Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-116428

Employee: Gari Lezama

Employer: American Airlines

Insurer: American Home Assurance Company

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

Date of Accident: November 3, 2002

Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. Having reviewed the whole record, the Commission adopts the findings, conclusions award and decision of the administrative law judge to the extent not inconsistent with the modifications herein and finds that the award by the administrative law judge will be affirmed in part and reversed in part as set forth hereinafter: (1) the award of past medical expenses is reversed; (2) the award of future medical expenses is reversed; (3) the denial of temporary total disability (TTD) credit for overpayment is reversed; and (4) the award of permanent partial disability is affirmed as modified herein.

Procedural History

On January 11, 2005, employer, by counsel, filed an Application for Review requesting oral argument with the Commission and requesting reversal of the December 22, 2004 Award issued by the administrative law judge in this case. On July 7, 2005, the request for oral argument was denied. Pursuant to § 286.090 RSMo. the Commission modifies the award of the administrative law judge dated December 22, 2004, as follows:

Past Medical Expenses:

The administrative law judge ordered employer to pay $60.00 for past expenses for insoles. The only reference to insoles is found in employee's testimony at the hearing that the insoles were "prescribed" by the physical therapist and cost $9.00 per pair (Tr. 27-28). If such testimony is accompanied by the bills for the purchase of the prescribed item which the employee identifies by testimony as being related to and the product of his 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 past medical expense compensation. *Martin v. Mid-America Farm Lines, Inc.,* 769 S.W.2d 105, 111-112 (Mo. 1989). The record contains no evidence of a prescription for insoles; no bills or receipts for insoles; no documentation as verification of any amount actually paid for insoles. Thus there is not sufficient competent and substantial evidence in the record on which to base an order for such payment by employer. The award for past medical

expenses is reversed.

Future Medical Expenses:

The administrative law judge ordered payment by employer of $500.00 for possible purchase of insoles in the future, as an "over-the-counter medical item . . . reasonably necessary to relieve employee of the effects of the work related injury . . .." Future medical care may be allowed where employee shows a "reasonable probability" it will be needed. Here, there is no competent and substantial medical evidence in the record to support the conclusion that there is any reasonable probability such care is or will in fact be required or that such insoles are or will be medically necessary for future treatment of or relief from the effects of claimant's workplace injury. There is no evidence in the record at all upon which to base the conclusion that there is any reasonable probability any future medical care for claimant's workplace injury will be needed. Nevertheless, the administrative law judge awarded this specific amount, apparently based solely on speculation, both that future medical care will be required and in the specific amount awarded. Because there is no competent and substantial evidence in the record to support (a) the need for such insoles; (b) the particular amount; or (c) any general requirement for future medical care at all, the awarding of such is reversed.

Temporary Total Disability (TTD):

Temporary Total Disability payments are appropriate to compensate the injured employee during the healing period, to compensate the employee for the loss of ability to earn wages. *Williams v. Pillsbury Co.,* 696 S.W.2d 488, 489 (Mo. App. E. D. 1985). The administrative law judge denied employer's request for credit against the TTD paid for the asserted overpayment of such benefits from February 19, 2003 through March 1, 2003, the date the administrative law judge determined employee was capable of competing for employment in the open market. TTD benefits were actually paid from the date of injury, November 3, 2002 until March 1, 2003. The TTD payments at issue here are those from February 19, 2003 until March 1, 2003.

The medical reports in evidence show that on February 18, 2003, Dr. Kramer released claimant for full occupational duties, with no restrictions (Tr. 59). On March 18, 2003, Dr. Kramer expressly found that employee had reached maximum medical improvement and restated his February 18, 2003 release of claimant for full occupational duties with no restrictions (Tr. 60-61). Temporary disability benefits are payable until the employee cannot expect further improvement of the disabling medical condition or a reasonable employer could be expected to hire claimant. *Williams,* 694 S.W.2d at 489 (Mo. App. 1985). Therefore, no payments for TTD benefits were required after February 18, 2003 and that portion of the award of the administrative law judge is reversed.

Permanent Partial Disability Finding:

When there is conflicting evidence as to the permanent partial disability of an employee, the issue is peculiarly for the Commission's determination. The Commission is free to deviate from the exact disability percentages given by the medical experts, especially when, as here, there is additional testimony as to the employee's reduced ability to function. *Jost v. Big Boys Steel Erection, Inc.*, 946 S.W.2d 777, 779 (Mo. App. 1997) (reversed on other grounds). Determination of the degree of disability is not solely a medical question. *Quinlan v. Incarnate Word Hosp*., 714 S.W.2d 237, 238 (Mo. App. 1986); *Wiedower v. ACF Industries, Inc*., 657 S.W.2d 71, 74 (Mo. App. 1983). After review of the whole record, the Commission determines that there is competent and substantial evidence in the record to support the administrative law judge's determination that employee is 20% permanently partially disabled, and accordingly, that finding is affirmed.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued December 22, 2004, are attached hereto and incorporated herein by this reference.

The Commission approves and affirms the administrative law judge's allowance of attorney's fee therein as fair and reasonable.

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

Given at Jefferson City, State of Missouri, this ___3rd___ day of November 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

_____
Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Worker's Compensation Law, I believe the decision of the administrative law judge should be affirmed.

Employee suffered a crush injury to his right ankle resulting in three fractures. The majority of the Commission denies compensation of $560 to cover some of the cost of over-the-counter insoles for employee's right shoe. Sixty dollars was awarded for past medical expense. Five hundred dollars was awarded as future medical benefits.

> Section 287.140.1 entitles the worker to medical treatment as may be reasonably required to cure and relieve from the effects of the injury, meaning treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. In interpreting the statute, we are mindful that the Workers' Compensation Law is to be liberally construed with a view to the public welfare. Section 287.800.

Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 266 (Mo. App. 2004) (citations omitted).

> It is not necessary that a claimant seeking future medical benefits produce conclusive evidence

> to support that claim. *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo. App. 1995). Rather, it is sufficient to show that the need for additional medical treatment by reason of the compensable accident is a "reasonable probability." *Id.* "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Id.*

Mathia v. Contract Freighters, 929 S.W.2d 271, 277 (Mo. App. 1996).

Observations of plantar fascia tenderness and references to plantar fascia taping are scattered throughout the physical therapy records. The records reveal employee's complaints of heel pain. The records also reveal that on January 3, 2003, the physical therapist instructed employee to get a heel cup. On February 16, 2003, employee told the physical therapist he still needed heel cushions. Most importantly, employee testified credibly that the insoles provide him with relief.

Employee's testimony convinces me that the use of the insoles provides him with relief from the effects of his injury. Of course, this result was anticipated by the physical therapist that recommended them. Employee has established not only a reasonable probability that the insoles relieve the effects of the injury, but a certainty that they do. The majority of the Commission errs by denying employee the relief to which he is entitled.

The majority also errs by denying employee temporary total disability benefits for the period February 19, 2003 through March 1, 2003. Employee credibly testified that he was still experiencing pain and swelling in his ankle and was unable to work during this period.

I would affirm award of the administrative law judge. I respectfully dissent from the decision of the majority of the Commission to modify the award of the administrative law judge in this case.

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John J. Hickey, Member

AWARD

Employee: Gari Lezama Injury No.: 02-116428

Dependents: N/A Before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri

Employer: American Airlines

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company

Hearing Date: November 19, 2004 Checked by: MDV:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes

2. Was the injury or occupational disease compensable under Chapter 287? Yes

3. Was there an accident or incident of occupational disease under the Law? Yes

4. Date of accident or onset of occupational disease: November 3, 2002

5. State location where accident occurred or occupational disease was contracted: St. Louis

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 occurred or occupational disease contracted: Crushed foot working as baggage handler.

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

13. Part(s) of body injured by accident or occupational disease: Right ankle

14. Nature and extent of any permanent disability: 20% of right ankle

15. Compensation paid to-date for temporary disability: Not provided

16. Value necessary medical aid paid to date by employer/insurer? Not provided

Employee: Gari Lezama Injury No.:02-116428

17. Value necessary medical aid not furnished by employer/insurer? $60-80.00

18. Employee's average weekly wages: $584.31

19. Weekly compensation rate: $389.54/$340.12

20. Method wages computation: Agreed

COMPENSATION PAYABLE

21.Amount of compensation payable:

Future medical expenses: $500.00

Past medical expenses $60.00

31 weeks of permanent partial disability from Employer $10,543.72

22. Second Injury Fund liability: Open

TOTAL: $11,103.72

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

Mike Londoff

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gari Lezama Injury No.: 02-116428

Dependents: N/A

Employer: American Airlines

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company Checked by: MDV:tr

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

PREFACE

Claimant was a baggage handler for American Airlines when his right foot was crushed between a baggage cart and a tug. The issues presented for resolution by way of the hearing are past medical expenses in the amount of $60.00 to 80.00 for a shoe insert, future medical care, permanent partial disability, and the Employer claims a credit for temporary total disability benefits from February 19, 2003 to March 1, 2003 in the amount of $667.78.

