasciitis. "No", Dr. Krause answered. (Krause Dp. pg. 18) "I did not" feel the incident of 03/01/06 was the prevailing factor in the cause of Humphreys' Achilles tendonitis, Dr. Krause also stated. (Krause Dp. pg. 18) The doctor was further queried if it was his opinion that it was not the prevailing factor for Humphreys' bilateral plantar fasciitis or Achilles tendonitis, was this his opinion in regards to both of her lower extremities; did he feel the 03/01/06 incident caused any of the conditions in Humphreys' left foot or her right foot beyond the ankle sprain. "The incident of March 1st, '06 caused the ankle sprain and no other conditions in her foot or ankle", Dr. Krause answered. (Krause Dp. pg. 18)

On cross examination by the claimant, Dr. Krause indicated that if the records showed Humphreys went on the same day of the incident to Urgent Care in O'Fallon, she was diagnosed with a sprained right foot and ankle. The doctor was asked if it was consistent with a sprain if Dr. Fischer had found that Humphreys could not bear weight on her right foot at all. "He put her on crutches and -- correct", Dr. Krause responded. (Krause Dp. pg. 21) Dr. Krause stated that he guessed Humphreys had a Grade II sprain since she was treated. The doctor explained the different levels of sprains: "A Grade I sprain is a partial tearing of the ligament or a stretching of the ligament. A Grade II sprain is a partial tearing. And a Grade II sprain is a complete tearing of the ligament." (Krause Dp. pg. 22) Dr. Krause stated that a person could have lingering problems from a sprain/strain "(i)f they're not treated appropriately they can". (Krause Dp. pg. 21) Dr. Krause agreed that Dr. DiFilippo treated Humphreys, eventually performing an MRI where he found partial tears in three ligaments; Dr. Krause agreed that this was consistent with a sprain or a strain type of injury, and that the MRI testing was appropriate as well.

During cross examination, Dr. Krause agreed that Humphreys was in a boot, but further stated he did not know if she had been in a boot. The doctor stated that a cast "is a circumferential hard dressing made of fiberglass, typically you can't get off". (Krause Dp. pg. 23) Explaining the difference in a boot and a cast, Dr. Krause testified: "The main thing is it fits tighter because it's custom made to your foot where the boot is not, and you can't remove it so the patient complaint is much better." (sic) The doctor was asked to comment on his understanding as to whether or not Humphreys was using crutches during that period. Dr. Krause answered: "They gave her crutches so I suspect she was using them to some extent. Generally for an ankle sprain I put people in a boot or a cast so they don't have to use crutches. You know, I would suspect she used crutches as needed for pain." (Krause Dp. pg. 24)

Dr. Krause agreed, during cross examination, that he did not have anything in his notes about Humphreys' experience either wearing the boot or the cast as far as how she was able to walk or function. Dr. Krause again agreed with the diagnosis of right ankle sprain, and stated that this was related to the "misstep of the porch on the 1st of March". (Krause Dp. pg. 24) The doctor agreed that he had also diagnosed Humphreys with bilateral plantar fasciitis, and that at least by Humphreys' history

she had not had plantar fasciitis before March 1, 2006; the doctor agreed that he was not provided with any medical records showing that Humphreys had treatment for this condition in either foot before March 1, 2006. Dr. Krause agreed he had described the plantar fasciitis condition as “(l)igaments on the bottom of the foot, yes”. (Krause Dp. pg. 25) Explaining about what causes this condition, Dr. Krause testified:

“Nobody really knows for sure. We think it’s pounding on hard surfaces, so I see a lot of runners who are training for a marathon. And sometimes we see it in people who have a one-time event and fall from a height or something, but most commonly they’ve been walking a lot or standing a lot, and repetitive pounding on hard surfaces.” (Krause Dp. pg. 25)

The doctor agreed that plantar fasciitis can be the result of physical activity overload. Dr. Krause was queried if the condition could be due to faulty foot mechanics, such as having an abnormal pattern of walking. “I think that’s a stretch, but yes”, Dr. Krause responded. (Krause Dp. pg. 25) The following testimony then occurred:

1. I got that from the Mayo Clinic website. Just so I don’t misstate it, here’s what they say. It can be due to faulty foot mechanics, being flat footed, having a high arch or even having an abnormal pattern of walking can adversely effect the way weight is distributed when you’re on your feet, putting added stress on the plantar fasciitis, would you agree with that?

1. I would.

1. Okay. When a person walks wearing a boot or a cast on the foot that is injured, that would generally alter the person’s gait?

1. Absolutely.

1. When a person walks wearing a boot or cast on a foot that is injured, that activity can result in an abnormal weightbearing on the non-injured foot; would you agree with that?

1. Yes, ma’am.

1. It can also cause you to walk abnormally on the injured foot as well; would you agree with that?

1. Correct.

1. And isn’t it true that abnormal weightbearing on one foot due to an injury on the other foot, can over time cause pain in the other foot?

1. It could, sure.

1. When a person walks with one painful foot, and let’s say removing the cast or the boot, that can cause the person to tend to bear more weight on the other foot, is that correct?

1. It could, yes.

1. And it could also – when a person walks with one painful foot, that activity can result in more weightbearing on the other non-painful foot, do you agree with that?

A Yes.

Q. Do you agree it’s possible the symptoms Ms. Humphreys developed in her left low extremity could be from an overuse symptomology related to favoring her right lower extremity?

A. Possible.

Q. That’s something that you can’t rule out?

A. Can’t rule out.

Q. And actually there’s really no -- you really didn’t’ delve into that with her as far as how she was functioning with the --

A. With the boot.

Q. -- with the boot and the cast?

A. Correct.

Q. Would abnormal gait and an injured foot, say on the right, would also cause to increase stress on that particular foot as well; would you agree with that, on the right foot?

A. Yes.

Q. Would there be any significance to you that she didn't have these problems or symptoms – I'm talking about the plantar fasciitis – prior to her injury on March 1st, and they arose during her course of treatment following her injury? Would that suggest to you that there might be a connection there as far as resulting from --

A. I don't think there's a connection but there could be. (Krause Dp. pp. 25-28)

During cross examination, Dr. Krause stated that he had diagnosed Humphreys with achilles tendonitis, and stated that he had found this in his own evaluation and in the medical records. Achilles tendonitis is "an inflammation of the achilles tendon at or just above where it attaches to the heel", Dr. Krause explained. (Krause Dp. pg. 30) Explaining what causes achilles tendonitis, Dr. Krause said: "Generally overuse and tightness in the tendon". (Krause Dp. pg. 30) The doctor agreed that he was not aware of any prior diagnosis of this condition for Humphreys before March 1, 2006, and agreed that he did not see any prior treatments for this condition. The doctor was asked if achilles tendonitis was a problem that could also result from stress or overuse in following an injury. Dr. Krause answered: "It's an overuse-type thing. It's not classically seen after an injury to the contralateral side...It's an overuse." (Krause Dp. pg. 31) The doctor was asked if it could be an overuse resulting from an abnormal walking or an emphasis of putting more stress on the uninjured side. "In theory, yes", Dr. Krause answered. (Krause Dp. pg. 31) When queried if it was true that he couldn't rule this out as being connected in Humphreys' case, if she had over use or put more emphasis on the left side because of injury to the right. "I couldn't possibly rule it out", Dr. Krause responded. (Krause Dp. pg. 31)

The following testimony occurred during redirect examination concerning causation:

1. The condition of bilateral plantar fasciitis, we discussed earlier and you discussed on cross-examination this idea that her being in the boot caused abnormal weight bearing that could possibly cause altered gait with development of plantar fasciitis. In your opinion, do you believe that any of the treatment that Ms. Humphreys received, including the cast and the boot, caused her condition of bilateral plantar fasciitis?

1. I did not.

1. Based on your experience in treating and specializing in the treatment of feet and ankles?

A Right. And as we discussed, I would argue that the boot would protect that somewhat. You get it from running and pounding activities. If I put you in a boot, you can't do those for one, and you're bearing relatively more weight on the booted side than the other side. So that would argue that someone in a boot has a less chance of getting it than your average joe." (Krause Dp. pp. 36-37)

Dr. Krause agreed that Humphreys had given him a history of prior surgery to her foot. The doctor further stated: "She had a cyst taken off her left foot at St. Joe's. On her health history she did not get updates." (Krause Dp. pg. 37) The doctor was asked the significance of this. "I don't think there's any significance", Dr. Krause responded. (Krause Dp. pg. 37)

On the issue of causation, the claimant, in her memorandum, correctly notes:

"Claimant carries the burden of proving a causal connection between the accident and the claimed injuries *McGrath v. Satellite Sprinkler Systems*, 877 S.W.2d 704, 708 (Mo.App. 1994), and the standard of proof is one of 'reasonable probability.'" *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). In analyzing this standard, the term 'probable' means 'founded on reason and experience which inclines the mind to believe but leaves room for doubt.' *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986). Such proof must be made by competent and substantial evidence rather than speculation. *Griggs*, 503 S.W.2d at 703.

In this case, the evidence reveals a need for sophisticated medical testing in regards to diagnosis and treatment of the claimant's bilateral foot condition. In instances of complicated medical questions, the Courts have stated that medical opinion is required for the determination of causation.

“...an injury may be of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed. When the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific techniques for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding...” *Knipp v. Nordyne, Inc.* 969 S.W.2d 236, 240 (Mo.App. 1998)

* * *

“Medical causation not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 222 (Mo.App. 1992).

