

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

Injury No.: 10-076600

Employee: Lolita Maderazo
Employer: Dillard's, Inc.
Insurer: Fidelity & Guaranty Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated June 2, 2011.

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 Robert J. Dierkes, issued June 2, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED
Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Lolita Maderazo

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed because employee's injury did not arise out of and in the course of her employment.

Employee fell at work and fractured her left hip. Employee testified at the hearing that a coworker, Sherry Ryan, swung a door open and employee caught her foot in the door, causing employee to fall. Employee further reiterated that Ms. Ryan was there when this happened and that Ms. Ryan was the first person to see her when she fell. Mardi Miller, another coworker, also saw employee while she was sitting on the floor following the fall.

Employee testified on cross-examination that she did not initially tell anyone what caused her fall. Employee specifically denies saying anything to Ms. Ryan right after the fall. However, Ms. Ryan testified that employee affirmatively told her that she did not know why she fell. Ms. Ryan denied that employee caught her foot in the door after Ms. Ryan had gone through the door and pushed it open. Ms. Ryan testified that had that been the case, she would have felt employee hit the door or otherwise heard her hit the door or fall, which Ms. Ryan did not.

Ms. Miller testified that employee did not mention her foot being caught in the door. In fact, Ms. Miller testified that she asked employee how she fell shortly after the fall and employee stated, "I don't know. I just fall."

Ms. Miller testified that employee was sitting approximately six feet from the swinging doors when she found employee on the floor. Ms. Ryan testified that employee was lying approximately eight to nine feet from the swinging doors when she first saw employee on the floor. Employee testified that she was unable to move at all following her fall.

Ms. Miller also testified that employee has walked with a limp for as long as she has known employee. Similarly, Ms. Ryan testified that employee has had trouble walking for as long as she had known her. Employee denied having problems with her left knee "giving out" due to her arthritis during the hearing. This was in contrast to employee's deposition testimony in which she stated that her left knee would occasionally give out due to her arthritis.

The first doctor employee saw following the injury was Dr. Eckenrode. Employee testified that she affirmatively told Dr. Eckenrode that she did not know why she fell. She further testified that Dr. Eckenrode's report was accurate when it stated that "[employee] says she is not sure why she slipped. The floor was not wet. She did not trip over anything...."

Employee: Lolita Maderazo

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Employee testified that she did not remember getting her foot caught in the door until several months after she fell at work. She attributed this lapse in memory to “losing her mind” for approximately four weeks after the fall.

Employee bears the burden of proof with regard to whether an accident occurred and resulted in an injury to her while working for the employer. *McGrath v. Satellite Sprinkler Systems, Inc.*, 877 S.W.2d 704, 708 (Mo. App. 1994), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Employee did not satisfy her burden of proof.

Section 287.020.2 RSMo¹ defines “accident” as “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.”

Section 287.020.3 RSMo provides, as follows:

(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.”

I do not find employee’s testimony that her foot was caught in the swinging door to be credible. Therefore, I find that the credible evidence establishes that employee “just fell” and that there was no causal connection between the work activity and the injury other than the fact of its occurrence while at work.

The ALJ found employee’s testimony credible despite the fact that it conflicts with employee’s own testimony, the testimony of Ms. Miller and Ms. Ryan, as well as the Boone County Hospital medical records offered by employee. It is illogical to conclude that employee would remember her foot getting caught in the door months after the

¹ Statutory references are to the Revised Statutes of Missouri 2010 unless otherwise indicated.

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incident when she affirmatively told several people right after the incident that she did not know how she fell.

Employee explained that the reason she did not remember her foot getting caught in the door for several months was because she “lost her mind” for several weeks after the injury. Despite losing her mind after the injury, employee was still able to communicate with Dr. Eckenrode regarding her medications, her personal history, and her family.

In my opinion, it is suspiciously convenient that employee would recall – months later – very specific facts that satisfy the legal criterion for determining that her injury arose out of and in the course of her employment. For this reason, I do not find employee’s testimony credible. Employee’s testimony is inconsistent with the weight of the evidence.

The credible evidence establishes that employee “just fell.” Employee was found several feet from the swinging door and had testified that she could not move after she fell to the floor. Employee told several people after the fall that she did not know why she fell, “I just fall.”

The Court in *Miller v. Missouri Highway Transportation Commission*, 287 S.W.3d 671 (Mo. 2009), found that injuries of this nature are not compensable. *Id.* at 674. In *Miller*, the claimant was walking on an even road when his knee popped. *Id.* The Court found that because there was no causal connection between the work activity and the injury, other than the fact of its occurrence at work, the injury was not compensable.

