

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

Injury No. 12-025345

Employee: Kathy Narens
Employer: Lincoln University
Insurer: C A R O

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

*Injury arising out of and in the course of employment*¹

The parties dispute whether employee suffered an injury arising out of and in the course of employment when she fell while traversing employer's premises at the end of her work shift. Employee fell when, in an effort to avoid a crowd of students walking in her direction down a narrow sidewalk, she stepped on a steep edge of the sidewalk with her right foot and turned her ankle. Section 287.020.3(2) RSMo provides, in relevant part, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if ... [i]t 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.

Employer suggests, in its brief, that employee's injuries are not compensable because she was on her way home for the day. We are not persuaded. "Pursuant to the plain language of section 287.020.5, the extended premises doctrine is not totally eliminated but is now limited to situations where the employer owns or controls the area where the accident occurs." *Scholastic, Inc. v. Viley*, 452 S.W.3d 680, 684 (Mo. App. 2014). Under the extended premises doctrine as it exists following the 2005 amendments to the Missouri Workers' Compensation Law, employee was unquestionably in the course of her employment when she sustained her injury, because she was on a premises owned and controlled by employer.

Second, we acknowledge employer's argument that employee would have traversed crowded sidewalks in her normal, nonemployment life, but we believe this argument

¹ We note that the parties framed the issue as "whether the alleged *accident* arose out of and in the course of employment," *Transcript*, page 3 (emphasis added). Section 287.020.3(2) RSMo, however, makes clear that the relevant inquiry is whether employee sustained an *injury* arising out of and in the course of the employment. The distinction is not merely academic where both terms enjoy specific definitions under Chapter 287, and where recent and controlling case law has reiterated that the focus must be on whether the claimed injuries—as opposed to the accident—arose out of and in the course of employment. See *Gleason v. Treasurer of the State*, 455 S.W.3d 494 (Mo. App. 2015).

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misstates the real issue before the Commission. A risk or hazard need not be unique to the workplace in order to render an injury sustained thereby compensable; rather, the statute is satisfied by proof that the employment unequally exposed employee to the particular risk or hazard from which the employee's injuries came. Here, the risk or hazard from which employee's injuries came was traversing the crowded campus sidewalk with its steep drop-off.

Notably, subsequent to employee's accident, her supervisor suffered a fall at the same location owing to the same conditions. This evidence strongly suggests the condition of the sidewalk in that location was hazardous. After careful consideration, we are convinced (and we so find) that employee's daily exposure to this location and this condition of the sidewalk involved an increased risk of suffering an injury-producing fall. Given the fact that employee's work for employer daily exposed her to this increased risk, we feel confident in inferring (and we so find) that this is a risk or hazard to which employee was not equally exposed in her normal nonemployment life.

We conclude, therefore, that employee's injuries arose out of and in the course of employment.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued March 25, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 1st day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kathy Narens Injury No.: 12-025345

Dependents: N/A

Employer: Lincoln University, Missouri Office of Administration

Additional Party: N/A

Insurer: Self-Insured
administered through Central Accident Reporting Office

Hearing Date: February 24, 2015

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

Checked by: HDF/scb

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: April 11, 2012
5. State location where accident occurred or occupational disease was contracted: Cole County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See Award
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: Left ankle and foot
14. Nature and extent of any permanent disability: 30% left ankle
15. Compensation paid to-date for temporary disability: - 0 -
16. Value necessary medical aid paid to date by employer/insurer? - 0 -

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- 17. Value necessary medical aid not furnished by employer/insurer? \$2,682.59
- 18. Employee's average weekly wages: ----
- 19. Weekly compensation rate: \$350.47 for all benefits
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: 30% left ankle = 46.5 weeks
46.5 x \$350.47 = \$16,296.86
Plus TTD = \$5,607.52
Plus medical reimbursement = \$2,682.59
- 22. Second Injury Fund liability: N/A
- 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 amounts, including medical aid and TTD benefits, hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Brian J. Dean.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kathy Narens

Injury No: 12-025345

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Lincoln University, Missouri Office of Administration

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

Additional Party: N/A

Insurer: Self-Insured,
administered through Central Accident Reporting Office

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on February 24, 2015. Memoranda were submitted by March 13, 2015.