It is found, considering the medical opinions and medical evidence, that there is no evidence of prior continuing ankle/foot problems for the claimant at the time of the March 1, 2006 work related right foot/ankle injury. This evidence medical evidence and opinions establish, it is found, that on the day of the March 1, 2006 injury, the claimant was diagnosed with - sprained right foot, right ankle. It is found that there is no dispute among the medical expert opinions that the March 1, 2006 event where Humphreys misstepped off the front porch and twisted her right ankle (found herein in this Award to be a work related event) caused the injury of - right ankle lateral compartment strain/sprain with partial tears of the anterior talofibular ligament and calcaneofibular ligament with persistent peroneal tendonitis, by Dr. Volarich; and Dr. Krause, noting that the MRI “showed evidence of tears of the lateral ankle complex, which is the ligaments you tear when you sprain your ankle”, also diagnosed the March 1, 2006 injury as - right ankle sprain.

It is found that there is no dispute among the medical experts that the claimant suffers from the condition of bilateral plantar fasciitis; the issue is the cause of this condition. The claimant alleges that the condition was a result of the treatment given for her March 1, 2006 right ankle sprain injury. Dr. Volarich agreed with the claimant, testifying that it was his opinion within a reasonable degree of medical certainty that Humphreys’ work-related accident of March 1, 2006 was the prevailing factor in causing the injuries and diagnosis of – a. right ankle lateral compartment strain/sprain with partial tears of the anterior talofibular ligament and calcaneofibular ligament with persistent peroneal tendonitis and plantar fasciitis, and b. bilateral plantar fasciitis. Dr. Volarich opined that the injury which originally affected the right side eventually caused problems on the left due to abnormal weight-bearing, that the abnormal weight-bearing caused the left side plantar fasciitis. Dr. Volarich further opined that what caused the plantar fasciitis on the right side was the same sort of stresses, that in trying to regain normal gait once out of the cast, the claimant was not doing that because of the injury to the lateral compartment and this resulted in different stresses on the right foot now from the primary injury. Dr. Volarich acknowledged that the claimant had other risk factors for plantar fasciitis such as - middle-aged, flat footed and over-weight; Dr. Volarich further testified, though:

“I think they’re contributing to it, sure, because the risk factors have been there all along. As I mentioned earlier, if it was just the risk factors of the overweight, the female, middle-aged woman – or middle-aged woman, and the flat feet, I would have expected her to have some problems sometime over the years.....Again, she had no problems with either foot before this accident. So I think the accident was the prevailing factor causing it, but she has all the other risk factors that have been present for many years that didn’t give her any trouble.” (Volarich Dp. pg. 30)

It is found that the records of the doctor who treated the March 1, 2006 right ankle/foot injury, Dr. DiFilippo, these records reflected additional complaints from the claimant on 05/01/06 of left foot pain and a diagnosis by Dr. DiFilippo that now included - suspected tendonitis of the left ankle, and rule out retro-calcaneal tendonitis on the left. The record revealed that Dr. DiFilippo ordered an MRI of the left ankle on 05/04/06, and by 05/16/06 diagnosed the claimant with ankle sprain on the right and Achilles tendonitis on the left. The treating doctor Dr. DiFilippo opined that it was difficult to say with certainty that the symptoms in the left lower extremity was related to the claimant’s right ankle injury, but further stated that it was possible to argue that this was an overuse symptomatology related to favoring the right lower extremity. Dr. Krause, who evaluated the claimant on behalf of the employer/insurer, agreed that the claimant, upon examination, had symptoms consistent with bilateral plantar fasciitis, but further opined that the March 1, 2006 incident when the claimant sprained her right ankle was not the prevailing factor in the development of the claimant’s bilateral plantar fasciitis. Dr. Krause testified that when wearing a boot you’re bearing all your weight on that side, that because it elevates you a little bit some may suggest you bear more weight on that side relative to the other side. If you’re walking with the boot without crutches you would bear equal or more weight on the boot side, Dr. Krause said. I don’t recall ever tying the development of plantar fasciitis to wearing a boot for an ankle sprain, the doctor stated. Dr. Krause stated though, during cross examination, that plantar fasciitis

is caused by repetitive pounding on hard surfaces. The doctor agreed, during cross examination, a person walking wearing a boot or cast on a foot can result in an abnormal weightbearing on the non-injured foot, and that abnormal weightbearing on one foot due to an injury to the other foot can over time cause pain in the other foot; Dr. Krause agreed that when a person walks with one painful foot that activity can result in more weightbearing on the other non-painful foot. Dr. Krause agreed that the symptoms Humphreys developed in her left lower extremity could be from an overuse symptomatology related to favoring her right lower extremity, and that he could not rule that out. Dr. Krause agreed that abnormal gait and an injured foot on the right would also cause to increase stress on that particular foot as well. Dr. Krause testified that he did not think there was a connection between the fact that Humphreys did not have plantar fasciitis problems or symptoms prior to March 1, 2006 and that these symptoms arose during her course of treatment following her injury. But there could be a connection, Dr. Krause also said. Dr. Krause stated that he had diagnosed Humphreys with Achilles tendonitis, which is “an inflammation of the Achilles tendon at or just above where it attaches to the heel”; the doctor opined that he did not feel the March 1, 2006 incident was the prevailing factor in the cause of the claimant’s Achilles tendonitis. Dr. Krause explained what caused Achilles tendonitis – “Generally *overuse* and tightness in the tendon”. (emphasis added) (Krause Dp. pg. 30) *See, generally, Wilson v. Emery Bird Thayer Co.*, 403 S.W.2d 953, 958 (Mo.App. 1966) in which it was held that when the primary injury is shown to have arisen out of and in course of employment, every natural consequence that flows from the primary injury likewise must be deemed to have arisen out of employment. It is found that the substantial weight of the evidence, including the medical treatment records, support Dr. Volarich’s opinions on the issue of causation for the condition in the claimant’s feet of bilateral plantar fasciitis; it is found that the substantial weight of the evidence establishes that the prevailing factor for the development of the condition of bilateral plantar fasciitis was the abnormal weight bearing the claimant was subjected to in the course of her treatment and healing for the work related right ankle sprain sustained on March 1, 2006.

ISSUE: Nature and extent of the temporary total disability for a period of 12 days

Humphreys testified that after the injury on March 1, 2006 I called my boss, Jane Harrer, told my boss what happened and asked her if she would come and get me. Jane came and got me, Humphreys said, and I went to Unity Medical Group (St. John's Urgent Care) for medical attention and was driven there by my boss, Jane Harrer. When I was finished there, Jane took me home, Humphreys stated.

At Unity they did x-rays and for my foot they gave me a shoe that had like a solid bottom and it was like soft-sided, Humphreys answered. He gave me a prescription for like an anti-inflammatory, I believe, and a pain medication, Humphreys stated.

Humphreys stated that she was supposed to go back to see the doctor at Urgent Care Center about a week later, but she did not go back to that doctor. Explaining why she had not gone back, Humphreys testified because the next day I was called by the School District and I was told that it was not a Workers' Compensation coverage, so I was free to go see any doctor I wanted to see if I felt I still needed to see a doctor.

Humphreys agreed that as indicated in the medical records, she next saw a doctor on March 2nd, which would that have been the next day. I went to Dr. DiFilippo, Humphreys said. Explaining how she had found this doctor, Humphreys stated that the doctor’s office, St. Charles Orthopedic office, I had taken my son and my mother-in-law both there, so I was familiar with their office. Humphreys agreed that she began treatment then with Dr. DiFilippo. She stated that she missed 12 days from work due to her foot and received her sick pay for those days from Fort Zumwalt.

Humphreys agreed that she retired at the end of that school year. She was asked to discuss the kinds of benefits she is paid upon retiring. You would receive payment for all the sick days that you had saved in the sick bank, Humphreys stated. She agreed that, therefore, those 12 days were subtracted from her sick bank and she did not get paid for those at the time she retired at the end of that spring. My sick days, Humphreys said, I would like to be compensated for those 12 days that were used as sick days.

In evidence was a copy of a wage statement of Ms. Humphreys (No. 5) showing bi-monthly payments of \$877.53 for a time period of 9/15/05 to 9/1/06. The wage statement reflected a total gross pay for the 09/15/05 through 09/01/06 period of \$21,060.72. The wage statement reflected no sick leave or personal leave; the statement indicated consistent payments of \$877.53 bimonthly for the time period of 09/15/05 through 09/01/06.

Medical treatment records from **Unity Corporate Health** (No. B) began with a 03/01/2006 entry which noted the following in the History section:

The patient states she was working as a parent educator doing a home visit when she stepped down off of a porch step and felt a pop in her right foot and ankle. Afterwards she saw a bump on her right foot. She complains of pain in her lateral right foot and lateral ankle.....

In the Observation section was written:

There is tenderness and edema of the right lateral foot and ankle. The patient is unable to bear weight at all. She appears to have full range of motion with some discomfort on range of motion maneuvers. Neurovascular appears to be intact.

The record included reports of x-rays taken on 03/01/06 of the right ankle and the right foot, and both reported impressions of – negative. The written assessment on 03/01/06 included: Sprained right foot, right ankle. The written treatment plan included:

The patient is provided with an ankle splint. She also was given a postop shoe. She may apply cold as needed for pain and elevate as needed for swelling....she returns to transitional duty and will follow-up with me on March 9. There is no suggestion of permanency. Causation work related. Anticipated time to recover is 2-6 weeks.

A Work Status Report in the 03/01/06 record indicated that Humphreys was released to Light/Modified/Transitional Duty 03/01/06 to 03/09/06 of sit down work only. Written in the Other instructions section was: Ankle splint/Post Op Shoe. Ultram – Crutches if needed.