Similar to the facts in *Miller*, the credible evidence in this case shows that there is no causal connection between employee’s work activity and the injury. The credible evidence establishes that employee’s fall was most likely due to an idiopathic condition, her arthritic knee condition. Section 287.020.3(3) RSMo provides that, “[a]n injury resulting directly or indirectly from idiopathic causes is not compensable.” An idiopathic injury is one that is “peculiar to the individual.” *Stricker v. Children’s Mercy Hospital*, 304 S.W.3d 189, 191-92 (Mo. App. 2009) (citations omitted). Employee testified that her left knee occasionally gave out and both Ms. Ryan and Ms. Miller testified as to employee’s difficulty walking prior to this injury.

I find that employee failed to satisfy her burden of proving that her injury arose out of and in the course of her employment. For the foregoing reasons, I disagree with the administrative law judge’s conclusion that this is a compensable injury. As such, I would reverse the temporary or partial award of the administrative law judge and issue a final award denying compensation.

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

Alice A. Bartlett, Member

TEMPORARY OR PARTIAL AWARD

Employee: Lolita Maderazo

Injury No. 10-076600

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Dillard's, Inc.

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

Additional Party: Second Injury Fund

Insurer: Fidelity & Guaranty Insurance Co.

Hearing Date: April 27, 2011

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 14, 2010.
5. State location where accident occurred or occupational disease contracted: Columbia, Boone 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: Employee had emptied trash in the dock area. Employee re-entered the store proper through a pair of swinging doors. One of the doors caught Employee's foot causing her to fall and fracture her left hip.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Parts of body injured by accident or occupational disease: Left hip.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? \$959.40.
16. Value necessary medical aid not furnished by employer/insurer? \$36,584.67.

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- 17. Employee's average weekly wages: \$334.00.
- 18. Weekly compensation rate: \$222.67.
- 19. Method wages computation: Stipulation.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$36,584.67
27 and 6/7 th weeks of temporary total disability benefits:	6,202.95

Each of said payments to begin immediately 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:

William Rotts

Employee: Lolita Maderazo

Injury No. 10-076600

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lolita Maderazo

Injury No: 10-076600

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Dillard's, Inc.

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

Additional Party: Second Injury Fund

Insurer: Fidelity & Guaranty Insurance Co.

Checked by: RJD/cs

ISSUES DECIDED

An evidentiary hearing was held in this case in Columbia on April 27, 2011, on Claimant's request for a temporary or partial award. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on May 12, 2011. The evidentiary hearing was held to decide the following issues:

1. Whether Employee sustained an accident arising out of and in the course of her employment with Dillard's, Inc. on or about September 14, 2010;
2. Whether Employee is entitled to temporary total disability ("TTD") benefits, and, if so, for what period(s) of time; and
3. Whether Employer and Insurer shall be ordered to reimburse Employee for charges for medical care and treatment she has already been provided.

STIPULATIONS

The parties stipulated as follows:

1. The Division of Workers' Compensation has jurisdiction over this case;
2. Venue for the hearing is proper in Boone County;
3. The claim is not barred by Section 287.430 or Section 287.420;
4. Both Employer (Dillard's, Inc.) and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. Employer-Insurer paid medical benefits in the amount of \$959.40, and no temporary disability benefits;
6. The average weekly wage is \$334.00, with a compensation rate of \$222.67; and
7. Fidelity and Guaranty Insurance Company fully insured the Missouri Workers' Compensation liability, if any, of Dillard's, Inc. at all relevant times.

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EVIDENCE

The evidence consisted of the testimony of Claimant, Lolita Maderazo; the deposition testimony of Dr. Todd Oliver; the testimony of Mardi Miller, Dillard's store manager of the Columbia Mall store; the testimony of Sherry Ryan, Claimant's former co-worker; medical records; and medical bills.

DISCUSSION

The facts of this case are simple. Claimant was born in the Philippines on February 18, 1946. Claimant has been in the United States since 2001. Claimant worked for Employer from September 2004 until her injury on September 14, 2010. She was employed full-time as a housekeeper/dock associate. Claimant worked from 7:00 AM to 4:00 PM with a one-hour lunch break. Claimant's English is very poor.

Prior to September 14, 2010, Claimant had advanced arthritis in both knees.

Claimant testified that she normally picked up trash and cleaned from 7:00 AM until 10:00 AM. The housekeeping supplies are kept in the dock area. The dock area is separated from the store proper by a pair of lightweight swinging doors. Mardi Miller, the store manager, testified that each door swings in an arc measuring approximately two feet. The floor in the area of the swinging doors is wooden tiles over concrete.

On September 14, 2010 at approximately 8:00 AM, Claimant sustained a fall in the area of the swinging doors; Claimant fractured her left hip in the fall. Claimant testified that she had completed picking up all the trash and had thrown the trash into the dumpster in the dock area. Claimant was then heading back into the store proper through the swinging doors. Claimant testified that "Sherry" had just come through the swinging doors, and that one of the doors, as it swung, caught her left foot, causing her to fall. It is unclear from Claimant's testimony whether Sherry had gone through the swinging doors in the same direction as Claimant, or from the opposite direction.

Claimant testified that she did not believe anyone saw her fall, but it is clear that Claimant's former co-worker, Sherry Ryan, discovered Claimant lying, injured, on the floor. Both Claimant and Ryan testified that Ryan discovered Claimant lying on the floor. Ryan testified that she thought Claimant was lying 8'-9' from the swinging doors. Ryan testified that she asked Claimant what had happened, to which Claimant responded "Sherry, I fall down." Ryan testified that she asked Claimant why she fell, to which Claimant responded "I don't know."

Sherry Ryan then summoned the store manager, Mardi Miller. Miller testified that when she arrived on the scene, Claimant was in a sitting position on the floor, approximately 6' from the swinging doors. Miller testified that she asked Claimant what happened, to which Claimant responded: "I don't know, I just fall." Claimant agreed on cross-examination that she did not tell

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Ryan or Miller about catching her foot on the swinging door prior to the fall. Claimant also agreed that she simply told the emergency room physician: "I fall down".

Mardi Miller testified that when she saw Claimant on the floor she was "trembling"; Miller thought Claimant "might be going into shock." Both Miller and Ryan testified that Claimant appeared to have difficulty walking prior to September 14, 2010. Ryan testified that she did not feel that Claimant's walking difficulties would cause her to fall.

After having sustained the fall and the fractured hip, Claimant could not get up, even with assistance. An ambulance was called and emergency personnel carried Claimant out on a stretcher. Claimant was taken to Boone Hospital Center where Dr. Todd Oliver of Columbia Orthopaedic Group performed surgery consisting of an intramedullary stabilization of the left intertrochanteric femur fracture. Claimant was hospitalized for ten days post-surgery. According to Dr. Oliver's deposition testimony given on February 24, 2011, Claimant was still under Dr. Oliver's care and had not achieved maximum medical improvement, although Dr. Oliver believed that Claimant "is on her way to a very good outcome".

Dr. Oliver testified that Claimant's fall on September 14, 2010 was the cause of her left hip fracture. There is no medical evidence (nor indeed any evidence) to the contrary. There is no question that Claimant did NOT have a fractured left hip prior to the fall. Therefore, the crucial question in this case is whether the fall was "an accident arising out of and in the course of (her) employment". Employer/Insurer suggests that the fall was idiopathic. This is based totally on speculation and conjecture that one or both of Claimant's arthritic knees gave out on her, causing her to fall. I find that the fall was not the result of idiopathic causes. The fall was either unexplained ("I don't know, I just fall" -- as Claimant stated at the scene), or was caused by Claimant's left foot colliding with or catching on one of the swinging doors (as stated in the Claim for Compensation and in Claimant's testimony). Based upon the 2005 legislative abrogation of the holding in *Drewes v. Trans World Airlines*, 984 S.W.2d 512 (Mo. 1999), I would be compelled to find Ms. Maderazo's fall, if unexplained, not to be compensable as not "arising out of" her employment. However, if I find that Claimant's fall was caused by the swinging door, then this issue should be decided in Claimant's favor (as discussed more fully below).

FINDINGS OF FACT AND RULINGS OF LAW

First of all, all three witnesses impressed me as being truthful. As noted earlier, Claimant's English language skills are quite poor. Regarding Claimant's testimony at the hearing, it was my impression that Claimant generally (but not always) understood the question, but she often had difficulty in answering. Her testimony was clear, however, as to how the fall happened.

I find that the fall happened as Claimant testified it happened. Claimant fell and broke her left hip. She did not, and could not move from the location of the fall. The other two witnesses placed her location as being from six to nine feet from the swinging doors. The location of the fall is quite consistent with Claimant's testimony. Considering Claimant's poor

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English skills, and the fact that Claimant was in extreme pain and possibly “going into shock”, the fact that Claimant gave no more detail to Ryan and Miller than “I just fall” is certainly understandable.

I find that Claimant’s fall was caused by the swinging door striking or catching Claimant’s foot. I find that Claimant had been in the dock area emptying trash. Emptying trash was a part of her job and the dumpster was located in the dock area. To enter and exit the dock area, Claimant was required to go through the swinging doors. Therefore, the fall clearly arose during the course of her employment.