FINDINGS OF FACT

1. Claimant worked as a baggage handler for American Airlines. On the date of the accident he was connecting a baggage cart to a tug when his right foot became crushed between the cart and tug. He was conveyed to Barnes Jewish Hospital by ambulance and an x-ray was taken disclosing three fractures.

2. Claimant followed up with Barnes Care and had pain and swelling in his foot and was placed in a wrap around cast. He was given prescriptions for the pain and swelling. Claimant was referred to Dr. Kramer, a bone specialist, who placed him in an air cast. Claimant had to get crutches on his own because they were not prescribed.

3. Claimant was kept off work for several months, was told not to be on his foot for more than one hour, to stay in bed, to pack ice around the ankle, he was ordered to perform no bending, and told not to move the ankle. Claimant followed up two weeks later and the leg was still swollen and was keeping him awake with the pain and he continued to have the same physical restrictions. Claimant went to physical therapy for four months and the physical therapy did help. He utilized weights in physical therapy.

4. Claimant worked in ramp service for two and one half years prior to the accident. In this capacity he would load and unload baggage, have to climb up steps, squat, stoop, bend, walk up ramps, and work on uneven surfaces.

5. Claimant has had no prior workers' compensation claims.

6. On Claimant's last visit on March 18, 2003 with the Employer's physician, he still had pain and swelling in the ankle but it had gone down. Claimant had not returned to work at the time and didn't think he could work at the time. Nevertheless, he was released to work.

7. Claimant got a job in April of 2003 with Jet Blue, another air carrier, performing ground operations. He moved his first luggage following the accident on April 28, 2003 for Jet Blue. This was the first time that he had moved luggage since November of 2002. Claimant experienced foot problems that day with pain and swelling. In 2003 Claimant missed about six days from work and in 2004 four days of work as a result of problems associated with the original ankle fracture. Claimant's foot swells now three to four times a week when he works and the ankle is much worse by end of the week than it is at the beginning of the week after he has been able to rest.

8. Claimant was about 160 pounds on the date of the accident but because of the pain he has not been eating and now weighs 147 pounds.

9. Claimant was given an insole at physical therapy to take the pressure off his foot. He has used 8 to 10 insoles since the injury and they cost about $9.00 for two pairs. He uses them in his work shoes and his everyday shoes.

10. Claimant now gets assistance at work whenever lifting over 65 pounds.

11. Claimant was diagnosed with a non-displaced calcaneal fracture.

12. The ankle is stiff in the morning and the stiffness goes away after awhile. Doctors told him that the ankle is as good as it is going to get.

13. Photographs admitted into evidence corroborate Claimant's allegations of ankle swelling and bruising.

14. Dr. Cohen rates Claimant's disability at 25% of the right ankle. Dr. Kramer rated Claimant's disability at 5% of the right foot. Dr. Kramer thought Claimant reached maximum medical improvement on March 18, 2003 and that he was then capable of performing his full occupational duties without any limitations.

15. Claimant was a credible witness who testified in a direct and forthright manner displaying respect for all parties involved in this process. Claimant did not appear to overstate his problems yet it is clear that he sustained a moderately severe crush fracture to his right ankle. It is also clear that Claimant relies to a great extent on his ability to ambulate in performing his jobs not only for American Airlines, but also for his new employer Jet Blue. Claimant credibly testified to ongoing pain and swelling and credibly testified that he was unable to work when Dr. Kramer had discharged him. Claimant credibly testified that he was unable to move baggage for his new employer until April of 2003.

RULINGS OF LAW

1. Claimant sustained a 20% permanent partial disability by reason of the crush facture to his ankle while working for American Airlines when his leg got caught between a baggage cart and a tug on November 3, 2002.

2. Claimant was temporarily and totally disabled from that time up until April of 2003 and he has been paid temporary total disability benefits until the time that he was capable of competing for employment in the open labor market. Therefore, the claim for a temporary disability credit is not granted.

3. Claimant reasonably uses insole inserts to relieve the pressure off his foot. He has used 8 to 10 since the injury and they are $9.00 per set. This over-the-counter medical item is reasonably necessary to relieve Claimant of the effects of the work related injury and therefore I award a lump sum of $500.00 for the purchase of future insoles.

4. Claimant was a credible witness.

Date: _____ Made by:

_____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Gary J. Estenson
Acting Director
Division of Workers' Compensation