Medical treatment records of **Dr. Emil A. DiFilippo, M.D.** (No. C) began with a 03/02/06 treatment entry in which the doctor wrote: Peggy Humphreys has an ankle sprain on the right. She turned her ankle at a friend's home. She has moderate swelling of the lateral aspect of the ankle, lateral aspect of the foot." It was written that x-rays of the ankle and foot showed no definite fracture, and stress x-rays showed no gross instability. Dr. DiFilippo noted that Humphreys had a cast boot and also had an air cast to use later. Crutches with weight bearing as tolerated, the doctor wrote. Dr. DiFilippo further wrote in the 03/02/06 entry: "Off work for two weeks and return in three weeks for repeat x-rays of the ankle, oblique of the foot. In the next treatment entry of 03/23/06 it was written that Humphreys was generally improved; it was written that she was to continue to wear a boot and return in three weeks, and if she had increasing difficulties an MRI might be required. In the next treatment entry of 04/17/06 the doctor wrote that it was 1 ½ months post ankle sprain and Humphreys was still symptomatic. It was written that an MRI was to be scheduled. Further noted was: "She has a wrap around elastic brace."

A report of an MRI of the right lower extremity performed on 04/19/06 was in the record. The next treatment entry in Dr. DiFilippo's record was dated 05/01/06, and Humphreys' complaints of continued pain about the area of the right ankle was noted. It was noted that the MRI showed partial tear of the collateral ligaments. It was written that Humphreys had good clinical stability. The doctor wrote that a cast was applied on the right ankle, and the cast was split; further written was that Humphreys was to return in three weeks for removal of the cast and then repeat stress x-ray and then repeat casting for another three weeks. It was written that Humphreys might wish a second opinion and was given Dr. Aubuchon's number. Dr. DiFilippo further wrote: "She also has some discomfort about the posterior aspect of the left ankle and points to the retro calcaneal area. There is no gross swelling. X-rays are negative." A MRI of the ankle was planned. The doctor wrote of his impression in the 05/01/06 entry: 1. Suspected tendonitis of the left ankle (negative Thompson test and no defects in the tendon). Rule out retro-calcaneal tendonitis on the left; 2. Partial tear of the collateral ligaments on the right.

A report of an MRI of the left lower extremity joint performed on 05/04/06 was in the record. In the next treatment entry of 05/16/06 it was written that Humphreys was seen for resolving ankle sprain on the right, and that she was to return in a week for a cast change. On the left, she has ankle discomfort posteriorly, Dr. DiFilippo wrote. The written treatment recommendations were: "To attend physical therapy for her left ankle. Return next week for a cast change on the right. Will probably require physical therapy on the right." The impression on 05/16/06 was: Ankle sprain on the right. Achilles tendonitis on the left. To have ultrasound on the left." In the next treatment entry of 05/23/06 it was written that Humphreys' sprain on the right had improved after three weeks casting, and a new cast was applied. It was noted that the achilles tendonitis on the left was generally improved with physical therapy, but therapy would be continued. The doctor further wrote: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." In the next entry of 05/31/06 it was noted that Humphreys was approximately one month in a cast on her right ankle for ankle sprain. "The cast was deteriorated and she wishes to have this cast discontinued", the doctor wrote. Dr. DiFilippo again noted: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." It was noted that Humphreys was on over the counter anti-inflammatory medications. The

next entry of 06/19/06 included: "Peggy Humphreys is generally improved with ankle sprain right and left". It was written that physical therapy would be continued.

The record next contained a Physical Therapy Progress Report, dated 07/17/06, to Dr. DiFilippo in which the progress of Humphreys was discussed. It was noted that Humphreys had been referred to physical therapy with a diagnosis of Left Posterior Tibialis Tendinitis, Peroneal Tendinitis, and Right Ankle Sprain. It was written that Humphreys had attended all sessions with no no-shows. It was noted that Humphreys was continuing with pain complaints, and continued to present with decreased flexibility and tenderness. The recommendation by the therapist was for continued therapy for another month.

Dr. Volarich and Dr. Krause evaluated Humphreys on behalf of the claimant and the employer/insurer, respectively. Neither of these doctors commented on the claimant's ability to work during her treatment for the work related injuries.

Section 287.020.6 RSMo 2005 defines the term "total disability" as an "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident". "Temporary total disability" is not defined by the workers' compensation statute, but is intended to be an award intended to cover a healing period and is a benefit granted only for the time prior to when the employee can return to work; an award for temporary total disability is not intended to encompass disability after the condition has reached the point where further progress is not expected. *See, Williams V. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. E.D. 1985). The claimant's testimony of an inability to work during treatment for the work-related injury with corroborating medical evidence constitutes substantial evidence on which to award temporary total disability benefits. *See, generally, Patterson v. Engineering Evaluations*, 913 S.W.2d 344, 347 (Mo.App. E.D. 1995).

It is found, that it has been determined in this Award that the claimant suffered a compensable injury to her right ankle/foot upon the March 1, 2006 event when she misstepped and twisted her right ankle. It is further found that the treatment records of Dr. DiFilippo indicate treatment for this work related injury beginning on March 2, 2006. Dr. DiFilippo wrote in the 03/02/06 treatment entry: "Off work for two weeks and return in three weeks for repeat x-rays of the ankle, oblique of the foot." The claimant gave undisputed testimony that she began treatment with Dr. DiFilippo for the March 1, 2006 work related right ankle injury, and missed 12 days from work due to her foot, and received her sick pay for those days from Fort Zumwalt. Humphreys stated that she retired at the end of that school year, and explained that upon retiring she would have received payment for all the sick days that she had saved in the sick bank; she agreed that those 12 days were subtracted from her sick bank and she did not get paid for those at the time she retired at the end of that spring. It is found that the substantial and competent evidence establishes that the claimant is entitled to temporary total disability benefits for a total of twelve days, beginning on March 3, 2006. [NOTE: It is found that, as the evidence indicates that the claimant was paid sick day benefits pursuant to a contract without reference to a compensable injury, the employer is not entitled to a credit against its temporary total disability liability for the sick days paid when the claimant missed work. *See, Section 287.270 RSMo*, and, *generally, Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 227 (Mo.App. E.D. 1996).] It has previously been determined in this Award that the average weekly wage for this claimant is \$566.15, and thus her workers' compensation rates are \$377.43/\$365.08. Therefore, it is found that the claimant is entitled to the following temporary total disability amount: \$377.43/week divided by 7 days/week = \$53.92/day; \$53.92/day x 12 days = \$647.04.

ISSUE: Liability of past medical expenses

It has been determined in this Award that March 1, 2006 event when the claimant misstepped and twisted her right ankle was a compensable accident. Additionally, it has been determined in this Award that the substantial and competent evidence establishes that as a result of the March 1, 2006 work related accident the claimant sustained injuries of a right ankle sprain, and bilateral plantar fasciitis.

The claimant, Humphreys, testified about the treatment she received for these work related injuries, stating that she went to Unity Medical Group and, when told by her employer she could no longer be treated at Unity Medical Group because it was a denied workers' compensation case, she sought treatment on her own from Dr. DiFilippo.

Humphreys testified that after the injury on March 1, 2006 she called my boss, Jane Harrer, told my boss what happened and asked her if she would come and get me. Jane came and got me, Humphreys said and I went to Unity Medical Group (St. John's Urgent Care) for medical attention and was driven there by her boss, Jane Harrer. When I was finished there, Jane took me home, Humphreys stated.

At Unity they did x-rays and for my foot they gave me a shoe that had like a solid bottom and it was like soft-sided, Humphreys answered. He gave me a prescription for like an anti-inflammatory, I believe, and a pain medication, Humphreys stated.

Humphreys stated that she was supposed to go back to see the doctor at Urgent Care Center about a week later, but she did not go back to that doctor. Explaining why she had not gone back, Humphreys testified because the next day I was called by the School District and I was told that it was not a Workers' Compensation coverage, so I was free to go see any doctor I wanted to see if I felt I still needed to see a doctor. Kathy Bresnahan called to tell me this, Humphreys said. I honestly don't know Bresnahan's role, but she was calling me for Fort Zumwalt, Humphreys said. Bresnahan did not explain what she meant when she said it wasn't Workers' Compensation, Humphreys said.

Humphreys agreed that as indicated in the medical records, she next saw a doctor on March 2nd, which would that have been the next day. I went to Dr. DiFilippo, Humphreys said. Explaining how she had found this doctor, Humphreys stated that the doctor's office, St. Charles Orthopedic office, I had taken my son and my mother-in-law both there, so I was familiar with their office. Humphreys agreed that she began treatment then with Dr. DiFilippo.

Discussing her treatment with Dr. DiFilippo, Humphreys stated that the first thing the doctor did was he gave me a boot for my right foot. It was a soft inner sleeve that slid into another boot that was a hard solid plastic on the bottom, and it had two meta rods that ran up both sides, and Velcro that went around to hold it all in place, she said. Humphreys agreed that the boot held her foot and leg at a perpendicular angle, and held it solid so she didn't have movement with her foot. I wore this boot for six weeks, Humphreys stated. I was using crutches for the first 2 1/2 weeks from the day I injured it, she said, and then I was on crutches for an additional two weeks. After the boot was taken off the doctor told me to get a soft brace, an elastic brace, to continue help supporting my foot and ankle, she said. Humphreys agreed that this was something that she purchased on her own, stating that she purchased it at Wal-Mart. I believe it was around \$9, she said. She agreed that she just purchased the one, and that she wore it for about two weeks. Humphreys agreed that as indicated in the records, this was about the time she had an MRI of her right foot while still treating with Dr. DiFilippo. After the MRI my understanding of what was wrong with my ankle, Humphreys stated, is that I had torn ligaments and tendonitis. Treatment after this was that the doctor put a hard cast on it, she stated. Humphreys agreed that this cast again held her foot in that same L-shape. I had no movement, Humphreys said. She stated that she did not use crutches when she had this cast on. Humphreys agreed that at this point when she got the cast it was about the beginning of May. I wore this cast about four weeks, she said. Then after this cast came off the doctor gave me another boot and I wore the boot for an additional two weeks, Humphreys stated.

