

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No. 10-112950

Employee: Kelly Reisa  
Employer: Kellogg Company  
Insurer: Old Republic Insurance Company  
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 (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 24, 2015. The award and decision of Administrative Law Judge John K. Ottenad, issued March 24, 2015, is attached and incorporated by this reference.

The Commission further approves and affirms 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 16<sup>th</sup> day of October 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

# AWARD

Employee: Kelly Reisa

Injury No.: 10-112950

Dependents: N/A

Employer: Kellogg Company

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

Additional Party: Second Injury Fund (Open)

Insurer: Old Republic Insurance Company  
C/O Enterprise Comp, Inc.

Hearing Date: November 18, 2014  
Record Closed on December 18, 2014

Checked by: JKO

## 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 22, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant worked as a territory sales manager for Employer and injured her right foot and left foot, when she developed bilateral plantar fasciitis as a result of her 10 years of extensive, repetitive work activities for Employer (working on concrete floors, going up and down ladders and going up on her toes to reach items).
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 Foot and Left Foot
14. Nature and extent of any permanent disability: 1% of the Right Foot and 20% of the Left Foot
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Kelly Reisa

Injury No.: 10-112950

- 17. Value necessary medical aid not furnished by employer/insurer? (Alleged) \$12,012.00
- 18. Employee's average weekly wages: \$1,278.57
- 19. Weekly compensation rate: \$807.48 for TTD/ \$422.97 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

16 5/7 weeks of temporary total disability (05/25/11 to 09/19/11)	\$13,496.45
31.5 weeks of permanent partial disability	\$13,323.55

22. Second Injury Fund liability: Open

**TOTAL: \$26,820.00**

23. Future requirements awarded: N/A

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: Aaron D. Lefton.

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Kelly Reisa	Injury No.: 10-112950
Dependents:	N/A	Before the
Employer:	Kellogg Company	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund (Open)	<b>Compensation</b>
Insurer:	Old Republic Insurance Company	Department of Labor and Industrial
	C/O Enterprise Comp, Inc.	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JKO

On November 18, 2014, the employee, Kelly Reisa, appeared in person and by her attorney, Mr. Aaron D. Lefton, for a hearing for a final award on her claim against the employer, Kellogg Company, and its insurer, Old Republic Insurance Company C/O Enterprise Comp, Inc. The employer, Kellogg Company, and its insurer, Old Republic Insurance Company C/O Enterprise Comp, Inc., were represented at the hearing by their attorney, Ms. Yvette M. Boutaugh. The Second Injury Fund is a party to this case, but did not participate in the hearing, because the Fund was being left open by agreement of the parties, pending the outcome of this part of the case.

To allow the parties time to prepare and submit their briefs or proposed awards in this matter, the record was technically left open for a period of thirty days. Although we did not go back on the record or take any further evidence in this matter after November 18, 2014, the record was, then, finally closed on December 18, 2014 and the briefs were submitted by the parties by December 23, 2014, after an extension of time to file was requested by the parties.

Along with this Claim [Injury Number 10-112950, with a date of injury of April 22, 2010, alleging injury to the right foot and left foot], Claimant also tried her other open companion claim at the same time. Injury Number 10-048811, with a date of injury of April 16, 2010, alleges injury to the left upper extremity. Separate awards have been issued for each of these cases.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

**STIPULATIONS:**

- 1) On or about April 22, 2010, Kelly Reisa (Claimant) allegedly sustained an occupational disease injury.
- 2) Claimant was an employee of Kellogg Company (Employer).
- 3) Venue is proper in the City of St. Louis.

- 4) The Claim was filed within the time prescribed by the law.
- 5) At the relevant time, Claimant earned an average weekly wage of \$1,278.57, resulting in applicable rates of compensation of \$807.48 for total disability benefits and \$422.97 for permanent partial disability (PPD) benefits.
- 6) Employer has not paid any benefits to date in this case.

**ISSUES:**

- 1) Did Claimant sustain an occupational disease?
- 2) Did the alleged occupational disease arise out of and in the course of Claimant's employment for Employer?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to her alleged occupational disease at work for Employer leading up to April 22, 2010?
- 4) Did Claimant provide Employer with proper notice of the injury under the statute?
- 5) Is Employer responsible for the payment of past medical benefits in an amount to be determined?
- 6) Is Claimant entitled to the payment of temporary total disability benefits for a period of time to be determined?
- 7) What is the nature and extent of Claimant's permanent partial disability attributable to this injury?

**EXHIBITS<sup>1</sup>:**

The following exhibits were admitted into evidence in this case:

***Employee Exhibits:***

1. Medical bill from Dr. Mitchell Needleman
2. Medical bill from the Imaging Center at Wolf Creek, LLC

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<sup>1</sup>As a result of both claims being tried in a consolidated hearing, and to address the parties' desire to only have certain evidentiary exhibits admitted into one or the other case, a consecutively numbered/lettered evidentiary list was established for each party, with the parties only offering certain exhibits into evidence in each case. Claimant offered Exhibits 1-7 and 10 into evidence in Injury Number 10-112950, and Exhibits 7-10 into evidence in Injury Number 10-048811. Similarly, Employer offered Exhibits A-G into evidence in Injury Number 10-048811, and Exhibits H-M into evidence in Injury Number 10-112950.

3. Certified medical bill of Belleville Surgical Center
4. Certified medical treatment records of St. Joseph's Hospital-Breese
5. Medical bill of St. Joseph's Hospital-Breese
6. Deposition of Dr. Mitchell Needleman, with attachments, dated March 25, 2014
7. Deposition of Dr. Dwight Woiteshek, with attachments, dated April 9, 2014
10. Claimant's redacted personnel file from Employer

***Employer/Insurer Exhibits:***

- H. Claim for Compensation in Injury Number 10-112950
- I. Medical treatment records of Dr. Mitchell Needleman
- J. Deposition of Dr. Craig Aubuchon dated September 3, 2014
- K. Curriculum vitae of Dr. Craig Aubuchon and medical report dated March 26, 2012
- L. Photograph of step ladder and store shelves
- M. POP Display Measurements for various displays used by Employer in stores

***Notes:*** 1) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on November 18, 2014.

2) Unless stated otherwise below, any objections contained in the deposition transcripts in evidence are **OVERRULED** and the testimony fully admitted into evidence in this case.