Section 287.020.2 states, in part:

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.

The fall was certainly unexpected and traumatic. There is no question that the fall produced objective symptoms of an injury (fractured hip). The fall was a specific event, and it did occur during a single work shift. There was an accident

Section 287.020.3 (2) states:

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

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

Clearly, Claimant’s fall was the prevailing factor (indeed, the sole factor) in causing her injury (fractured hip), thus subsection (a) has been satisfied. Regarding subsection (b), the Southern District Court of Appeals stated in *Pile v. Lake Regional Health System*, 321 S.W.3d 464 (Mo. App. S.D. 2010) at page 467:

(T)he application of this subsection of the statute involves a two-step analysis. The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a workers’ job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.

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In the instant case, the risk or hazard is the swinging door striking a foot or other portion of Claimant's body. To constitute a "risk" or "hazard", it is not necessary that the entity in question be broken, defective or inherently dangerous. It can still be a "risk" or "hazard" if it works exactly as designed or intended. Ladders, scaffolds and stairs are common examples of risks or hazards that, while functioning exactly as designed or intended, can nonetheless pose a risk or hazard of injury to an employee. If an employee is working on or near a ladder, scaffold or stairs, and the hazard or risk posed thereby is realized, the resulting accident arises out of the employment; no further inquiry as to whether the employee was equally exposed to such hazard or risk in normal, non-employment life is necessary. The swinging door posed a hazard or risk to Claimant as she was in the performance of her duties of emptying trash, and that hazard or risk caused the fall. As Claimant's injury came from a hazard or risk *related* to her employment, it did not come from a hazard or risk unrelated to her employment. Claimant's fall and fractured hip constitute a compensable accident and injury.

Claimant is requesting TTD benefits from the date of the accident until released to full duty without restrictions on March 28, 2011.

The inquiry for qualification for temporary total disability benefits is similar to that for qualification for *permanent* partial disability, and that is whether Claimant, in his current physical condition, could compete on the open market for employment. *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App.W.D. 1997). A claimant can be totally disabled even if able to perform sporadic or light duty work. *Cooper* at 575. In *Brookman v. Henry Transportation*, 924 S.W.2d 286 (Mo.App.E.D. 1996), a mechanic who was not capable of doing his former job nor competing on the open market for employment and whose condition had not reached maximum medical improvement *was* entitled to TTD benefits, despite the fact that, due to economic necessity, he swept floors for two weeks, did remodeling work for four weeks and worked as a telemarketer for three weeks. "The commission is to decide whether a claimant is employable on the open [labor] market by looking at the 'anticipated length of time until the claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the claimant will return to the claimant's former employment.'" *Boyles v. USA Rebar Replacement, Inc.*, 26 S.W.3d 418, 424 (Mo.App.W.D. 2000).

Claimant Lolita Maderazo was hospitalized from September 14, 2010 to September 24, 2010. She was released home and was still unable to work. Dr. Oliver granted permission to Claimant to return to work, but only to light duty (sit down assignment only), on October 22, 2010. In November 2010 Claimant asked Employer if she could return to work and was informed she was terminated. Claimant remained on restricted duty until March 28, 2011 when Dr. Oliver released her to return to work without restrictions. Claimant is entitled to TTD benefits from September 15, 2010 through March 28, 2011, a total of 27 6/7 weeks. At the stipulated rate of \$222.67, Employer/Insurer's liability for TTD benefits totals \$6,202.95.

Claimant has also requested that Employer/Insurer be ordered to reimburse her for her medical expenses. Employer and Insurer have denied this claim, and have thus failed and refused to provide medical treatment to Claimant as required by Section 287.140. When the employer refuses or fails and neglects to provide needed treatment, the employer is held liable for

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the medical treatment procured by the employee. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 879 (Mo. App. S.D. 1984). Claimant has proven that she was provided reasonable and necessary medical treatment for her left hip fracture, and that the unpaid charges therefor are in the total amount of \$36,584.67. Employer and Insurer shall reimburse this amount to Claimant.

ORDER

Employer and Insurer are hereby ordered to pay Claimant the amount of \$6,202.95 for temporary total disability benefits. Employer and Insurer are further ordered to pay Claimant the amount of \$36,584.67 for medical expenses. Claimant's attorney, William Rotts, is allowed 25% of all amounts awarded to Claimant hereunder as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

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.

Date: June 2, 2011

Made by: /s/Robert J. Dierkes

ROBERT J. DIERKES
Chief Administrative Law Judge