Humphreys was asked, other than the brace, did she have to pay for any part of her medical treatment during the time she was treating with Dr. DiFilippo. I paid co-pays, Humphreys answered, which to Dr. DiFilippo they were \$10 a visit. Also there were my two prescriptions for anti-inflammatory and pain medication that I filled one time, she said, which I believe were around \$30 total.

The claimant agreed that the cast went on at the beginning of May, and then she wore it to about the end of May, and then two more weeks. So, Humphreys agreed, from March 2nd, when I first saw Dr. DiFilippo until mid June is the time period when I had a boot for six weeks, an elastic brace for about two weeks, a cast for about four weeks, and another boot for about two weeks. It was noted that Humphreys had testified that with the first boot, she used crutches for the first 2 1/2 weeks and then after that she wasn't using the crutches anymore; Humphreys was queried how did the boot affect her walking when she wore it. It made me taller on the right side than on the left side, so I would wobble as I walked, Humphreys answered. I was putting some weight on my right, she said, I was not putting full weight on my right. Humphreys explained this was because my foot still hurt. The kind of shoe that I wore on my left was my tennis shoe, Humphreys said. Stating that wearing the boot on her right foot during that first six weeks eventually caused other problems for her, Humphreys said - my left foot started hurting. It was about four or five weeks into wearing the first boot that my left foot started really bothering me in my heel and my ankle, she said. She was asked if she had had pain in her left foot during the year before her injury, and Humphreys answered - No. I had not had pain like that in my heel and ankle on the left at any time before this injury, Humphreys stated.

I told Dr. DiFilippo about the pain that developed in my left foot after my injury in 2006, Humphreys stated. Dr. DiFilippo had me go get an MRI on my left foot. She agreed that she had already had an MRI on her right foot on 4/19/06. My understanding of what that MRI showed on the left foot was that I had tendonitis and plantar fasciitis, Humphreys said. She agreed that the MRI did not show a torn ligament. The doctor order treatment for my left foot of physical therapy, she said, which was done at the Frontier Integrated Hospital starting in May of 2006. She agreed that this was while she was still wearing a cast on her right foot, and further agreed that while she still had a boot on the right foot for two weeks after that

cast she continued to do physical therapy on her left during that time. Humphreys was queried - And then you were finished with the cast and finished with your boot, so when you started walking with no cast on the right how did your right foot feel? It was very sore from no mobility for a long time, Humphreys answered, so it took quite a few days to loosen it up. She agreed that the doctor ordered physical therapy on her right foot.

Agreeing that she had problems with swelling on the right, Humphreys explained that after she had the last boot off it was not as much as in the beginning but, it would still swell when she was on it a lot.

It was noted that Humphreys had had physical therapy through the summer, the last date in mid-August; she was asked why she had eventually stopped the physical therapy. Because of insurance, she answered. She was further queried - What was your understanding about your therapy, that you were finished or not? That they felt I was finished, yes, Humphreys answered. She was asked if she felt she was finished. No, Humphreys answered. This is because I was still having pain in both my feet at that time in my heels and my ankles and on my right foot along the outside of my right foot, she said. Humphreys was asked why she had stopped seeing Dr. DiFilippo. Because I felt like he thought I was just being a baby, she answered. Humphreys was asked - After the last boot was finished and you had seen the doctor after that, was it your understanding there was anything more that he was going to do for you? No, Humphreys answered. She was asked if there was anything her physical therapist wanted to do. He wanted to have me fitted for inserts for my shoes, Humphreys answered. She stated that she did not get these. Explaining why not, Humphreys said because the insurance didn't cover them.

Humphreys testified about how her feet felt after therapy ended and after she last saw Dr. DiFilippo; about how her feet were feeling through the fall of 2006. They bothered me a lot, Humphreys said. It was hard for me to walk, she stated. It was very painful when I would get up in the morning, Humphreys testified, I would have to lay in bed for a few minutes and stretch my feet out before I could even step down. When I first started walking at the beginning of the day I would primarily walk on my front part of my foot because it was so uncomfortable to put my heel down, she said. She was asked what kinds of things has she done on her own to try to get her feet to feel better. I stretch every morning before I get up, Humphreys responded. I still do the exercises that they taught me to do at physical therapy, she said, and I bought really good shoes. I also had bought some inserts, she stated, at one point we went to the foot store and I bought inserts made of real hard plastic to see if those would help. I paid \$189.00 for the pair of inserts, one for each foot, Humphreys said. Also pads that you put over the top; like the things that go in your shoes; I don't know what they're called, Humphreys further stated. I bought these the beginning of February, she said, and the last day I wore them was April 10, 2007. In the very beginning I felt some relief from my pain, Humphrey testified, then I don't know what happened with the inserts, if over time they flattened, I don't know, but that they became very, very uncomfortable to wear and I had to remove them out of my shoes. She agreed that she has not worn them since April of 2007, and agreed that these were not prescribed they were something she bought at the foot store. It was noted that Humphreys had said she had gone and bought shoes, and she was asked where she had purchased them. I went to the New Balance store in Fenton, Humphreys answered. Explaining how they had helped her choose shoes, Humphreys testified that they fit my feet, looked at how I stand, how I walked, and they fitted me with shoes that would support the areas of my feet that needed to be supported. I bought two pairs of shoes, Humphreys said, and they were \$135.00 for each pair. She again agreed that this was not on a prescription from a doctor, this was something she did herself specifically because of the complaints she had. I bought the shoes right after Christmas of 2007, Humphreys said, somewhere between that and the beginning of January, 2008, I don't remember exactly what day.

Humphreys testified about the bills for the medical services she received. When I treated with Dr. DiFilippo in 2006 none of that treatment was for anything other than my feet, Humphreys said. I did not treat with Dr. DiFilippo for anything other than what I consider related to this work injury, she said. It is the same for the physical therapist, Humphreys said, I did not treat for anything other than the right and left foot, and I did not have any treatment for anything not related to what I consider to be this work injury. It is my understanding that the physical therapists still consider themselves to be owed money for treatment for this right and left treatment I had, Humphreys stated. It is my understanding that the charges that the group health carrier has paid, they are interested in reimbursement if this is found to be a work-related injury, Humphreys said. She agreed that she is interested in reimbursement for the things she described that she has paid for, including any co-pays she paid that are reflected in the physical therapy notes. Humphreys agreed that she had testified to a \$10 per visit to Dr. DiFilippo and she would like to be reimbursed for this. She agreed she had talked about \$30 for prescriptions, about \$9 for a brace, and talked about \$189 for the inserts that she bought and also she spent \$270 for two pairs of tennis shoes from New Balance.

The claimant was asked if she is able to wear those two pairs of tennis shoes for everything she does. No, Humphreys answered. I do not have them on right now, she said. The claimant explained what happens when she is not wearing those

shoes, stating if I go for more than 24 hours without wearing the shoes, when I wake up in the morning my feet are sore again and I have to start everything over. I am better than I was, the claimant said, but I still have problems with my feet. She agreed that when she wears those specific shoes, she doesn't have the symptoms in her feet. If I don't wear those shoes I have increased pain in both feet, Humphreys said. It was noted that Humphreys had mentioned about stretching before she gets out of bed in the morning. That's something I do everyday, Humphreys responded. If I don't wear the shoes for 24 hours, when I get up in the morning my heels are very tender and it takes me a little while to get moving and stretch everything back out again, Humphreys stated. Humphreys agreed that she is interested in having more medical treatment for her right and left foot complaints.

On cross examination, Humphreys agreed that she had testified earlier that when she left Fort Zumwalt she no longer had health insurance through the School District. She was asked if she has health insurance through another source. Stating that she has, Humphreys further said the source is my husband's employer.

During cross examination it was noted that Humphreys had stated it was her understanding that when Dr. DiFilippo sent her for an MRI on her right foot it showed she had some torn ligaments and tendonitis, and Humphreys agreed. She was queried - isn't it true that Dr. DiFilippo told you you had an ankle sprain. I can't say yes or no, Humphreys answered, I don't really remember. It is my impression that I had something other than an ankle sprain, Humphreys stated. This is because of where the pain was in my foot, she explained, because the pain ran along the outside of my foot and into my heel and up the back of my ankle. Humphreys agreed that she didn't have a fracture or anything like that. Humphreys agreed that the boots she had described and the casts that she had described had kept her ankle stable. I was on crutches for a couple weeks but then after that I did not have to use crutches again, Humphreys said. She was queried - when you were given the boot by Dr. DiFilippo, were you able to walk with the boot on? After the two weeks, yes, Humphreys answered. She was asked to describe how she would walk in the boot, was it one foot in front of the other. Yes, Humphreys answered. She was then queried - explain how you didn't put your full weight down on the foot with the boot if you were walking one foot in front of the other. Well, you walk a little faster, I guess, on the opposite side so you're not as much weight bearing on the one side, Humphreys answered. She was asked - When you rolled your foot when you were stepping down on that porch, you didn't injure your left foot in any way; is that correct? That's correct, Humphreys responded.

During cross examination, Humphreys agreed that since being released from the physical therapist and no longer seeing Dr. DiFilippo she has had no medical care from any provider. She agreed that she went to Dr. DiFilippo on her own. Humphreys agreed that she has had health insurance since that time. She was queried - And you haven't chosen to go see someone else? It was a pre-existing condition for the new insurance, Humphreys responded. She was asked if she had attempted to see someone else. No, Humphreys answered, they said it was a pre-existing condition, so I haven't. She was asked who had told her that. My husband's employer, Humphreys answered. I also had to list it with my new insurance and they stated up front too that they would not cover any treatment to my feet. Humphreys was queried - You said that the physical therapist released you from care; correct? It was the middle to the end of August and my insurance would be over August 31st, so yes, they released me, Humphreys answered. She agreed that Dr. DiFilippo released her as well. She was then asked - Or you chose not to return? Right, Humphreys responded.