The parties stipulated that on or about April 11, 2012, the claimant, Kathy Narens, was in the employment of Lincoln University, Missouri Office of Administration (Lincoln University). The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was self-insured and administered by the Central Accident Reporting Office. The employer had timely notice of the injury. A claim for compensation was timely filed. The appropriate rate of compensation for all benefits is \$350.47 per week. No temporary disability benefits have been paid. No medical aid has been provided.

The issues to be resolved as the result of hearing include 1) the occurrence of an accident, 2) whether the alleged accident arose out of and in the course of employment, 3) the liability of the employer/insurer for four half days of temporary partial disability benefits, those days being August 2, 3, 4 and 5 of 2012, 4) the liability of the employer/insurer for medical expenses in the amount of \$2,089.48, and 5) the nature and extent of permanent disability.

The parties stipulated that in the event of an award favorable to the claimant on the preliminary issues, the employer/insurer would be liable for 16 weeks of temporary total disability benefits from April 11, 2012, through August 1, 2012, in the amount of \$5,607.52.

FACTS

The claimant, Kathy Narens, has been employed full time by Lincoln University since 2009 as an administrative assistant in the career and academic support department. Currently, Ms. Narens works in the Martin Luther King building, but in 2012, Ms. Narens worked in the Dawson annex. Ms. Narens' workday spans from 7:45 in the morning through 4:45 in the afternoon. On April 11, 2012, Ms. Narens was leaving work, walking to the Lincoln University parking lot for which she had a parking pass, headed toward her car. Ms. Narens was walking on the right side of the sidewalk and stepped to the side to avoid a group of students walking toward her. When

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Ms. Narens stepped to the right, she stepped off of the sidewalk down into a grassy area with her right foot and overcompensated by falling onto her left foot and ankle. The location of the fall was on property owned and controlled by Lincoln University. Ms. Narens testified that her supervisor sustained a similar type fall in August of 2013 at the same location, injuring her knee.

Ms. Narens testified to medical treatment at Capital Region Medical Center where x-rays of her left foot and ankle were taken and where she had surgery on her left ankle performed by Dr. Galbraith two days later. Ms. Narens also testified to physical therapy for her left ankle with one physical therapy session with Central Missouri Physical Therapy and subsequent physical therapy at Lake Regional Health Center. Ms. Narens also testified to treatment for a pulmonary embolism at an Urgent Care Center and Lake Regional Health Center before she started physical therapy.

According to Ms. Narens she was released to return to work on August 1, 2012, and actually returned to work the following Monday. Ms. Narens said that during her first week back she either worked half days or into the early afternoon. Ms. Narens said that since she has been back to work she has missed no time from work as the result of her left ankle.

Ms. Narens reported that her group health carrier paid for the majority of her medical bills and that she is only claiming out of pocket expenses. Ms. Narens is claiming that her out of pocket expenses from the April 11, 2012 injury from Capital Region Health Center are in the amount of \$2,425.12, from all physical therapy are in the amount of \$325.00, from Capital Region Radiology are in the amount of \$88.99, from Dr. Galbraith are in the amount of \$75.00, from Urgent care are in the amount of \$150.00, and for prescription expenses are in the amount \$64.80, although Ms. Narens listed other prescription expenses on her summary of out of pocket expenses.

Currently, Ms. Narens complains of numbness all around her left ankle, exacerbated by cold weather, as well as some swelling in her left ankle on the right side. Additionally, Ms. Narens feels that she has lost range of motion in the left ankle. Ms. Narens testified that she no longer wears heels for fear the left ankle will give way and wears a comfort shoe instead. Ms. Narens can no longer climb ladders or small steps due to the left ankle injury and the corresponding loss of range of motion. Ms. Narens takes over the counter pain relievers and takes no prescription medication for left ankle pain.

Ms. Narens' report of injury filed on the day of the fall and the report of the Lincoln University Police Department generally corroborate Ms. Narens' description of the fall as occurring on a crowded sidewalk when she stepped off of the sidewalk into the grass, causing her to fall and injure her left ankle.