3) Employer raised foundation objections to the admission of Exhibits 2 and 3 at the time of hearing. Employer contended that there was no testimony or any other evidence regarding the reasonableness, necessity or relatedness of the bills. Since Claimant had not yet had the chance to testify at the time the objections were lodged, and since I had also not had the chance to review the other medical testimony in the depositions in this case, I withheld ruling on the objections to see if Claimant would lay a foundation for these Exhibits or alternatively if another medical expert addressed their reasonableness, necessity or relatedness to this case. I indicated that I would rule on the objections and the admissibility of these Exhibits in the Award in this case. Now that I have had the chance to review the appropriate testimony, Employer's objections are **OVERRULED** and the Exhibits are admitted into evidence in this case.

**FINDINGS OF FACT:**

Based on a comprehensive review of the evidence, including Claimant's testimony, the testimony of Employer's witness, the expert medical opinions and testimony, the medical treatment records, the medical bills, and the other documentary evidence in this matter, as well as based on my personal observations of Claimant and the other witness at hearing, I find:

- 1) **Claimant** is a 47-year-old former territory sales manager, who worked for Kellogg Company (Employer) for almost 12 years overseeing delivery, stocking and displays of Kellogg products in five to nine stores in her territory. In February 2011, her job title changed from territory sales manager to territory sales rep, where she was

receiving less pay, but essentially performing the same job duties. Her employment ended with Employer on September 20, 2011, when there was no job available for her with Employer when she returned from her alleged work injury. She has worked for the last three years as a sales associate at Aldi's.

- 2) Claimant testified that as a territory sales manager for 12 years for Employer, she was working an average of 50-60 hours per week. She said that she generally worked 5 days per week, but sometimes she had to work 7 days if there was no merchandiser to help her. If she worked weekends, then she generally worked 5-6 hours per day. Generally, on a typical day in this position, Claimant said that she started at 6:00 or 6:30 in the morning at the first store. She would pull out the pallet or pull stock, inventory the shelves and pull product to fill the shelves (an average of 1-4 pallets of products), stock the shelves, rotate the product, clean up the trash, and, then move on to the next store and start the process all over again. She estimated that she spent approximately an hour per day in the car driving from store to store, or approximately 7 hours per week out of a 50-60 hour work week. She estimated that her job duties in the stores were comprised of 15% of the time taking stock and placing orders, and 85% of the time stocking shelves or pulling pallets, of which 10-15% of the time she was up on ladders to stock the shelves. The rest of the time stocking shelves she was standing or squatting, with her feet in a bent position (up on the balls of her feet). She estimated that when she was not on the ladders to stock shelves, she spent about 50% of the time standing and 50% squatting. She acknowledged that there was also some time spent on her tiptoes to reach some of the higher shelves and products in the stores. Claimant said that since she is 5'2" tall, she was on a ladder or on her tiptoes to reach shelves 5 and 6. Other than driving from store to store, Claimant testified that she was constantly on her feet on concrete floors or on concrete floors with a laminate overlay. She wore tennis shoes all the time.
- 3) Claimant characterized her job duties for Employer as being foot-intensive, because it was fast-paced work where she was always on her feet, going up and down ladders and dealing with product on the shelves and in the backs (storerooms or warehouses) of the stores. She also noted that she never stopped moving.
- 4) Claimant testified that she has filed a **Claim** (Exhibit H) for injury to both feet with a date of injury of April 22, 2010. She said that the complaints in her feet started in the latter half of 2009 and progressively worsened over time. She sought treatment on her own with Dr. Needleman because of pain in both feet, which was located between the ball of the foot and the heel. She said that she reached the point with these complaints where she was almost falling in the morning when getting out of bed because it hurt to try to stand on her feet.
- 5) Medical treatment records from **Dr. Mitchell Needleman** (Exhibit I) document her treatment with this podiatrist that began on April 22, 2010. She presented with complaints of bilateral foot pain, right worse than left, especially when taking her first step in the morning. Claimant indicated that the complaints have been present for 5 months and have been getting progressively worse. She also noted that if she is up on her feet all day, the pain gets worse, as well as if she sits for a period of time, and,

then, tries to stand up and walk. Claimant denied any history of trauma leading to her complaints and noted that she had tried insoles and changes in shoes to try to alleviate the complaints on her own. Dr. Needleman diagnosed plantar fasciitis with the possibility of heel spurs. He discussed treatment options with her and provided pads for her feet to see if that helped her complaints. On April 29, 2010, Dr. Needleman casted her for orthotics to be made and removed a couple warts from her right foot. She received the bilateral foot orthotics on May 17, 2010 and by June 28, 2010, was reporting 90% relief. However, by September 16, 2010, she was only reporting 10-20% relief. The doctor talked to her about foot exercises, including wall push-ups and toe raises. When she returned to the doctor on October 7, 2010, Dr. Needleman administered cortisone injections to both heels to see if that provided any relief of her complaints. At the visit on November 5, 2010, between the cortisone injections and the orthotics, she seemed to be getting pretty good relief of her complaints, but by November 22, 2010, her left foot was in severe pain again, with mild pain in the right foot. He provided another injection into each heel. When she returned on February 18, 2011, she was primarily complaining of her left foot and received another injection in the left heel. She received another cortisone injection on May 6, 2011 into the left heel and was scheduled for surgery because of the continued significant problems in the left foot. Throughout the medical records and reports up to this point, I found no specific reference to Claimant's employment nor any opinion from the doctor that her bilateral foot condition was related to her work activities for Employer.

- 6) Dr. Needleman took Claimant to surgery at **Belleville Surgical Center** (Exhibit I) on May 25, 2011. He performed a plantar fascial release with excision of infracalcaneal exostosis of the left foot on that date. She was progressing well after surgery with decreased complaints and increasing function, until June 21, 2011, when she was leaning over at home and felt a pop in the left foot. Claimant testified that she lost her balance and stepped wrong on the foot, resulting in the fracture.
- 7) Dr. Needleman told her to go to the emergency room because he was not in the office and she was in severe pain. She went to **St. Joseph's Hospital-Breese** (Exhibit 4), where X-rays revealed a minimally displaced fracture of the calcaneus and she was discharged with a diagnosis of a suspected Achilles tendon rupture. When she saw Dr. Needleman the next day, he sent her for a left ankle MRI at the **Imaging Center at Wolf Creek** (Exhibit I), which confirmed the nondisplaced calcaneal fracture, but also showed that the Achilles tendon was intact. The doctor noted that she would need to remain non-weight bearing for another 6-8 weeks and could not return to work until the fracture was healed. As she continued to follow up with Dr. Needleman, she was primarily treating for complaints related to the calcaneal fracture after July 11, 2011. She was given a bone stimulator that helped in the healing of the fracture. On September 2, 2011, Dr. Needleman's notes contain a reference from Claimant that she never had heel pain prior to her work and being on hard concrete floors. However, she was doing well with only a little discomfort in the left heel. On September 19, 2011, Dr. Needleman released Claimant to return to work without restrictions because she was walking in regular shoes, without crutches, putting total weight on the foot and her pain complaints were improving.

- 8) Dr. Needleman (Exhibit I) did write a letter to Claimant's attorney dated January 5, 2011 (which I believe from the context and deposition testimony should be dated 2012, not 2011), in which he opined that Claimant treated with him for bilateral plantar fasciitis. He noted that she had no symptoms in her feet prior to her job, which included going up and down ladders, lifting boxes, being on concrete floors and having to reach for things on her toes. He opined that, "Due to the fact that she had no pain prior to her job the condition is labeled as job related." He placed her at maximum medical improvement for this condition, noted that she had no restrictions referable to the left foot and was asymptomatic referable to the right foot.
- 9) Claimant testified that she began missing time from work after the surgery on her left foot. She was supposed to be out of work for 6-8 weeks, but she lost her balance from stepping wrong about 2 weeks into her recovery and was diagnosed with a fracture that kept her out of work until her release on September 19, 2011. As noted above, she was then fired by Employer on September 20, 2011.
- 10) Claimant testified that she told her supervisor that she was going to be off work for surgery, but she did not believe she ever specifically told Employer it was for plantar fasciitis. She did not remember discussing her foot diagnosis with Employer. Claimant admitted that she never told anyone she considered to be a supervisor at work for Employer that she believed her foot condition was related to her work. She said that she assumed they knew based on the conversations she had with them about her need to wear special shoes, but she also did not know at that time what plantar fasciitis was or what it entailed. Claimant estimated that the conversation about the shoes occurred in 2010 after she had already received the orthotics from Dr. Needleman. She also admitted that she never asked Employer to provide her with any treatment for her feet.
- 11) Claimant testified that her medical bills were paid by her personal health insurance and she received short-term disability payments from Employer while she was off work following the foot surgery.
- 12) **Dr. Mitchell Needleman** submitted **medical bills** (Exhibit 1) totaling \$4,497.00, of which \$3,557.00 appears related to the plantar fasciitis treatment, \$775.00 appears related to the calcaneal fracture and subsequent treatment, \$65.00 appears related to billing charges and copies of records, and \$100.00 for the treatment of warts. The bill shows an amount due of \$0.00, as all of it has either been paid or adjusted off the bill pursuant to an insurance contract. The **bill from the Imaging Center at Wolf Creek, LLC** (Exhibit 2) totals \$1,145.00, with no amount currently due as all of it has been paid or adjusted off the bill pursuant to an insurance contract. The **bill from Belleville Surgical Center** (Exhibit 3) totals \$5,323.00, with no amount currently due as all of it has been paid or adjusted off the bill pursuant to an insurance contract. Finally, the **bill from St. Joseph's Hospital-Breese** (Exhibit 5) totals \$1,047.00, with no amount currently due as all of it has been paid or adjusted off the bill pursuant to an insurance contract.

- 13) In terms of current complaints related to this alleged April 22, 2010 occupational disease injury, Claimant testified that she has absolutely no issues with the right foot at all. With regard to the left foot, she said that it is wider than the right, so it makes finding shoes difficult. She said that she cannot wear heels anymore and she still wears lifts in both shoes. She noted that she will have pain in the left foot if she is not wearing lifts. Claimant also described continued pain in the left foot every night at a level of 1-2 out of 10. She said that she continues to perform her stretching exercises. Claimant denied having any residual issues from the left calcaneal fracture, except that sometimes with weather changes she notices some pain there. She noted that she is scared to do any running because of the foot.
- 14) The deposition of **Dr. Craig Aubuchon** (Exhibit J) was taken by Employer on September 3, 2014 to make his opinions in this case admissible at trial. Dr. Aubuchon is board certified in orthopedic surgery with a sub specialty in foot and ankle surgery. He explained that there is a difference between an orthopedic surgeon, like him, and a podiatrist, in that the orthopedic surgeon is a medical doctor but a podiatrist is not. He noted that he sees hundreds of cases of plantar fasciitis in his regular practice over the course of a year. He examined Claimant on one occasion, March 26, 2012, at Employer's request, and provided no medical treatment to Claimant. He issued his report (Exhibit K) in this case on that same date. Claimant provided a consistent history of her work activities for Employer leading up to April 22, 2010 and complained of continued pain over the medial aspect of the left heel, especially if she is on it for an extended period of time, as well as numbness in the bottom of the left heel. Following his review of the medical treatment records and performing a physical examination of Claimant, Dr. Aubuchon opined that Claimant had plantar fasciitis of both feet. He noted that the symptoms on the right resolved with conservative treatment, but she required surgery on the left, complicated by the subsequent calcaneus fracture. He did not believe that her work activities for Employer were the prevailing factor in the cause of the plantar fasciitis, because she denied a history of injury.
- 15) Dr. Aubuchon explained that just because the bilateral foot complaints started while she was employed by Employer does not mean he can relate them to Employer's work duties. He also did not believe the calcaneal fracture was related to her work activities either. When asked about the potential causes of Claimant's plantar fasciitis, Dr. Aubuchon said that it could be the heel spur, which would also not be related to her work activities, she tends to pronate her feet, which can cause irritation to the plantar fascia, or it could just be idiopathic. He explained that plantar fasciitis is one of the most common diagnoses he sees in his practice, with people of all types and walks of life getting it. He said that merely being on one's feet does not cause plantar fasciitis, because people not on their feet get it too. He did not believe she was in need of any further treatment and felt she was capable of working without restrictions. Since he did not believe her condition was caused by her employment, whether trauma or cumulative trauma, he opined that she had not sustained any permanent partial disability.

- 16) On cross-examination, Dr. Aubuchon agreed that the treatment Claimant received for the plantar fasciitis was reasonable and necessary. He also agreed that he has seen it develop because a person is constantly on their feet throughout the day. However, he did not think that foot-intensive activities added to the risk of developing plantar fasciitis because he has also seen it develop in people who are not on their feet very much. Essentially, Dr. Aubuchon agreed that being on one's feet is a nonissue in the development of plantar fasciitis, in his opinion. Yet, he acknowledged that only people up and walking get plantar fasciitis. While Dr. Aubuchon did not think regular squatting added pressure to the plantar fascia, he agreed that being on one's tiptoes or squatting while on the balls of the feet could put someone at added risk for developing plantar fasciitis. However, he believed one would have to be performing this activity excessively to affect a diagnosis of plantar fasciitis. Dr. Aubuchon acknowledged that he was relying on the job description provided by Employer as a basis for his opinions, but exactly how she physically performed those activities (tiptoes or not) was not contained in that description. He did not believe walking on concrete versus walking on any other surface causes plantar fasciitis. Basically, he concluded that it was unclear why anyone gets plantar fasciitis, they just do and it could be multiple factors that actually cause it. He admitted that he does not know what causes the condition, but in this case, he knows it was not related to work.
- 17) The deposition of **Dr. Dwight Woiteshek** (Exhibit 7) was taken by Claimant on April 9, 2014 to make his opinions in this case admissible at trial. Dr. Woiteshek is board certified in orthopedic surgery. He examined Claimant on one occasion, June 28, 2013, at Claimant's attorney's request, and provided no medical treatment to Claimant. He issued his report in this case on July 5, 2013, following his physical examination of Claimant and his review of the medical treatment records. Claimant provided a consistent history of the onset of her bilateral foot complaints leading up to April 22, 2010. She reported continued pain and discomfort in her heels. His physical examination of Claimant revealed slight lost range of motion in the ankles, and pain, tenderness and slight swelling over the bilateral heels. Medically causally related to the work activities leading up to April 22, 2010, Dr. Woiteshek diagnosed traumatic plantar fasciitis of the right heel treated without surgery, traumatic plantar fasciitis of the left heel, status post surgery, and subsequent postoperative fracture of the left calcaneus treated without surgery.
- 18) Dr. Woiteshek opined that Claimant's work activities for Employer (going up and down ladders, working on concrete floors and going up on her toes to reach items) leading up to April 22, 2010 were the prevailing factor in the cause of her bilateral foot diagnoses and need for treatment. Of those work activities, he explained that being on concrete floors was the main factor, because it is horribly hard on the heels. He also explained that the fracture was an uncommon occurrence, but was the result of weakening the bone in the area where the doctor removed the heel spur, so that is why he believed it to be related to the work injury. He rated Claimant as having permanent partial disabilities of 35% of the left heel for the surgically treated plantar fasciitis and calcaneal fracture, and 15% of the right heel for the plantar fasciitis, referable to the April 22, 2010 work injury. Dr. Woiteshek also placed some work

restrictions on Claimant on account of this work injury, including avoiding repetitive activities with the feet and limited prolonged weight bearing (standing and walking).

- 19) The deposition of **Dr. Mitchell Needleman** (Exhibit 6) was taken by Claimant on March 25, 2014 to make his opinions in this case admissible at trial. Dr. Needleman is a podiatrist, board certified in podiatric surgery. He specializes in treatment and surgery of the foot and ankle, including treatment for plantar fasciitis. He was Claimant's treating physician in this case and testified consistent with his medical records and opinions described above. He testified that most people develop plantar fasciitis from standing on hard concrete floors all the time, walking back and forth, and going up on their toes a lot. He said that it is repetitive trauma to the heel that causes it. In this case, he opined that Claimant's work activities for Employer were the prevailing factor in the cause of her bilateral plantar fasciitis. As for the subsequent calcaneal fracture, Dr. Needleman opined that that had nothing to do with the plantar fasciitis or surgery. He said that it was a totally isolated event that happened when Claimant was at home. He did not relate that at all to the work injury at issue in this case. As far as Claimant's time off work, Dr. Needleman acknowledged that the time off work for the unrelated calcaneal fracture overlapped with the time off work for the plantar fasciitis, but there was no real way for him to separate that out. He said that it can take anywhere from three to six months for someone to recover from surgery to the point where they can go back to work, but everyone is different in how quickly they reach that point. He acknowledged that the average though is about three months off work for plantar fasciitis.
- 20) On cross-examination, Dr. Needleman acknowledged that pronation of the foot can be a potential cause of plantar fasciitis, but in Claimant's case he ruled it out because he did not believe she was pronating that bad based on examining her feet and shoes. He noted, however, that once you cut the plantar fascia, the foot does change, so that could explain why Dr. Aubuchon noticed the pronation more when he examined Claimant after the foot surgery.
- 21) On cross-examination, Claimant agreed that the **photograph of the shelves** (Exhibit L) was fairly similar to the shelving she stocked at most stores. The type of ladder shown in the picture was used at Shop 'N Save, but at Wal-Mart she had a regular 10-foot ladder to get the product off the high stock shelves in the back storeroom. Claimant admitted that she did not make the bonus in 2009 that she had made in other years, but noted that she still had to work just as hard, because if the product sales were down, then she would get less hours for a merchandiser to help her, requiring that she do more of the stocking, etc. herself. Therefore, even if sales were down, the amount of stocking she had to perform would not necessarily be less, as more of it would fall on her to perform without the help of a merchandiser. Claimant agreed that the most popular or frequently used items would be in the middle shelves, meaning that that is where most of the stocking would be performed, unless there was a sale or special advertisement. In that respect, she estimated that 10% of the day was spent stocking the upper shelves and 15% of the day was spent stocking the lower shelves. In addition to the drive time of approximately an hour per day, she estimated that

perhaps 5% of the overall time was spent on sales and marketing with the store managers.

- 22) **Lindell Adkisson** testified on Employer's behalf at hearing. He is currently a merchandising manager, but has worked in the past as a territory manager, district manager and sales trainer for Employer. He said that he has looked at the stores that were in Claimant's territory in 2008 and 2009 and is familiar with them, but he never personally saw Claimant work. He admitted that he has no personal knowledge of Claimant's work, because she never worked for him.
- 23) Mr. Adkisson was in basic agreement with Claimant's testimony on the different parts of the job that were included in working as a territory sales manager, but there was some disagreement on the amount of time each part of the job might take. Mr. Adkisson estimated that 40-50% of the job was servicing (handling product and putting it on shelves), 16-20% was sales (ordering, checking shelves, checking stock, meeting with the manager), 8-10% was driving and 5-10% was administration time. He noted that the other 10% of the time would be distributed among these categories depending on the week. Mr. Adkisson agreed that all of the work is on your feet, except for the driving and administration time, which would involve sitting. He also indicated that a typical week was based on 45 hours of work. He agreed that a 60-hour week might happen, but not that often. However, Mr. Adkisson acknowledged that the job is mostly work until you are done, so it could take someone longer to do the same tasks as opposed to another employee.
- 24) In terms of the amount of product handled per week, Mr. Adkisson estimated that on average there would be 16 deliveries per week for the 8 stores in the territory with 11-16 pallets per week, or approximately 1,200 cases per week for this territory. At first, he indicated that there was also a merchandiser assigned to the territory (part-time or full-time), who would spend an average of 32 to 33 hours per week servicing the accounts and stocking shelves. Later, he indicated that a merchandising assistant would be available 50% of the time in this territory, which is quite similar to Claimant's testimony that she had one approximately 20 hours per week. Mr. Adkisson also described **the various product displays** (Exhibit M) that would have to be put together and stocked by the territory sales manager as a part of their work activities. This was in addition to the regular stocking and rotating of product on the traditional store shelves. He admitted that sometimes he would have to use a ladder for stocking in the storeroom, but he agreed that he is also taller than Claimant so he generally did not need a ladder nor had to get on his tiptoes to reach the regular shelves for stocking.

## **RULINGS OF LAW:**

Based on a comprehensive review of the evidence, including Claimant's testimony, the testimony of Employer's witness, the expert medical opinions and testimony, the medical treatment records, the medical bills, and the other documentary evidence in this matter, as well as

based on my personal observations of Claimant and the other witness at hearing, and based on the applicable statutes of the State of Missouri, I find:

Considering the date of the alleged injury, it is important to note the statutory provisions that are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court “shall construe the provisions of this chapter strictly” and that “the division of workers’ compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.” Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, “In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”

Claimant bears the burden of proof on all essential elements of her Workers’ Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

As the first three issues in this matter are inter-related, I will address all three of them in the same section of the Award.

***Issue 1: Did Claimant sustain an occupational disease?***

***Issue 2: Did the alleged occupational disease arise out of and in the course of Claimant’s employment for Employer?***

***Issue 3: Are Claimant’s injuries and continuing complaints, as well as any resultant disability, medically causally connected to her alleged occupational disease at work for Employer leading up to April 22, 2010?***

Under **Mo. Rev. Stat. § 287.067.1 (2005)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, under **Mo. Rev. Stat. § 287.067.3 (2005)**, “An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” That section then defines “prevailing factor” as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” It continues, “Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), provided guidance on the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that he contracted an occupationally-

induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) Whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Id.* at 48. Finally, the Court noted, "where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible." *Id.*

Based on Claimant's credible testimony and the competent, credible and persuasive testimony of Dr. Mitchell Needleman and Dr. Dwight Woiteshek, I find that Claimant has met her burden of proving the presence of an occupational disease that arose out of and in the course of her employment for Employer. I further find that she has met her burden of proof to show that her bilateral foot condition is medically causally related to her employment for Employer.

In order to meet her burden of proof in this matter, Claimant, first, needed to present credible testimony on her own behalf regarding the nature of her work activities for Employer and the onset of her complaints/problems. I find that she has. Claimant credibly described her work activities, which included spending the vast majority of each workday standing or walking on concrete floors, sometimes on her tiptoes or squatting on the balls of her feet, or sometimes going up and down ladders, to stock shelves and rotate product in the five to nine stores in her territory, while she worked for Employer for over 10 years as a territory sales manager. Based on Claimant's credible description of her work activities, I find that her job duties for Employer on a daily basis as a territory sales manager included extensive, repetitive work on her feet on concrete floors.

Employer tried to dispute Claimant's description of her work activities through the testimony of Mr. Lindell Adkisson. However, upon comparing his description of the territory sales manager position with Claimant's testimony about that same thing, I was unable to find any major discrepancies that led me to question the accuracy of Claimant's testimony in this regard. Claimant testified that she worked an average of 50-60 hours per week, while Mr. Adkisson testified that the job was based on a 45 hour per week average, but it could be more based on how quickly one worked. That is not a major difference in the number of hours worked, when we are admittedly dealing with averages. Mr. Adkisson admitted that this territory would have had a merchandising assistant for about 50% of the time, which, if you use his 45 hours a week figure, would mean Claimant had a merchandising assistant 22.5 hours per week. Claimant testified she had that kind of help for approximately 20 hours per week. Again, it is a rather minor difference. Finally, Claimant estimated that she was on her feet working for approximately 85% of the time, while Mr. Adkisson estimated that the job required work on one's feet for all but approximately 20% of the time, when you are driving or doing administration tasks. Even using Employer's figure of 80% of the day on one's feet, that means the vast, overwhelming majority of each workday for over 10 years, Claimant was working on her feet on concrete for Employer. In reaching my conclusions in this analysis, I am also mindful of the fact that Mr. Adkisson's testimony is based on never having directly supervised Claimant, nor observed her working. Taking all of these things into account, I find that rather than

disputing Claimant's description of her work activities, this testimony actually helped to bolster the accuracy of it and show that Claimant was, in fact, working in a foot-intensive position, where she was always on her feet, going up and down ladders and dealing with product on the shelves and in the backs (storerooms or warehouses) of the stores.

In order to meet her burden of proof in this case, Claimant, next, needed to offer competent, credible and persuasive medical testimony to support her contention that her work activities for Employer resulted in an occupational disease that caused her bilateral foot condition/injury. To meet this burden of proof, Claimant offered the opinions and testimony of Dr. Mitchell Needleman and Dr. Dwight Woiteshek, who opined that Claimant's work activities for Employer (going up and down ladders, working on concrete floors and going up on her toes to reach items) leading up to April 22, 2010 were the prevailing factor in the cause of her bilateral foot diagnoses and need for treatment. Both experts pointed especially to the extensive work on concrete floors as the main cause of Claimant's foot condition and need for treatment. To counter these opinions, Employer offered the opinions and testimony of Dr. Craig Aubuchon, who opined that Claimant's bilateral foot condition was not related to her work activities for Employer. He concluded that it was unclear why anyone gets plantar fasciitis, they just do and it could be multiple factors that actually cause it. He termed the cause of the foot condition as idiopathic, indicating that he does not know what causes the condition, but in this case, he knows it was not related to work. He acknowledged that only people up and walking get plantar fasciitis, but thought that being on one's feet is a nonissue in the development of plantar fasciitis, in his opinion. Having considered all three opinions and reviewed them in light of the rest of the medical treatment records and evidence in this case, I find that the opinions and testimony of Drs. Needleman and Woiteshek are more competent, credible and persuasive than the contrary opinions of Dr. Aubuchon in this case.

In evaluating the credibility and persuasiveness of each of these experts' opinions, I must first note that Dr. Needleman was a treating physician, not merely hired to provide an opinion to either side in connection with the litigation. In that respect, I felt that his opinion in this matter carried a bit more weight. I am also mindful of the fact that he is a podiatrist, not an orthopedic surgeon, but as a podiatrist, he specializes exclusively in treating conditions of the foot and ankle. Next, I must note that I found quite a lot of consistency in the opinions offered by Dr. Needleman and Dr. Woiteshek, in just about every respect except for the causation of the subsequent calcaneal fracture. That consistency helped to bolster the credibility and persuasiveness of their opinions as compared to that of Dr. Aubuchon. Finally, I noted that Dr. Aubuchon relied extensively on Employer's job description in reaching his conclusions in this case, as opposed to really considering and utilizing Claimant's first-hand account of what she did on this job for the 10 years that she worked for Employer. While I agree that the job description from Employer is some evidence of the job duties involved in the position, it seems to me that the best evidence is actually Claimant's own description of her work. While Employer's description would contain a general sense of the work activities, exactly how she physically performed those activities (tiptoes or not, for example) was not contained in that description. I find that his failure to utilize a more detailed and thorough description from Claimant of exactly how she physically performed her work activities for Employer undercut the persuasiveness of his opinions, when compared to the opinions of Drs. Needleman and Woiteshek.

Based on Dr. Needleman's and Dr. Woiteshek's opinions on the relationship between the excessive work on her feet and the development of the bilateral foot condition, I find that there was an exposure to the disease greater than or different from that which affects the public generally because of the work Claimant was doing with the extensive, repetitive work on concrete floors, on ladders and on her tiptoes as a part of her job. I also find that there is a recognizable link between the disease (bilateral plantar fasciitis) and some distinctive feature of the employee's job (extensive work on concrete floors, on ladders and on tiptoes) which is common to all jobs of that sort. Drs. Needleman and Woiteshek credibly described a recognizable link between those distinctive features of Claimant's job and the bilateral plantar fasciitis. Considering all these things, I find Drs. Needleman and Woiteshek credibly established that Claimant's work was the prevailing factor in causing the bilateral foot conditions.

Accordingly, on the basis of Claimant's credible testimony and the credible and persuasive testimony of Drs. Needleman and Woiteshek, I find that Claimant met her burden of proving the presence of an occupational disease of bilateral plantar fasciitis that arose out of and in the course of employment for Employer, and which was medically causally connected to it. I find that Claimant's extensive, repetitive work activities for Employer (working on concrete floors, going up and down ladders and going up on her toes to reach items) over the 10 years that she worked there as a territory sales manager was the prevailing factor in causing this medical condition and any disability Claimant currently has in her feet as a result of it. I find that her work for Employer was the primary factor, in relation to any other factor, in causing both the medical condition and disability in the feet.

***Issue 4: Did Claimant provide Employer with proper notice of the injury under the statute?***

Under **Mo. Rev. Stat. § 287.420 (2005)**, "No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice."

When considering this notice provision for occupational diseases, and specifically interpreting the phrase "after the diagnosis of the condition," Courts have held that "a person cannot be diagnosed with an 'occupational disease or repetitive trauma' until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure." **Allcorn v. Tap Enterprises, Inc.**, 277 S.W.3d 823 (Mo. App. S.D. 2009). In other words, a mere diagnosis of a condition is not enough. It is only after a diagnosis is made and a medical causal connection between that diagnosis and the work exposure is given, that the 30-day notice time frame begins to run.

Case law has held that the purpose of this section is to give an employer the timely opportunity to investigate the facts surrounding an injury, and if the injury occurred, the chance to provide the employee with medical treatment in order to minimize the disability. **Willis v. Jewish Hospital**, 854 S.W.2d 82 (Mo. App. E.D. 1993) *overruled on other grounds by Hampton*

*v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)*. However, if the employee failed to give timely written notice of the injury, that failure may be circumvented if the failure to give timely written notice did not prejudice the employer.

In the case at bar, Claimant did not remember discussing her foot diagnosis with Employer. Claimant admitted that she never told anyone she considered to be a supervisor at work for Employer that she believed her foot condition was related to her work. She said that she assumed they knew based on the conversations she had with them about her need to wear special shoes, but she also did not know at that time what plantar fasciitis was or what it entailed. Given the information contained in the Court file for this case, I find that the Claim for Compensation was filed by Claimant on January 10, 2012. In the absence of any other evidence in the record of any earlier written or verbal notice from Claimant to Employer about her foot condition, I find that the filing of the Claim on January 10, 2012 is the first notice Employer was provided of this bilateral foot condition injury.

Much like in *Allcorn*, the resolution of this issue in the case at bar turns on when “the diagnosis of the condition” occurred. Having reviewed the medical treatment records and expert reports in detail, I find that the first “diagnosis of the condition” occurred on January 5, 2012, when Dr. Mitchell Needleman issued his report, in which he both, offered a diagnosis and medically causally connected it to Claimant’s employment for Employer. To the extent that Claimant filed her Claim for Compensation in this matter on January 10, 2012, within 30 days after the diagnosis of the condition, I find that Claimant appropriately provided timely notice of her occupational disease to Employer pursuant to the statute.

While it is true that Claimant may have had an idea earlier in this case that her excessive work on concrete and on her feet was the cause of her bilateral foot issues, I find that Claimant’s layperson belief of what may be causing her bilateral foot complaints is not a sound basis, in and of itself, for making a medical causal connection between a diagnosis and a work activity or exposure. Claimant is not a diagnostician and does not have the medical training or expertise to offer an opinion on medical causation. I find that Claimant’s belief as to medical causation does not start the 30-day notice clock running. It takes a medical professional to offer such an opinion to start that notice clock.

Second, while it is also true that some of the earlier medical treatment records in this case in 2011, generally discuss Claimant’s work activities and how those activities may be impacting the symptoms she is having in her feet, I found no frank medical causation opinions relating Claimant’s complaints or diagnoses to her work activities for Employer in those records, until the letter in January 2012. It is true that there were references to Claimant’s work and the foot complaints she was having, but that does not equate to a diagnostician clearly and specifically medically causally relating the diagnoses to Claimant’s work for Employer.

Having found no such medical causation opinion from a medical diagnostician in the record of evidence prior to Dr. Needleman offering his opinion on January 5, 2012, and having found that Claimant provided written notice to Employer in her Claim for Compensation that she filed in this matter on January 10, 2012, I find that Claimant appropriately provided timely notice of her occupational disease to Employer pursuant to the statute.

***Issue 5: Is Employer responsible for the payment of past medical benefits in an amount to be determined?***

Under **Mo. Rev. Stat. § 287.140.1 (2005)**, “the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...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.” **Mo. Rev. Stat. § 287.140.3 (2005)** also states, “All fees and charges under this chapter shall be fair and reasonable...” Claimant bears the burden of proving these elements of the claim.

The Missouri Workers’ Compensation Statute is very clear that if the employer is going to be responsible for the payment of the medical bills, then the employer has the right to select the medical providers and direct the medical care. The statute, however, does give Claimant an option. If Claimant desires to direct her own medical care and choose her own treating physicians, then she has the right to do that, but then she is responsible for the payment of the bills associated with that treatment, not the employer.

Claimant began treating on her own for her bilateral foot condition, with doctors of her own choosing, since she was apparently, initially unsure if this was really a work-related condition or not. Claimant did not remember ever discussing her foot diagnosis with Employer. She admitted that she never told anyone she considered to be a supervisor at work for Employer that she believed her foot condition was related to her work. She testified that she assumed they knew based on the conversations she had with them about her need to wear special shoes, but even then, she still did not ask them to assume her care or direct her treatment. In fact, she admitted that she never asked Employer to provide her with any treatment for her feet and treated on her own for her foot complaints and problems.

I find no evidence in the record to suggest that Claimant ever, at any time, asked Employer to provide any medical care or treatment to her for her bilateral foot condition. In fact, in reviewing the Claim for Compensation Claimant filed in this case, I found no demand for medical treatment there either. Instead, I find that Claimant continued to treat on her own with doctors of her own choosing for her bilateral foot condition and submitted the medical bills through her own health insurance.

Since Claimant never requested or demanded medical treatment for this injury at any time from Employer, I find that Employer was never given the opportunity to control the medical care or select the treating physicians as is their statutory right. Since Employer was never given the opportunity to control the medical care or select the treating physicians, and since Claimant continued to treat on her own with doctors of her own choosing, I find that Claimant is responsible for the medical bills referable to this treatment, not Employer. As is noted in the statute above, Claimant has the right to select her own physicians “at his/[her] own expense.”

An argument can be made that, although she never requested medical treatment from Employer, since Employer was aware she was seeking treatment, and since Employer was

denying the Claim, Employer effectively failed or refused to provide needed medical treatment, thus, necessitating that Claimant obtain it on her own. However, this argument overlooks the fact that Employer never actually failed or refused to provide medical treatment, because Employer was never asked to provide it by Claimant. One could assume that since Employer was disputing the Claim from the beginning, that any request for medical care for Claimant's bilateral foot condition would have been refused. However, an award of benefits under the statute cannot be based on pure speculation.

Without Claimant having requested that Employer provide medical care for her bilateral foot condition, at some point during the pendency of this Claim, and without Employer actually failing or refusing to provide that requested medical care, I am left to conclude that Claimant decided, which she has the right to do under the statute, to control her own medical care and select her own physicians, thus, making her, not Employer, responsible for the resulting medical charges for this treatment. Claimant's request for the payment of past medical expenses is denied.

***Issue 6: Is Claimant entitled to the payment of temporary total disability benefits for a period of time to be determined?***

Employer is responsible under the statute for the payment of temporary total disability benefits pursuant to **Mo. Rev. Stat. § 287.170 (2005)** during the continuance of such disability at the appropriate weekly rate of compensation. The statute also defines "total disability" under **Mo. Rev. Stat. § 287.020.6 (2005)** as the "inability to return to any employment and not merely... (the) inability to return to the employment in which the employee was engaged at the time of the accident." Claimant bears the burden of proof on this element of her claim just as on any other element.

In this case, Claimant continued to work for Employer until she had the surgery on her left foot on May 25, 2011. She was, then, taken off work by Dr. Needleman and eventually released to return to work on September 19, 2011. The period of time that she might otherwise be entitled to TTD is somewhat complicated by the fact that approximately a month after her surgery, she sustained a calcaneal fracture to her left foot, which Dr. Needleman has opined is not related to this work injury and Dr. Woiteshek has opined is related to the work injury. The question must, then, be addressed if the calcaneal fracture impacted her time off work by extending it, and, if so, if the fracture is not related to the work injury, by how much, as Employer would not then be responsible for that increased period of time.

Putting aside for a moment the causation issue with regard to the calcaneal fracture, and focusing solely on how much time Claimant may have needed to be kept off work for just the plantar fasciitis surgery, Dr. Needleman testified that it can take anywhere from three to six months for someone to recover from surgery to the point where they can go back to work, but everyone is different in how quickly they reach that point. However, he acknowledged that the average is about three months off work for plantar fasciitis. He also noted that because of the overlap of the conditions, there was no real way for him to separate that out.

Given that Claimant's actual time off work for both the plantar fasciitis surgery and the calcaneal fracture is well within the period of time that Dr. Needleman opined would be necessary even if one just considered time off work for plantar fasciitis alone (three to six months), I find that Claimant is entitled to receive temporary total disability (TTD) benefits for that entire period of time. There is no question that Dr. Needleman restricted her ability to be on her foot and do any work during that period. Especially given the demands of her job and how foot-intensive her job activities are, it makes even more sense that Dr. Needleman would not have wanted to return her to performing those same kinds of activities too soon, when those activities gave rise to the plantar fasciitis in the first place.

Since the parties were unable to agree on what period of time for temporary total disability would be in dispute if I found this matter compensable, it was left to me, based on the records and evidence, to determine the appropriate period. I find that Claimant was taken off work by Dr. Needleman, on account of her plantar fasciitis foot condition, from May 25, 2011 through September 19, 2011. I find that this period covers the time Claimant was treating for and recovering from her left foot plantar fasciitis surgery, during which Dr. Needleman either had Claimant completely off work or under restrictions that did not allow her to return to employment.

Given my findings above that Claimant sustained a compensable occupational disease at work, and based on the medical evidence referenced above and Claimant's testimony, I find that Claimant was temporarily and totally disabled during this period and entitled to the payment of that benefit by Employer.

Therefore, I find Claimant has met her burden of proving that she is entitled to TTD benefits from May 25, 2011 through September 19, 2011, at the stipulated rate of \$807.48 per week. Accordingly, Claimant is awarded 16 5/7 weeks of TTD benefits from Employer.

***Issue 7: What is the nature and extent of Claimant's permanent partial disability attributable to this injury?***

Under **Mo. Rev. Stat. § 287.190.6 (1) (2005)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id.*** at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelson v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Additionally, under the 2005 amendments to the Workers' Compensation Law, the Legislature added further provisions that have an impact on the determination of the nature and extent of permanent partial disability. **Mo. Rev. Stat. § 287.190.6 (2) (2005)** states,

Permanent partial disability... shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

Therefore, according to the terms of this statute, it is incumbent upon the claimant to have a medical opinion from a physician that demonstrates and certifies claimant's permanent partial disability within a reasonable degree of medical certainty. Further, if there are conflicting opinions from physicians in a given case, then objective medical findings must prevail over subjective findings.

In awarding permanent partial disability for this injury under these statutory provisions, it is, thus, necessary to deal with each of these sections. Considering the evidence listed above, I find that the medical opinion from Dr. Woiteshek demonstrates and certifies, within a reasonable degree of medical certainty, that Claimant sustained permanent partial disability as a result of the work-related injury on April 22, 2010.

Accordingly, I find that Claimant has successfully met her burden of proof to show that Employer is responsible for the payment of permanent partial disability related to the April 22, 2010 injury.

Following this 2010 injury, based on Claimant's credible testimony, I find that Claimant has absolutely no issues with the right foot at all. With regard to the left foot, she said that it is wider than the right, so it makes finding shoes difficult. She said that she cannot wear heels anymore and she still wears lifts in both shoes. She noted that she will have pain in the left foot if she is not wearing lifts. Claimant also described continued pain in the left foot every night at a level of 1-2 out of 10. She said that she continues to perform her stretching exercises. Claimant denied having any residual issues from the left calcaneal fracture, except that sometimes with weather changes she notices some pain there. She noted that she is scared to do any running because of the foot.

With regard to the right foot, when Dr. Woiteshek examined her, she was still having some problems and complaints, but now I find that everything with the right foot has resolved, except for the fact that she continues to wear lifts in both shoes to prevent a recurrence of complaints in her feet. As a result of the improvement in her condition, while I find that she has some very minimal amount of disability in the foot as a result of the conservatively treated plantar fasciitis condition, requiring ongoing use of heel lifts, I do not believe it rises to the level as opined by Dr. Woiteshek.

With regard to the left foot, Claimant clearly has some ongoing complaints and problems that affect her ability to function on account of the surgically treated plantar fasciitis in that foot. However, she seems to have made a full recovery with regard to the calcaneal fracture, again showing somewhat of an improvement as compared to the problems and complaints she expressed to Dr. Woiteshek at the time of his evaluation. Therefore, while I again find that there is some permanent partial disability in the left foot on account of this injury, I do not believe that it rises to the level as expressed by Dr. Woiteshek.

On the basis of all of this evidence in the record, I find that Claimant has permanent partial disabilities of 1% of the right foot at the 150 week level and 20% of the left foot at the 150 week level related to this compensable accident at work on April 22, 2010.

Therefore, I find that Employer is responsible for the payment of 31.5 weeks of permanent partial disability benefits related to this compensable accident at work on April 22, 2010.

**CONCLUSION:**

Claimant sustained a compensable occupational disease injury of plantar fasciitis to her right and left feet arising out of and in the course of her employment for Employer leading up to April 22, 2010, which was also medically causally connected to it. Claimant's extensive, repetitive work activities for Employer (working on concrete floors, going up and down ladders and going up on her toes to reach items) over the 10 years that she worked there as a territory sales manager was the prevailing factor in causing this medical condition and any disability Claimant currently has in her feet as a result of it. Her work for Employer was the primary factor, in relation to any other factor, in causing both the medical condition and disability in the feet. Having found no medical causation opinion from a medical diagnostician in the record of evidence prior to Dr. Needleman offering his opinion on January 5, 2012, and having found that Claimant provided written notice to Employer in her Claim for Compensation that she filed in this matter on January 10, 2012, I find that Claimant appropriately provided timely notice of her occupational disease to Employer pursuant to the statute.

Having never requested that Employer provide medical care for her bilateral foot condition at some point during the pendency of this Claim, Claimant decided, which she has the right to do under the statute, to control her own medical care and select her own physicians, thus, making her, not Employer, responsible for the resulting medical charges for this treatment. Claimant's request for the payment of past medical expenses is denied.

Claimant has met her burden of proving that she is entitled to TTD benefits from May 25, 2011 through September 19, 2011, at the stipulated rate of \$807.48 per week. Accordingly, Claimant is awarded 16 5/7 weeks of TTD benefits from Employer. Employer is also responsible for the payment of a total of 31.5 weeks of permanent partial disability related to the April 22, 2010 injury, based on 1% permanent partial disability of the right foot (1.5 weeks) and 20% permanent partial disability of the left foot (30 weeks).

The Second Injury Fund Claim is being left open by agreement of the parties, pending the outcome of this part of the case. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Aaron D. Lefton for necessary legal services.

Made by: \_\_\_\_\_

JOHN K. OTTENAD  
*Administrative Law Judge*  
*Division of Workers' Compensation*