During cross examination, Humphreys was asked if she had any receipts for the out-of-pocket expenses she had talked about. I have the receipt for the inserts from the foot store, but not with me, Humphreys answered. She was asked if she had the receipt from the elastic brace she had bought from Wal-Mart. No, Humphreys responded. She stated that she did not have the receipt with her from the payment for the anti-inflammatory and pain medication of \$30. I do not have the receipt from the shoes I said that I purchased, Humphreys said. She was asked if she had the receipt or cancelled check or anything on her for the orthotics, and Humphreys answered - No. The claimant stated that she was aware of the bills from the physical therapist, that there was a balance, and stated that she had received a bill from the physical therapist. I did not receive a bill from Dr. DiFilippo, Humphreys stated, and I did not receive a bill from Unity Health. She was asked if she had received a bill from SSM for the MRIs she had of her feet, and Humphreys responded - No. Humphreys agreed that the only thing she received was the bill from Frontier Physical Therapy. I did receive a phone call from GHP, Humphreys stated, not long after the accident happened they called and inquired how the accident happened. I told them that I got hurt leaving a visit, Humphreys said, and they asked about Workers' Compensation and I told them that it had been turned down by Workers' Compensation and that's why I was using my private insurance. She stated that she has not heard from them since.

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the shoes I said that I purchased, Humphreys said. She was asked if she had the receipt or cancelled check or anything on her for the orthotics, and Humphreys answered - No. The claimant stated that she was aware of the bills from the physical therapist, that there was a balance, and stated that she had received a bill from the physical therapist. I did not receive a bill from Dr. DiFilippo, Humphreys stated, and I did not receive a bill from Unity Health. She was asked if she had received a bill from SSM for the MRIs she had of her feet, and Humphreys responded - No. Humphreys agreed that the only thing she received was the bill from Frontier Physical Therapy. I did receive a phone call from GHP, Humphreys stated, not long after the accident happened they called and inquired how the accident happened. I told them that I got hurt leaving a visit, Humphreys said, and they asked about Workers' Compensation and I told them that it had been turned down by Workers' Compensation and that's why I was using my private insurance. She stated that she has not heard from them since.

Medical records in evidence included records from **Unity Corporate Health** (No. B) which began with a 03/01/2006 entry that noted the following in the History section:

The patient states she was working as a parent educator doing a home visit when she stepped down off of a porch step and felt a pop in her right foot and ankle. Afterwards she saw a bump on her right foot. She complains of pain in her lateral right foot and lateral ankle.....She says a long time ago she twisted the ankle and she has no recent history of injury or problem to the affected area.

Examination findings were discussed, and the record contained reports of x-rays taken on 03/01/06 of the right ankle and the right foot, and both reported impressions of – negative. The written assessment on 03/01/06 included: Sprained right foot, right ankle. The written treatment plan included:

The patient is provided with an ankle splint. She also was given a postop shoe. She may apply cold as needed for pain and elevate as needed for swelling....she returns to transitional duty and will follow-up with me on March 9. There is no suggestion of permanency. Causation work related. Anticipated time to recover is 2-6 weeks.

Medical records and medical bills from **Dr. Emil A. DiFilippo, M.D.** (No. C) were in evidence. The record began with a 03/02/06 treatment entry in which Dr. DiFilippo wrote: Peggy Humphreys has an ankle sprain on the right. She turned her ankle at a friend's home. She has moderate swelling of the lateral aspect of the ankle, lateral aspect of the foot." It was written that x-rays of the ankle and foot showed no definite fracture, and stress x-rays showed no gross instability. Dr. DiFilippo noted that Humphreys had a cast boot and also had an air cast to use later. Crutches with weight bearing as tolerated, the doctor wrote. Dr. DiFilippo further wrote in the 03/02/06 entry: "Off work for two weeks and return in three weeks for repeat x-rays of the ankle, oblique of the foot. In the next treatment entry of 03/23/06 it was written that Humphreys was generally improved; it was written that she was to continue to wear a boot and return in three week, and if she had increasing difficulties an MRI might be required. In the next treatment entry of 04/17/06 the doctor wrote that it was 1 ½ months post ankle sprain and Humphreys was still symptomatic. It was written that an MRI was to be scheduled. Further noted was: "She has a wrap around elastic brace."

A report of an MRI of the right lower extremity performed on 04/19/06 was in the record. The noted history was: Right ankle sprain. The written impression was:

IMPRESSION: Partial tear of the anterior talofibular ligament. Partial tear of the calcaneal fibular ligament. Mild deltoid ligament sprain.

Edema in the subcutaneous tissues overlying the lateral malleolus related to the prior ankle sprain.

There is a moderate amount of fluid along the flexor hallucis longus tendon which is a nonspecific finding as this tendon sheath can communicate with the ankle joint.

The next treatment entry in Dr. DiFilippo's record was dated 05/01/06, and Humphreys' complaints of continued pain about the area of the right ankle was noted. It was noted that the MRI showed partial tear of the collateral ligaments. It was written that Humphreys had good clinical stability. The doctor wrote that a cast was applied on the right ankle, and the cast was split; further written was that Humphreys was to return in three weeks for removal of the cast and then repeat stress x-ray and then repeat casting for another three weeks. It was written that Humphreys might wish a second opinion and was given Dr. Aubuchon's number. Dr. DiFilippo further wrote: "She also has some discomfort about the posterior aspect of the left ankle and points to the retro calcaneal area. There is no gross swelling. X-rays are negative." A MRI of the ankle was planned. The doctor wrote of his impression in the 05/01/06 entry: 1. Suspected tendonitis of the left ankle (negative

Thompson test and no defects in the tendon). Rule out retro-calcaneal tendonitis on the left; 2. Partial tear of the collateral ligaments on the right.

A report of an MRI of the left lower extremity joint performed on 05/04/06 was in the record. The noted history was: 48 year old with left ankle pain. The written impression was:

IMPRESSION: Abnormal fluid collection surrounding the tendon of the flexor hallucis longus. This may represent an injury to the musculotendon junction. No overt muscle retraction or abnormal signal centrally within the tendon itself. Correlate with the patient's symptoms and mechanism of any possible injury. Alternatively this could represent tenosynovitis.

Suggestion for some increased signal involving the deltoid ligament, correlate with any mechanism of strain or injury.

In the next treatment entry of 05/16/08 it was written that Humphreys was seen for resolving ankle sprain on the right, and that she was to return in a week for a cast change. On the left, she has ankle discomfort posteriorly, Dr. DiFilippo further wrote. The written treatment recommendations were: "To attend physical therapy for her left ankle. Return next week for a cast change on the right. Will probably require physical therapy on the right." The impression on 05/16/06 was: Ankle sprain on the right. Achilles tendonitis on the left. To have ultrasound on the left." In the next treatment entry of 05/23/06 it was written that Humphreys' sprain on the right had improved after three weeks casting, and a new cast was applied. It was noted that the achilles tendonitis on the left was generally improved with physical therapy, but therapy would be continued. The doctor further wrote: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." In the next entry of 05/31/06 it was noted that Humphreys was approximately one month in a cast on her right ankle for ankle sprain. "The cast was deteriorated and she wishes to have this cast discontinued", the doctor wrote. Dr. DiFilippo again noted: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." It was noted that Humphreys was on over the counter anti-inflammatory medications. The next entry of 06/19/06 included: "Peggy Humphreys is generally improved with ankle sprain right and left". It was written that physical therapy would be continued.

Records from **Frontier Integrated Health Center, Inc.** (No. D) were physical therapy records concerning the therapy given to Humphreys during the period of 05/22/06 through 08/08/06 by referral first by a Dr. Ottomeyer and subsequently by Dr. DiFilippo. In the first Physical Therapy Initial Evaluation letter to Dr. Ottomeyer, dated 05/22/06, the following was included:

Thank you for referral of Peggy Humphreys to this facility for physical therapy. This client was referred to physical therapy with a diagnosis of Left Posterior Tibialis and Left Peroneal Tendinitis. She reports that pain started about 6 weeks ago, as a result of compensating for a right ankle sprain and subsequent casting. Subjectively she reports having increased pain with prolonged walking and getting up in the mornings. She states stretching helps some, and ice didn't help too much. She reports having some edema late in the day. She rates her pain 5-6/10.....

This client presents with decreased flexibility, biomechanics and increased pain and tenderness. Treatment will be provided to increase functional mobility with decreased pain...

....Treatment will consist of manual therapy, taping therapeutic exercises, and modalities PRN.

The first Progress Report, dated 06/12/06, was written to Dr. DiFilippo. Dr. DiFilippo was thanked for the referral, and it was noted that Humphreys had been referred to physical therapy with a diagnosis of Left Posterior Tibialis Tendinitis, Peroneal Tendinitis, and Right Ankle Sprain. It was written that Humphreys had attended all sessions with no no-shows. Further written was:

Subjectively, she reports her left foot hurts a lot in the mornings when she gets out of bed. She states it felt good while it was taped. She states her right foot gets pretty sore in the boot. She states it tends to swell later in the day.

One other Physical Therapy Progress Report was in the record, and it was dated 07/17/06. It was noted that Humphreys was continuing with pain complaints, and continued to present with decreased flexibility and tenderness. The recommendation by the therapist was for continued therapy for another month. The record contained a Physical Therapy Daily Notes form which indicated that Humphreys was given another therapy session on 08/08/06 (though health insurance claim forms attached to the record indicated physical therapy treatment through 08/18/06). Additionally in this record was a list of the physical therapy

services provided to Humphreys during the period of 05/22/06 through 08/18/06 and charges for each of these services, which totaled \$2106.80; a Notice of Health Practitioner Lien sheet was in this record, and again noted the charges for the services rendered through 08/18/06, and that these services were for injuries sustained to Humphreys on or about 03/01/06.

It is found, considering the evidence, that there is no dispute among the medical experts, Dr. Volarich and Dr. Krause, that the treatment given for the claimant's March 1, 2006 right ankle sprain injury was necessary treatment [i.e. During redirect examination, Dr. Krause was asked if he believed Humphreys had received appropriate treatment for the ankle sprain through Dr. DiFilippo. "It was appropriate, yes, ma'am", Dr. Krause answered. (Krause Dp. pg. 36)].

It is further found, considering the evidence and the previous findings in this Award, that the substantial and competent evidence establishes that on March 1, 2006 the claimant received necessary treatment for injuries sustained in the work related accident on that date. It is found that the substantial and competent evidence indicates that the employer was aware the claimant was in need of additional treatment after the initial treatment on the day of the work related accident, as the employer (via the claimant's supervisor) took the claimant for this initial treatment and then took the claimant home after this treatment. It is found that the substantial weight of the evidence establishes that the claimant was in need of further treatment for her March 1, 2006 work related injuries subsequent to the employer's denial of further treatment on or about March 2, 2006, and that the claimant received this necessary treatment from Dr. DiFilippo.

See, generally, Banks v. Springfield Park Care Center, 981 S.W.2d 161, 164 (Mo.App. S.D.,1998) in which the Court noted:

"Section 287.140.1 provides, in pertinent part:

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

In discussing § 287.140.1, the court in *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo.App. E.D.1995), said:

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of the medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment."

It is found that the evidence supports an award for past medical expenses incurred by the claimant as a result of necessary treatment she received for injuries sustained in her March 1, 2006 work related injury. It is found that the record supports an award for the past medical expenses of Dr. DiFilippo in the amount of \$2,187.00 (See, Exh. C) as well as the bills for the two MRIs (See, Exh. No. E) ordered by Dr. DiFilippo in the amount of \$1,832.00 each (for a total of \$3,664.00) and the bill for physical therapy (See, Exh. No. D) which was ordered by Dr. DiFilippo in the amount of \$2106.80. It is found that as there is either no medical opinion support for and/or no receipts for certain bills for which Humphreys is seeking reimbursement (doctor visit co-payments, prescriptions, brace, inserts, and two pairs of tennis shoes from New Balance) there is an insufficient factual basis upon which to award compensation for these bills. *See generally, Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. E.D. 1994) in which the Court stated:

"In *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989), our Supreme Court stated that 'when [employee] testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the *professional services rendered as shown by the medical records in evidence*, a sufficient factual basis exists for the commission to award compensation.' *Id.* at 111-12[7] (emphasis added)."

It is found that pursuant to Section 287.140.1, the employer/insurer are liable for payment of the above mentioned bills of Dr. DiFilippo, for the two MRIs ordered by Dr. DiFilippo, and for the physical therapy service ordered by Dr. DiFilippo, totaling \$7957.80.

ISSUE: Future medical care

It has been determined in this Award that the claimant suffered a compensable accident on March 1, 2006, and that the medical evidence and opinions establish that the injuries and conditions medically causally related or resulting from the work related accident were right ankle sprain, and bilateral plantar fasciitis. The claimant is seeking further treatment for her work related injuries and conditions.

Humphreys testified about her understanding regarding the condition she has in her feet presently. I have plantar fasciitis, she answered. This was told to me by the physical therapist, Dr. DiFilippo, Dr. Volarich who evaluated me on my own behalf, and the doctor I saw for the insurance company, Dr. Krause, Humphreys stated. The plantar fasciitis is in both feet, she said. Humphreys added that in regards to Dr. DiFilippo, I know he said that I had plantar fasciitis on my left foot; I can't tell you absolutely that he said it on my right. Humphreys was asked about her visit with Dr. Krause on behalf of your Employer and Insurer that she saw one time in November, 2007. She stated that Dr. Krause spent about a total of 5 to 6 minutes talking to her about both of her feet and ankles. Dr. Krause just asked me how did it happen and he asked me what I do basically, she said. I believe I talked to Dr. Krause about the boot that I had worn, Humphreys stated, and I believe I told him that my right foot was casted in a boot for an extended period of time. She was asked if she had had a lot of conversation about the boot for six weeks and then an elastic brace. I don't believe there was a lot of conversation, no, Humphreys responded. Dr. Krause did ask me about how my feet feel now, she said. She was asked if Dr. Krause had asked questions about what kinds of things she does or how she is limited now. I know we talked about walking, Humphreys responded, and I told him that walking for extended periods still really hurts my feet. And Dr. Krause had said something to me about looking for another doctor for follow-up treatment, and I told him that another doctor, Dr. Volarich, had recommended that I continue on to seek treatment, and he agreed with the doctor, Humphreys testified. Dr. Volarich had recommended that I see, I think it might be Dr. Hertley (phonetic) in St. Peters; I can't remember exactly what his name is, she said. Dr. Krause said I should have continued on with treatment for my plantar fasciitis, Humphreys stated, he said I should have been continuing with treatment from the time I stopped seeing Dr. DiFilippo. She was asked if she had private insurance any longer at the time that she stopped seeing Dr. DiFilippo. No, not with the School District, Humphreys answered. She agreed it is her understanding that other treatment could help relieve the pain in her feet.

It was noted that Humphreys had had physical therapy through the summer, the last date in mid-August; she was asked why she had eventually stopped the physical therapy. Because of insurance, she answered. She was further queried - What was your understanding about your therapy, that you were finished or not? That they felt I was finished, yes, Humphreys answered. She was asked if she felt she was finished. No, Humphreys answered. This is because I was still having pain in both my feet at that time in my heels and my ankles and on my right foot along the outside of my right foot, she said. Humphreys was asked why she had stopped seeing Dr. DiFilippo. Because I felt like he thought I was just being a baby, she answered. Humphreys was asked - After the last boot was finished and you had seen the doctor after that, was it your understanding there was anything more that he was going to do for you? No, Humphreys answered. She was asked if there was anything her physical therapist wanted to do. He wanted to have me fitted for inserts for my shoes, Humphreys answered. She stated that she did not get these. Explaining why not, Humphreys said because the insurance didn't cover them.

Humphreys testified about how her feet felt after therapy ended and after she last saw Dr. DiFilippo; about how her feet were feeling through the fall of 2006. They bothered me a lot, Humphreys said. It was hard for me to walk, she stated. It was very painful when I would get up in the morning, Humphreys testified, I would have to lay in bed for a few minutes and stretch my feet out before I could even step down. When I first started walking at the beginning of the day I would primarily walk on my front part of my foot because it was so uncomfortable to put my heel down, she said. She was asked what kinds of things has she done on her own to try to get her feet to feel better. I stretch every morning before I get up, Humphreys responded. I still do the exercises that they taught me to do at physical therapy, she said, and I bought really good shoes. I also had bought some inserts, she stated, at one point we went to the foot store and I bought inserts made of real hard plastic to see if those would help. Also pads that you put over the top; like the things that go in your shoes; I don't know what they're called, Humphreys further stated. I bought these the beginning of February, she said, and the last day I wore them was April 10, 2007. In the very beginning I felt some relief from my pain, Humphrey testified, then I don't know what happened with the inserts, if over time they flattened, I don't know, but they became very, very uncomfortable to wear and I had to remove them out of my shoes. She agreed that she has not worn them since April of 2007, and agreed that these were not prescribed they were something she bought at the foot store. It was noted that Humphreys had said she had gone and bought shoes, and she was asked where she had purchased them. I went to the New Balance store in Fenton, Humphreys answered. Explaining how they had helped her choose shoes, Humphreys testified that they fit my feet, looked at how I stand, how I walked, and they fitted me with shoes that would support the areas of my feet that needed to be supported. I bought

two pairs of shoes, Humphreys said. She again agreed that this was not on a prescription from a doctor, this was something she did herself specifically because of the complaints she had. I bought the shoes right after Christmas of 2007, Humphreys said, somewhere between that and the beginning of January, 2008, I don't remember exactly what day.

The claimant was asked if she is able to wear those two pairs of tennis shoes for everything she does. No, Humphreys answered. I do not have them on right now, she said. The claimant explained what happens when she is not wearing those shoes, stating if I go for more than 24 hours without wearing the shoes, when I wake up in the morning my feet are sore again and I have to start everything over. I am better than I was, the claimant said, but I still have problems with my feet. She agreed that when she wears those specific shoes, she doesn't have the symptoms in her feet. If I don't wear those shoes I have increased pain in both feet, Humphreys said. It was noted that Humphreys had mentioned about stretching before she gets out of bed in the morning. That's something I do everyday, Humphreys responded. If I don't wear the shoes for 24 hours, when I get up in the morning my heels are very tender and it takes me a little while to get moving and stretch everything back out again, Humphreys stated. Humphreys agreed that she is interested in having more medical treatment for her right and left foot complaints.

On cross examination, Humphreys stated that she is not currently under the care of any physician for the problems she described in her feet. She stated that she is not currently under any prescription medication for the problems she described in her feet. She agreed that the last time she would have would have been that medication she described receiving from Dr. DiFilippo that she filled on one occasion. It was noted that Humphreys had testified about her current height and weight, that there's been some fluctuation; the claimant was asked if it is safe to say that she's lost about 40 pounds since the incident on March 1, 2006. Correct, Humphreys answered.

Medical treatment records in evidence included the records of Dr. DiFilippo which indicated that the doctor began treating Humphreys on March 2, 2006 for the injuries and conditions found be causally related to the March 1, 2006 work related accident. In the 05/16/08 entry Dr. DiFilippo noted that Humphreys was being seen for resolving ankle sprain on the right, and was to return in a week for a cast change. On the left, she has ankle discomfort posteriorly, Dr. DiFilippo wrote. The written treatment recommendations were: "To attend physical therapy for her left ankle. Return next week for a cast change on the right. Will probably require physical therapy on the right." The impression on 05/16/06 was: Ankle sprain on the right. Achilles tendonitis on the left. To have ultrasound on the left." In the next treatment entry of 05/23/06 it was written that Humphreys' sprain on the right had improved after three weeks casting, and a new cast was applied. It was noted that the achilles tendonitis on the left was generally improved with physical therapy, but therapy would be continued. The doctor further wrote: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." In the next entry of 05/31/06 it was noted that Humphreys was approximately one month in a cast on her right ankle for ankle sprain. "The cast was deteriorated and she wishes to have this cast discontinued", the doctor wrote. Dr. DiFilippo again noted: "She also has some taping about her longitudinal arch with weakness of longitudinal arch. Probably will require some type of plastizote inserts sometime after she is out of her cast on the right." It was noted that Humphreys was on over-the-counter anti-inflammatory medications. The next and final treatment entry of 06/19/06, Dr. DiFilippo included: "Peggy Humphreys is generally improved with ankle sprain right and left" It was written that physical therapy would be continued.

Dr. DiFilippo's record contained a Physical Therapy Progress Report, dated 07/17/06, to Dr. DiFilippo in which the progress of Humphreys was discussed. It was noted that Humphreys had been referred to physical therapy with a diagnosis of Left Posterior Tibialis Tendinitis, Peroneal Tendinitis, and Right Ankle Sprain. It was written that Humphreys had attended all sessions with no no-shows. It was noted that Humphreys was continuing with pain complaints, and continued to present with decreased flexibility and tenderness. The recommendation by the therapist was for continued therapy for another month.

Records from **Frontier Integrated Health Center, Inc.** (No. D) were physical therapy records concerning the therapy given to Humphreys during the period of 05/22/06 through 08/08/06 by referral first by a Dr. Ottomeyer and subsequently by Dr. DiFilippo. In the first Physical Therapy Initial Evaluation letter to Dr. Ottomeyer, dated 05/22/06, the following was included:

Thank you for referral of Peggy Humphreys to this facility for physical therapy. This client was referred to physical therapy with a diagnosis of Left Posterior Tibialis and Left Peroneal Tendinitis. She reports that pain started about 6 weeks ago, as a result of compensating for a right ankle sprain and subsequent casting. Subjectively she reports having increased pain with prolonged walking and getting up in the mornings. She states stretching helps some, and ice didn't help too much. She reports having some edema late in the day. She rates her pain 5-6/10.....

This client presents with decreased flexibility, biomechanics and increased pain and tenderness. Treatment will be provided to increase functional mobility with decreased pain...

....Treatment will consist of manual therapy, taping therapeutic exercises, and modalities PRN.

The first Progress Report, dated 06/12/06, was written to Dr. DiFilippo. Dr. DiFilippo was thanked for the referral, and it was noted that Humphreys had been referred to physical therapy with a diagnosis of Left Posterior Tibialis Tendinitis, Peroneal Tendinitis, and Right Ankle Sprain. It was written that Humphreys had attended all sessions with no no-shows. Further written was:

Subjectively, she reports her left foot hurts a lot in the mornings when she gets out of bed. She states it felt good while it was taped. She states her right foot gets pretty sore in the boot. She states it tends to swell later in the day.

One other Physical Therapy Progress Report was in the record, and it was dated 07/17/06. It was noted that Humphreys was continuing with pain complaints, and continued to present with decreased flexibility and tenderness. The recommendation by the therapist was for continued therapy for another month. The record contained a Physical Therapy Daily Notes form which indicated that Humphreys was given another therapy session on 08/08/06 (though health insurance claim forms attached to the record indicated physical therapy treatment through 08/18/06).

Dr. Volarich, who evaluated the claimant on the claimant's behalf, testified about his opinion on whether or not Humphreys was at maximum medical improvement: "It was my opinion she had not achieved MMI." (Volarich Dp. pg. 12) Testifying about his opinion as to whether or not he felt Humphreys requires further medical treatment for her work-related conditions, Dr. Volarich stated:

"I thought she needed more treatment for her feet. I recommended cortisone injections to each heel as well as having custom orthotics made for the pes planus. That's for support of the ankle and foot. I believe Dr. DiFilippo mentioned that as well. I thought she needed some anti-inflammatory medications and physical therapy with myofascial release techniques to help improve the plantar fasciitis." (Volarich Dp. pg. 13)

It was noted that Dr. DiFilippo had mentioned in his May 23, 2006 note that Humphreys would probably require some type of Plastazote inserts sometime after she was out of her cast on the right; Dr. Volarich was asked what were these and what were they for. Dr. Volarich answered:

"They're basically foot orthotics or shoe orthotics. They're inserts that the patient would put inside their shoe. The Plastazote is a special type of padding material. It's a little more soft, little more spongy, provides a little better padding and cushion when weight-bearing." (Volarich Dp. pg. 13)

Dr. Volarich stated that he did not think these Plastazote had been ordered for Humphreys. "That's why I made the suggestion in my report because I thought she needed those as well", the doctor further testified. (Volarich Dp. pg. 14)

During cross examination, Dr. Volarich agreed that he examined Humphreys a year and six months later. The doctor agreed that Humphreys had a full range of motion in her right ankle, there was no instability found, her anterior Draw test was negative, the Tinel's sign was negative at the tarsal tunnel, and there was no swelling and no crepitus. The doctor agreed that Humphreys had complaints of tenderness on palpation, and that this is subjective. Dr. Volarich was asked – Outside of the subjective complaints of tenderness, did you have any objective findings of ongoing problems in her right ankle? Dr. Volarich answered:

"Not from an instability standpoint, no. I didn't think she needed an operation on her ankle, if that's what you're asking."

"From a physical standpoint, no. We've already discussed the MRI showing documentation of partial tears. What I found was consistent with that." (Volarich Dp. pg. 26)

Dr. Volarich was queried – Grade one ankle sprain with partial tears, those tears heal over time, correct? The doctor answered: "No, typically, they don't. Because the ligaments are avascular structures, for the most part. There will probably be some scar develop with some time around the ligament, but as far as the ligament itself healing, I wouldn't expect it to heal." (Volarich Dp. pp. 26-27) The doctor was further queried if there was no healing in the ligament whatsoever. "I said there's some scarring that develops with time, but the ligament itself is not going to heal itself back together", Dr. Volarich

responded. (Volarich Dp. pg. 27) It was noted that Humphreys' relayed subjective complaints to Dr. Volarich included difficulty driving while she had her cast on, difficulty carrying items when she had the cast on, and difficulty getting down on the floor when she had the cast on; the doctor was asked, wasn't it true Humphreys no longer wore a cast. "Correct", Dr. Volarich answered. (Volarich Dp. pg. 27) Agreeing that, therefore this was no longer an issue, Dr. Volarich further stated: "It's the prolonged weight-bearing and impact is the primary issues now." (Volarich Dp. pg. 27) Dr. Volarich agreed that Humphreys had said she has difficulty standing for long periods of time. The doctor was queried that Humphreys had also told him that she is now in a new job where she's required to stand for long periods of time, Dr. Volarich responded: "It depends. When she's doing her -- assisting in a childbirth, yes, she would have to stand for a while." (Volarich Dp. pg. 27) Dr. Volarich agreed that Humphreys had also told him that there was no prolonged standing in her job at Fort Zumwalt. The doctor was asked if he would agree that Humphreys is now working in a field where she has to stand more than she did at her old job. Dr. Volarich answered: "Probably. Again, during labor and delivery, she would, yes." (Volarich Dp. pg. 28)

Dr. Volarich agreed, during cross examination, that he had noted upon examination of Humphreys that her gait was normal, she was able to walk barefoot and flatfoot across his examination room without foot drop, limp or ataxia. The doctor was asked if Humphreys' gait then back to normal. Dr. Volarich answered:

"No. She still had trouble. The rest of my gait exam shows that. She could toe walk, but she had difficulties trying to heel walk because she couldn't put full weight on her heels. She had poor balance when she was trying to tandem walk. Again, that's typical with people with foot trouble or ankle trouble. She could squat without too much trouble. But it was the balance issues that she had more trouble with." (Volarich Dp. pg. 32)

During cross examination, Dr. Volarich stated that the permanent restrictions he had mentioned were the result of a combination of both the plantar fasciitis and the ankle sprain. "I would say it's more from the plantar fasciitis because she had more trouble with impact and weight-bearing activities than she did with instability in the ankle". (Volarich Dp. pg. 35)

Dr. Krause, who evaluated the claimant on November 5, 2007 on behalf of the employer/insurer, testified about what his physical exam of Humphreys revealed:

"She had full motion. She had a negative anterior drawer which means the ligament had healed and healed appropriately. She did have some tenderness over her plantar fascia and some diffused tenderness around the back of her leg." (Krause Dp. pg. 11)

The doctor was asked if he had found any objective evidence of ongoing problems from the ankle sprain in his physical examination. "I did not", Dr. Krause answered. (Krause Dp. pg. 11)

It was noted that the doctor had also examined Humphreys for a condition known as plantar fasciitis. "I examined her left and she had symptoms consistent with plantar fasciitis", the doctor responded. (Krause Dp. pg. 11) The doctor was asked if Humphreys had had symptoms on the right or just on the left. "She had mild tenderness on the right of her plantar fascia but more so on the left." (Krause Dp. pg. 11) Dr. Krause explained what plantar fasciitis is:

"The plantar fascia is a ligament on the bottom of the foot that goes from the toes back to the heel bone called the calcaneus, and it spans the arch and it gets inflamed and painful after impact activities; such as running and repetitive pounding type activities. And it generally goes away with a stretching program." (Krause Dp. pp. 11-12)

Dr. Krause agreed that it is a treatable condition.

Dr. Krause testified about what the treatment for plantar fasciitis would consist of:

"The initial treatment is stretching exercises and soft heel cups, and if they don't get better with that, we'll do cortisone injections and night splints. Sometimes we'll put people in a boot for plantar fasciitis. On rare, rare occasions, you'll do surgery." (Krause Dp. pg. 16)

The doctor was asked, with the course of treatment you just described, in your experience, what kind of outcome do patients have that do have the condition of plantar fasciitis? Dr. Krause answered:

"85 percent of the patients will get better just with a stretching program and the heel cups and not need the cortisone

injections. And when I say get better, at four weeks they're not completely resolved but they're making improvements and they keep doing it and it goes away. 10 to 15 percent will come back and have the cortisone injection and most of those will get better with that. Some will come back for night splints but generally everybody gets better with this. It's not a short resolution. It takes sometimes six to eight months to totally resolve the symptoms, but plantar fasciitis is very, very common in my practice and I operate on one – maybe one a year, maybe one every other year.” (Krause Dp. pp. 16-17)

Dr. Krause was asked, to his knowledge, had Humphreys had an active treatment for her plantar fasciitis. “She had some physical therapy mainly for the achilles tendonitis but that would potentially help the plantar fasciitis”, Dr. Krause answered. (Krause Dp. pg. 16)

The doctor was asked if he felt Humphreys was in need of additional treatment for the ankle sprain. “No”, Dr. Krause answered, “that had resolved and she was essentially normal”. (Krause Dp. pg. 17)

Dr. Krause agreed that he had also diagnosed bilateral plantar fasciitis for Humphreys.

During cross examination it was noted that on 05/16/06 Dr. DiFilippo had ordered the treatment of ultrasound for Humphreys' achilles tendonitis on the left; Dr. Krause was queried that in his report he had suggested that there was some treatment that would be appropriate for Humphrey's condition of plantar fasciitis. Dr. Krause answered: “My standard treatment is heel cups and stretching initially. I didn't see that she had either of those.” (Krause Dp. pg. 28) Dr. Krause further testified: “That's how we normally treat it. I suspect I talked to her about treating it.” (Krause Dp. pg. 29) Dr. Krause agreed that he had indicated that cortisone injection would be an appropriate course of treatment for that condition “(i)f the stretching and heel cups don't work”. (Krause Dp. pg. 29) The doctor was asked if orthotics were an appropriate course of treatment for the condition, was this the heel cup the doctor was talking about? Dr. Krause answered:

“Heel cups are a first line, just a heel cup. There are orthotics. If you believe that high arch feet or flat feet or normal feet caused this, then you would say you would make an arch if they don't have one or decrease the arch if they do have one, depending on which theory you believe. So orthotics would help, although there's good literature that custom orthotics are not necessary.” (Krause Dp. pg. 29)

The doctor was asked if antiinflammatories were an appropriate course of treatment. “It's not a generalized first line treatment for that, but if it doesn't get better, I might go to antiinflammatories”, Dr. Krause answered. (Krause Dp. pg. 29) The doctor was asked about physical therapy with myofascial release. “Physical therapy, that wouldn't be me first line but if it doesn't get better”, Dr. Krause responded. (Krause Dp. pg. 30) Dr. Krause stated that he had diagnosed Humphreys with achilles tendonitis, and stated that he had found this in his own evaluation and in the medical records. Achilles tendonitis is “an inflammation of the achilles tendon at or just above where it attaches to the heel”, Dr. Krause explained. (Krause Dp. pg. 30) Explaining what causes achilles tendonitis, Dr. Krause said: “Generally overuse and tightness in the tendon”. (Krause Dp. pg. 30) The doctor agreed that he was not aware of any prior diagnosis of this condition for Humphreys before March 1, 2006, and agreed that he did not see any prior treatments for this condition. The doctor was asked if achilles tendonitis was a problem that could also result from stress or overuse in following an injury. Dr. Krause answered: “It's an overuse-type thing. It's not classically seen after an injury to the contralateral side...It's an overuse.” (Krause Dp. pg. 31) The doctor was asked if it could be an overuse resulting from an abnormal walking or an emphasis of putting more stress on the uninjured side. “In theory, yes”, Dr. Krause answered. (Krause Dp. pg. 31) When queried if it was true that he couldn't rule this out as being connected in Humphreys' case, if she had over use or put more emphasis on the left side because of injury to the right. “I couldn't possibly rule it out”, Dr. Krause responded. (Krause Dp. pg. 31)

It was noted, during redirect examination, that Dr. Krause had said that if an ankle sprain is not treated appropriately people may have ongoing problems; the doctor was asked if he believed Humphreys had received appropriate treatment through Dr. DiFilippo. “It was appropriate, yes, ma'am”, Dr. Krause answered. (Krause Dp. pg. 36) The doctor was asked, in the course of your practice, what percentage of people with Grade II ankle sprains that had appropriate course of treatment find that their symptoms resolve. “If they have a normal MRI, other than the tear of the ligament, 95 percent of those will heal”, Dr. Krause answered. (Krause Dp. pg. 36)

The doctor was asked, when he saw Humphreys in November of 2007 did he find any physical findings of swelling in her ankles. “I did not”, Dr. Krause answered. (Krause Dp. pg. 38)

On further cross examination, Dr. Krause agreed that there are people who have ankle sprains who have appropriate treatment who will experience ongoing problems as a result of the sprain. Dr. Krause stated that he had probably reviewed

both MRIs, “and they were within a month of each other and I don’t know if she’s had any other or not”. (Krause Dp. pg. 38) The doctor was queried if it was correct that there has not been an MRI at the time of the evaluations to assess the ligaments. “I did not get an MRI, that’s correct”, Dr. Krause answered. (Krause Dp. pg. 39) The doctor was queried, on further redirect, if there had been anything on Humphreys’ physical examination to suggest to the doctor that she needed a repeat MRI. “No”, Dr. Krause answered. (Krause Dp. pg. 39)

It is found, in considering the evidence, that both medical experts, Dr. Volarich and Dr. Krause, acknowledge that the claimant has the condition of bilateral plantar fasciitis. It is found that both medical experts state that there is further medical treatment that could and should be provided for this condition. Dr. Volarich, who was found to offer the controlling opinion that the claimant’s bilateral plantar fasciitis condition was one of the injuries Humphreys sustained as a result of her March 1, 2006 work related accident, further opined that the claimant was not at maximum medical improvement in regards to her work related injuries. It is found that Dr. Volarich’s opinion indicates a need for additional medical care for the condition of plantar fasciitis; it is found that Dr Krause definitively opines that the claimant is not in need of further treatment for the March 1, 2006 right ankle sprain. Medical opinion, in combination with the claimant’s testimony and medical records, is adequate to meet the claimant’s burden of proving a reasonable probability of a need for future medical aid. *See, generally, Dean v. St. Luke’s Hospital*, 936 S.W.2d 601, 604 (Mo. App. W.D. 1997). It is found that the claimant has met her burden of establishing that she is not at maximum medical improvement for injuries resulting from her March 1, 2006 work related accident; pursuant to Section 287.140, the employer/insurer are found to be liable to provide the recommended treatment the medical experts feel are necessary to cure and relieve the claimant from these injuries.

ISSUE: Nature and extent of permanent partial disability

It has been determined in this Award that the substantial and competent evidence establishes that the claimant, Humphreys, is not at maximum medical improvement for injuries sustained or resulting from the march 1, 2006 work related accident herein. Consequently, a determination of permanent partial disability, if any, is premature.

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This Award is temporary or partial in nature, and shall remain in full force and effect until further application by a party.

Date: July 29, 2008

Made by: /s/ LESLIE E.H. BROWN
LESLIE E.H. BROWN
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ JEFFREY W. BUKER
JEFFREY W. BUKER
Director
Division of Workers' Compensation

Attorney Shocklee for the Employer/Insurer: Employer/Insurer moves at the beginning of the hearing that if this Claim is found non-compensable or if Ms. Humphreys is deemed to be at complete maximum medical improvement in the case that the Award be deemed a Final Award in either of those instances.

At the beginning of the hearing, Attorney Vetter for the Claimant amended the Claim For Compensation to include the following: a. at Paragraph 7, parts of body injured: which states “right foot and ankle”, add – “left foot and left ankle”; b. at Paragraph 8, describe what employee was doing: I would like to amended to say – “While in the course and scope of her employment Employee stepped off a porch and twisted her right foot and ankle causing injury to those parts of her body described above”.

ISSUES: Whether or not the Claimant suffered an accident arising out of and in the course of her employment; Medical causation begins on page 5.

ISSUE: Rate begins on page 14.

ISSUE: Medical causation begins on page 19.

ISSUE: Nature and extent of the temporary total disability for a period of 12 days begins on page 33.

ISSUE: Liability of past medical expenses begins on page 36.

ISSUE: Future medical care begins on page 45.

ISSUE: Nature and extent of permanent partial disability begins on page 52.

SUMMARY OF THE EVIDENCE is under separate cover.

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See, generally, Section 287.030 which defines “employer” as every person, board of education, etc. “*using the service of another* for pay”. (emphasis added)