Dr. David Volarich, DO, evaluated Ms. Narens on May 21, 2014, and authored a report pertaining to his evaluation on that same day. Dr. Volarich opined that Ms. Narens' fall on April 11, 2012, caused her left ankle trimalleolar fracture dislocation, as well as the 5th metatarsal non-displaced fracture, as well as her left leg deep vein thrombosis and left lung pulmonary embolism. Dr. Volarich opined to a 40 percent permanent disability of the left leg at the 155 week level as the result of the trimalleolar fracture and the resulting open reduction internal

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fixation, and a 15 percent permanent disability of the left foot at the 110 week level as the result of the non-displaced fracture of the 5th metatarsal. Dr. Volarich found no permanent disability as the result of the left leg deep vein thrombosis or the left lung pulmonary embolism.

The records of Capital Region Medical Center include the April 11, 2012 Emergency Room record which notes “patient reports walking out of work. she was walking with one foot on the grass and the other on the sidewalk. reports falling and twisting left ankle...”

Dr. Galbraith’s records reflect his initial visit with Ms. Narens on April 12, 2012, at which time Dr. Galbraith noted that x-rays revealed “a trimalleolar fracture of the left ankle.” Dr. Galbraith’s operative note for April 13, 2012, reflects that he performed an “open reduction internal fixation, trimalleolar ankle fracture” on the left ankle. On August 1, 2012, Ms. Narens was returned to work, although allowed a handicap sticker for three months. With regard to Ms. Narens’ physical condition, Dr. Galbraith noted that the condition of the left ankle is “aggravated by standing/walking. [Ms. Narens] also describes having pain at night, having pain at rest, and weakness. The weakness is localized to left ankle. The pain is currently 2/10 on a scale of 1-10 and has a dull quality and a sharp quality.” That is the last of Dr. Galbraith’s records.

Photos of the location where Ms. Narens fell indicate that there is a difference in the height of the ground between the sidewalk and the grassy area next to the sidewalk and that the sidewalk is higher than the grassy area adjacent to it. Moreover, the photos reflect a worn area in the grass adjacent to the sidewalk where Ms. Narens fell, which looks like a path that has been cleared by frequent use as a walkway alongside the sidewalk.

The records of St. Mary’s Medical Clinic Lake Ozark reflect two visits. The first visit is recorded as May 2, 2012, and reflects back pain from the low back into the neck beginning two days previously; Ms. Narens was discharged with a prescription for flexeril and a biofreeze contrast pack and told to follow up if her condition worsened. The second visit is recorded as occurring a month later, on June 2, 2012, for complaints of back pain beginning the day before; Ms. Narens was referred to Lake Regional Health Center.

The records of Lake Regional Health Center for June 2, 2012, reflect a diagnosis of a pulmonary embolism and deep vein thrombosis as well as “suspicion of pneumonia” among other diagnoses.

Ms. Narens testified that her out of pocket expenses for her care at Capital Region Medical Center are \$2,425.12. This amount is corroborated by the Capital Region Medical Center billing statement.

Prescription reimbursement is sought for prescriptions prescribed by Dr. McKnelly who treated Ms. Narens at Capital Region Medical Center, Dr. Jones who saw Ms. Narens at Lake Regional Health Center, Dr. Galbraith who performed the left ankle surgery, and Dr. Kimball who saw Ms. Narens at St. Mary’s Medical Clinic Lake Ozark. The prescription expenses for which reimbursement is sought are warfarin, cyclobenzaprine, zofran, cephalexin, and hydrocodone.

Ms. Narens’ testimony regarding her out of pocket expenses for Dr. Galbraith’s treatment in the amount of \$75.00 is corroborated by Dr. Galbraith’s billing statement. The claim of \$15.00 in out

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of pocket expenses for physical therapy at Central Missouri Physical therapy is corroborated by a billing statement, and a \$120.00 physical therapy out of pocket expense for services at Lake Regional Health System is corroborated by a billing statement. The Capital Region Radiologists billing statement does not support the claim of \$88.99.

APPLICABLE LAW

RSMo Section 287.020.2. 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.

RSMo Section 287.020.3 (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.

RSMo Section 287.020.3 (3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

RSMo Section 287.120 1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment. Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death by accident or occupational disease, except such rights and remedies as are not provided for by this chapter.

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3. No compensation shall be allowed under this chapter for the injury or death due to the employee's intentional self-inflicted injury, but the burden of proof of intentional self-inflicted injury shall be on the employer or the person contesting the claim for allowance.

4. Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

5. Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

6. (1) Where the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs.

(2) If, however, the use of alcohol or nonprescribed controlled drugs in violation of the employer's rule or policy is the proximate cause of the injury, then the benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited.

(3) The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A preponderance of the evidence standard shall apply to rebut such presumption. An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section [195.010](#), at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

7. Where the employee's participation in a recreational activity or program is the prevailing cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:

(1) The employee was directly ordered by the employer to participate in such recreational activity or program;

(2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or

(3) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's

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participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

8. Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events.

9. A mental injury is not considered to arise out of and in the course of the employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action taken in good faith by the employer.

10. The ability of a firefighter to receive benefits for psychological stress under section [287.067](#) shall not be diminished by the provisions of subsections 8 and 9 of this section.

RSMo Section 287.140.1 In addition to all other compensation paid to the employee under this section, 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. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

AWARD

The claimant, Kathy Narens, has sustained her burden of proof that she sustained an accident arising out of and in the course of employment when she fell on a crowded sidewalk after stepping down into the grass and then falling onto her left ankle. Ms. Narens' testimony was

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consistent with the report of injury, the Capital Region Medical Center Emergency Room intake information, and the Lincoln University Police Report. Ms. Narens was on the property of Lincoln University and walking to her vehicle at day's end when she fell. There is nothing to suggest that the cause of the fall was anything other than the condition of the crowded sidewalk and the lower level adjacent ground which Ms. Narens was in effect trying to straddle when she fell injuring her left ankle.

The claimant, Kathy Narens, has failed to sustain her burden of proof that she is entitled to four half days of temporary disability benefits where there was no testimony regarding hours worked or missed when she initially returned to work. The reference to working less hours during her first week back to work is insufficient for an award of temporary partial disability benefits.

Ms. Narens has sustained her burden of proof that she is entitled to the out of pocket expenses she claims as follows: 1) the two visits to St. Mary's Medical Clinic Lake Ozark, what Ms. Narens described as Urgent Care are not subject to reimbursement. Both visits were for back pain and while I recognize that the second trip resulted in a referral to Lake Regional Health Center where the thrombosis and pulmonary embolism were eventually diagnosed, it is not clear to me that the St. Mary's Medical Clinic Lake Ozark visits were caused by Ms. Narens' left ankle injury or the thrombosis or the embolism, 2) the prescription expenses on September 11, 2012, for warfarin prescribed by Dr. Jones; the prescription expenses on May 1, 2012, for zofran prescribed by Dr. Jones; the prescription expenses on April 25, 2012, for cephalexin and hydrocodone prescribed by Dr. Galbraith; and the prescription expenses on April 14, 2012, for cephalexin and hydrocodone prescribed by Dr. McKnelly, a total of \$47.47. The prescription for cyclobenzaprine prescribed by Dr. Kimball is not reimbursed as it is a prescription in response to Ms. Narens' complaints of back pain when she initially went to St. Mary's Medical Clinic Lake Ozark for back pain. 3) the Capital Region Medical center bill in the amount of \$2,425.12, 4) Dr. Galbraith's bill for \$75.00, and 5) the physical therapy bill in the amount of \$15.00 for physical therapy at Central Missouri Physical Therapy and the physical therapy bill in the amount of \$120.00 for physical therapy at Lake Regional Health system.

Ms. Narens has sustained her burden of proof that she has a permanent disability of 30 percent of the left ankle as the result of the trimalleolar fracture dislocation as well as the 5th metatarsal non-displaced fracture. This award is based on Ms. Narens' testimony regarding her left ankle and her left foot as well as the records of Dr. Galbraith and the report of Dr. Volarich pertaining to the left ankle and foot injury.

Made by: _____

HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation