

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

Injury No. 11-019035

Employee: Martha (Sampley) Riggins  
Employer: My Camp  
Insurer: Missouri Employers Mutual Insurance

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, heard the parties' arguments, 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 by accident arising out of and in the course of employment*

We agree with the administrative law judge that employee met her burden of proving that she sustained an injury arising out of and in the course of her employment when she fell at work on March 16, 2011. We write this supplemental opinion to acknowledge employer's brief and argument advancing the case of *Porter v. RPCS, Inc.*, 402 S.W.3d 161, 174 (Mo. App. 2013). Therein, the court held that an employee "failed to prove that she sustained injuries arising out of and in the course of her employment because she failed to identify a specific risk or hazard that caused the accident." *Porter v. RPCS, Inc.*, 402 S.W.3d 161, 174 (Mo. App. 2013). Employer argues that under *Porter*, employee's testimony that she doesn't know what caused her to fall down is fatal to her claim for compensation.

We disagree because, like the administrative law judge, we are convinced that Dr. Oscar Schwartz provides the more persuasive opinion as to what happened to employee on March 16, 2011. Dr. Schwartz explained that employee's extremely variable work schedule affected her ability to go to sleep and to get the right amount of sleep, and that her loss of consciousness on March 16, 2011, was the product of shift work disorder with circadian misalignment and sleep deprivation. Dr. Schwartz specializes in sleep medicine and we view his credentials as noteworthy. We agree with the administrative law judge that the doctor's willingness to modify his opinion after receiving corrected and relevant information bolsters, rather than detracts, from his credibility in this matter. We are also convinced by Dr. Schwartz's deposition testimony that he had the relevant information he needed to make a sound diagnosis and opinion in this matter.

We conclude, therefore, that employee's inability to recall or identify what caused her to fall is irrelevant in light of Dr. Schwartz's persuasive opinion, which establishes that the duties of her work created an increased risk of sustaining an accidental injury. We likewise conclude that employee's injuries did not merely happen to occur while she was working, but instead resulted from a unique condition of her employment: namely, her variable shift schedule and the series of long overnight shifts she worked before the accident.

Employee: Martha (Sampley) Riggins

- 2 -

**Conclusion**

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

The award and decision of Administrative Law Judge Maureen Tilley, issued September 30, 2014, 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 14<sup>th</sup> day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

John J. Larsen, Jr., Chairman

---

DISSENTING OPINION FILED  
James G. Avery, Jr., Member

---

Curtis E. Chick, Jr., Member

Attest:

---

Secretary

Employee: Martha (Sampley) Riggins

### **DISSENTING OPINION**

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the Commission should reverse the award of the administrative law judge.

I disagree with the majority's conclusion that the testimony from Dr. Schwartz is sufficient to demonstrate that employee's accident and resulting injuries arose out of and in the course of her employment. Dr. Schwartz admitted that he reviewed (at most) only a handful of employee's medical records, that he never even interviewed her, and that he based his decision solely on employee's timesheets and his own assumptions about employee's activities during her time off. As employee's counsel conceded at oral argument, there is no evidence on this record of employee's normal sleep patterns in her off-work time. It may be that employee routinely sleeps less than 6 hours per day. If so, Dr. Schwartz can hardly fault employee's work schedule for not permitting her enough time to sleep. Absent evidence of employee's normal sleep schedule, we cannot rule out the possibility that employee's accident was more the product of her personal choices in her normal non-employment life than any risk or hazard resulting from her work schedule. Given the record before us, I believe it is clear that employee has failed to conclusively identify the hazard or risk that caused her accident, and that she has thus failed to meet her burden of proof under *Porter v. RPCS, Inc.*, 402 S.W.3d 161 (Mo. App. 2013).

I acknowledge that in the recent case of *Gleason v. Treasurer of the State*, WD77607 (Mar. 3, 2015), the court distinguished the *Porter* case, and held that when an employee's injuries are the product of falling from a height to which the worker would not have been equally exposed in normal non-employment life, the employee is not precluded from an award of benefits merely because the employee is unable to remember specifically why she fell. Here, however, there are no such unusual circumstances. Employee did not fall 25 feet from the top of a railcar, but in a kitchen at the home of employer's client.

I would also note that in distinguishing *Porter*, the *Gleason* court stated that the activity that caused the employee's injuries in *Porter* was "walking on a smooth surface." *Gleason*, at pg. \*12. But the actual holding in *Porter* was that the employee "failed to prove that she sustained injuries arising out of and in the course of her employment *because she failed to identify a specific risk or hazard that caused the accident. Porter failed to establish how she fell* and, therefore, failed to show that she was exposed to an unusual risk of injury that was not shared by the general public." *Porter*, 402 S.W.3d at 174 (emphasis added). The employee in *Porter* failed to prove her case not because her injuries resulted from walking on a smooth surface, but because she was unable to establish how or why she fell. That is precisely the situation before us. Absent a showing of an increased risk of injury as was present in the *Gleason* case, I do not believe we can use Dr. Schwartz's speculative opinions to fill in the gaps in employee's own testimony regarding what happened to her.

I would reverse the award and decision of the administrative law judge and enter an award denying compensation. Because the majority has determined otherwise, I respectfully dissent.

---

James G. Avery, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Martha (Sampley) Riggins Injury No. 11-019035  
Dependents: N/A  
Employer: My Camp  
Insurer: Missouri Employers Mutual Insurance  
Hearing Date: July 10, 2014 Checked by: MT/rf

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? March 16, 2011.
5. State location where accident occurred or occupational disease contracted: Perry 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 happened or occupational disease contracted: The employee was injured when she fell toward the end of her second consecutive 17.5 hour shift.

- 12. Did accident or occupational disease cause death? No.
- 13. Parts of body injured by accident or occupational disease: Right lower extremity.
- 14. Nature and extent of any permanent disability: 30%.
- 15. Compensation paid to date for temporary total disability: \$0.
- 16. Value necessary medical aid paid to date by employer-insurer: \$0.
- 17. Value necessary medical aid not furnished by employer-insurer: \$64,879.94.
- 18. Employee's average weekly wage: \$489.98.
- 19. Weekly compensation rate: \$326.67 for TTD/PTD and PPD.
- 20. Method wages computation: Stipulation.
- 21. Amount of compensation payable:

|  |                    |
|--|--------------------|
| Unpaid medical expenses:                       | \$64,879.94        |
| 7 and 1/7 weeks of temporary total disability: | \$ 2,333.36        |
| 46.5 weeks of permanent partial disability:    | <u>\$15,190.16</u> |
| TOTAL:   | \$82,403.46        |

- 22. Second Injury Fund liability: N/A
- 23. Future requirements awarded: The employer-insurer is ordered to provide past temporary total disability benefits as well as past medical aid. The employer-insurer is also ordered to provide future medical treatment as may be required to cure and relieve the effects of the March 16, 2011 injury. See award.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the employee 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 employee: Sarah Elfrink.

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW**

On July 10, 2014, the employee, Martha (Sampley) Riggins, appeared in person and with her attorney, Sarah Elfrink, for a hearing for a final award. The employer-insurer, My Camp, was represented at the hearing by their attorney, Kenneth L. Voigt. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These stipulations and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

### **STIPULATIONS:**

1. Covered employer: My Camp (employer) was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Missouri Employers Mutual Insurance (insurer).
2. Covered employee: On March 16, 2011 Martha (Sampley) Riggins (employee) was an employee of My Camp and was working under the Workers' Compensation Act.
3. Notice: The employer had notice of the employee's accident.
4. Statute of limitations: The employee's claim was filed within the time allowed by law.
5. Average weekly wage and rate: The employee's average weekly wage was \$489.98, resulting in a compensation rate of \$326.67 for temporary total disability benefits and permanent partial disability benefits.
6. Medical aid furnished by employer-insurer: The employer-insurer paid \$0 in medical aid.
7. Temporary disability paid by employer insurer: The employer-insurer paid \$0 in temporary disability benefits.

### **ISSUES:**

1. Accident: Whether on March 16, 2011, the employee sustained an accident or occupational disease arising out of and in the course of her employment.
2. Medical causation: Whether the employee's injury was medically causally related to the accident.
3. Additional medical aid – Past: The employee is making a claim for previously incurred medical in the amount of \$64,879.94. The employer-insurer dispute as to authorization.
4. Additional medical aid – Future: The employee is making a claim for future medical aid as necessary to cure and relieve the effects of the work-related injury.
5. Temporary total disability: The employee is making a claim for past TTD benefits in the amount of \$2,333.36 for the time period beginning on March 16, 2011, and ending on May 4, 2011. This is a period of 50 days or 7 and 1/7 weeks.
6. Permanent partial disability: The employee is making a claim for PPD to her right lower extremity.

### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

**Employees Exhibits:**

1. Report of Injury
2. Claim for Compensation
3. Medical records from Perry County Memorial Hospital: 3-16-2011 and medical records from Mid America Rehab (at Perry County Memorial Hospital), 4-15-2011 to 5-6-2011
4. Medical records from St. Francis Medical Center: 3-16-2011 to 3-19-2011
5. Medical records from Dr. Michael Trueblood: 3-23-2011 to 5-25-2011
6. Medical bills for unauthorized medical treatment totaling: \$64,879.94
7. Deposition and Report of Dr. Oscar Schwartz with exhibits: 1-30-2013
8. Deposition and Report of Dr. Robert Poetz with exhibits: 3-18-2013
9. Deposition of Martha (Sampley) Riggins: 1-16-2013
10. Time sheets, 12-28-2009 to 3-20-2011
11. Medical records from Cross Trails, 1-13-2011 and 5-3-2011

**Employer-Insurer Exhibits:**

- A. Deposition of Dr. John Krause w Exhibits: 5-8-2013
- B. Letters from Joseph Webb: 11-2-2011 and 3-20-2012
- C. Letters from Dr. Rhody D. Eisenstein: 8-9-2013 and 9-19-2013
- D. Curriculum Vitae of Dr. Rhody Eisenstein
- E. Perry County Ambulance Report: 3-16-2011
- F. Recorded Statement of Martha Sampley: 3-21-2011

**STATEMENT OF THE FINDINGS OF FACT:**

The employee, Ms. Martha (Sampley) Riggins, began working for My Camp in approximately August of 2008 and continued working there until December of 2011. Her rate of pay was \$9.00 an hour. Her job duties included providing in-home care for disabled adults including assistance with medications, assistance with bathroom trips, preparing meals, bathing, dressing, laundry and other light housework.

In the months before the accident, the employee primarily worked overnight shifts consisting of 12 hours per shift, four to five nights per week. In November of 2010, the employee's schedule was changed to include two 17.5-hour shifts per week. The time sheets indicate that the 17.5-hour shifts had been separated by one non-work day until February of 2011 when the employee worked a 12-hour shift on January 31, 2010, followed by a 19-hour shift on February 1, 2011, followed by a 17.5-hour shift on February 2, 2011. The employee testified about, and the time sheet verifies that, the week of February 14, 2011, she worked a 12-hour shift followed by three consecutive 17.5-hour shifts for a total of 64.5 hours in four days. This pattern of extended shifts on consecutive days continued into March of 2011.

On January 13, 2011 and May 3, 2011, the employee filled out Patient Health Questionnaires which indicated that she did not have any trouble "falling or staying asleep or sleeping too much." The employee stated on redirect that she would have answered differently if the questionnaire had been phrased "Did you have trouble getting enough sleep?"

On March 16, 2011, the date of the accident, the employee had worked approximately 13 hours of her second consecutive 17.5-hour shift. She did not have any days off in between shifts. The employee testified, and the time sheets verify, that the employee logged in at 2:30 p.m. on March 14, 2011, and worked 17.5 hours, logging out at 8:00 a.m. on March 15, 2011. She reported back to work just 6.5 hours later the same day for her next shift. She logged in again at 2:30 p.m. on March 15, 2011, and was scheduled to work until 8:00 a.m. on March 16, 2011; however, the accident occurred before her shift ended.

The employee testified that on the date of the accident she arrived at work at her usual time, 2:30 p.m. She assisted the clients with their evening routines and put them to bed at approximately 8:00 p.m. At 12:00 a.m. she woke one of the clients to dispense a required medication. She then alternated between light housework, such as sweeping and laundry, and watching TV. The employee testified that sometime later she became drowsy and got up from watching TV. She testified that she intended to go outside and have a cigarette and get some air to keep her from falling asleep. She testified that she remembers reaching for her purse and nothing else until after the fall.

At approximately 3:30 a.m., the employee testified that she “woke up” on the floor. She testified that she remembers shaking and rubbing her head and being confused as to why she was on the floor. She testified that although she did not feel immediate pain in her ankle, she knew that it was broken by the position of her foot. She further testified that she pulled herself up into a nearby kitchen chair and telephoned her supervisor, Ms. Robin Habeck.

The employee testified that her supervisor arrived at the client’s house within about 5 minutes and called 911 for an ambulance. The medical records indicate that the ambulance received that call at 3:51 a.m. and that the ambulance arrived at the Perry County Memorial Hospital with the employee at 4:32 a.m.

The medical records further indicate that the employee was assessed at the Perry County Memorial Hospital by Dr. Paul Salmon. An x-ray report prepared by Dr. John A. Merkle revealed a comminuted fracture of the fibula and a transverse fracture of the medial malleolus (tibia shaft) with 50% dislocation. At 7:20 a.m. that morning, Dr. Jonathon M. Bird signed the transfer form approving emergency transport of the employee to Dr. Trueblood at St. Francis Medical Center in Cape Girardeau.

The history and physical examination report prepared by Dr. Trueblood at St. Francis Medical Center indicates that the employee “had a syncopal episode and woke up on the kitchen floor” and that “she does not have good memory of the event”. The record further indicates that the CT head scan and lab results were normal and that although diabetic, the sugar levels were not low. Dr. Trueblood concluded that “we do not have a good explanation for her syncope”. Dr. Trueblood diagnosed a bimalleolar fracture of the right ankle and requested an evaluation for surgery.

The 3-16-2011 consultation record prepared by Dr. Ryan M. Davis indicates an intermediate risk for orthopedic surgery and that if “all tests look normal, would be okay to proceed to OR in a.m.”

Dr. Davis noted that his impression was that the employee had a syncopal type episode, suspect secondary to orthostatic hypotension versus vagal response with coughing after going from sitting to standing position.

The 3-16-2011 chest x-ray revealed no active disease, and the 3-16-2011 cardiologist's report revealed normal global systolic function without wall motion abnormalities.

The 3-16-2011 right ankle x-ray indicated a laterally displaced bimalleolar fracture.

The 3-17-2011 operation record indicates that Dr. Trueblood performed an open reduction, internal fixation of the right bimalleolar fracture. The note indicates that a 10-hole plate and screws were used to secure the fibula. The medial malleolus (tibia) fracture was repaired with two additional screws.

The 3-19-2011 discharge summary dictated by Dr. Trueblood indicated that by 3-19-2011 the employee was ready for discharge. The note indicates that she was instructed to elevate her foot, remain non-weight bearing, use a walker, keep her wounds clean and dry, take Vicodin for pain, and return to see Dr. Trueblood in a week for follow up. The record further indicates that the employee had no further episodes of syncope or dizziness and that no evidence of myocardial infarction or arrhythmia was found.

On 3-23-2011 the employee returned to Dr. Trueblood for her one-week follow up. That record indicates that the employee was put in a short-leg cast and instructed to remain non-weight bearing. The record further indicates that the cast and staples were to be removed before her next one-week follow up.

The records indicate that the employee was seen in follow up with Dr. Trueblood on 3-30-2011, 4-13-2011, 5-4-2011 and 5-25-2011. She was started on weight bearing and physical therapy for gait training on 4-13-2011. She was allowed to return to work in a boot on 5-5-2011. She was discharged from care without work restrictions on 5-25-2011.

The employee testified that she did not remember being transferred or admitted to St. Francis Medical Center and that her first memory of Dr. Trueblood was at his office on 3-23-2011.

The employee testified that she was able to return to work for My Camp on 5-5-2011. She was assigned higher-functioning clients. This amounted to fewer work duties and 12-hour shifts instead of 17.5-hour shifts.

The employee testified that her medical bills remain outstanding and that she has never received any TTD benefits.

The employee testified that she has never had any other episodes of syncope in her life. The employee testified that she has never had any complications, including fainting, seizures or syncope, from her diabetes or any other medical condition. The employee testified that she has never had any previous or subsequent injuries to her right ankle. The employee testified that she

regularly slept more than 4-5 hours in a day or night until her sleep was limited by the 17.5-hour shifts in November of 2010. She further testified that she currently sleeps more than 4-5 hours. The employee testified that she “worked crazy hours” and was consistently tired. The employee testified that she did not complain to her boss about the hours or about being tired because she wanted to keep her job. The employee testified that sleeping on the job was not allowed and was a dischargeable offense per the policy handbook. On cross examination the employee testified that although she coughed, she did not have a “coughing episode” just before the fall.

Employee testified that she continues to have pain both in the ankle and on the top of the foot; she rated her pain as a 6/10. The employee testified that she continues to have swelling of the ankle that varies in correlation to her activity level. She further testified that she has lost the feeling in her last two toes and that she has a restricted range of movement of the ankle. Specifically, she testified that she cannot bend her foot to put it into a boot and that she still takes stairs one-at-a-time. She further testified that she can no longer run, ride a bicycle, or take long walks with her grandchildren. She further testified that she usually wears shoes without a back, despite the weather, because shoes that touch the ankle area, such as tennis shoes, cause increased pain and swelling.

The records indicate that the employee was examined by Dr. Robert Poetz, a board certified family practice physician, on October 11, 2012, for the purpose of an IME on behalf of the employee. Dr. Poetz’s report notes crepitus, poor squatting, decreased pinprick sensation of the fourth and fifth toes, decreased range of motion of the ankle, and swelling. The report notes a 12 cm lateral ankle scar and a 5 cm medial ankle scar compatible with her open surgery. Dr. Poetz diagnosed a right ankle bimalleolar fracture and status post open reduction and internal fixation of the right bimalleolar fracture. Dr. Poetz opined that the employee may require surgical removal of the hardware in the future. Dr. Poetz further opined that the diagnostic testing, surgery, and medical care was medically necessary and that the medical charges were reasonable and customary. Dr. Poetz opined that the injury which occurred on March 16, 2011, was the substantial and prevailing factor to the disability to the right lower extremity. Dr. Poetz further opined that the employee suffered a 35% PPD to the lower right extremity measured at the ankle directly resultant from the March 16, 2011 work-related injury.

Dr. Poetz’s deposition testimony was taken on March 18, 2013. Dr. Poetz testified consistent with his reported opinions above. He described the employee’s surgery. He described the bony hypertrophy caused by callous formation and the hardware that cause the employee’s circumferential increase. He described the risk for surgical removal of the hardware in the future due to the hardware becoming painful or beginning to migrate or back out from the right ankle. On cross examination, Dr. Poetz stated that he had not reviewed the employee’s deposition testimony or Dr. Krause’s report.

The records indicate that the employee was examined by Dr. John Krause, a board certified orthopedic surgeon, on February 18, 2013, for an IME on behalf of the employer-insurer. Dr. Krause ordered x-rays which indicated the fractures were both healed and the presence of an osteophyte on the medial malleolus. Dr. Krause’s examination of the employee revealed full range of motion, soft tissue swelling, palpable hardware, and tenderness. Dr. Krause opined that

the medical treatment the employee received was “very reasonable”. He further opined that the employee was at MMI and had an 8% PPD of the ankle as a result of her bimalleolar ankle fracture and surgical treatment. He further opined that the employee can work full duty without restrictions.

Dr. Krause’s deposition testimony was taken on May 8, 2013. Dr. Krause testified consistent with his reported findings and opinions above. He stated that his 8% PPD rating was based on his finding that the employee “essentially had a normal ankle following the procedure other than the palpable hardware” and that “there’s a small risk of getting arthritis down the road”. On cross examination, Dr. Krause opined that he did not know if there is any direct relationship between the amount of displacement at the initial presentation and the disability at MMI. Dr. Krause testified that “if [he] had to guess”, the employee would have very little problem with this ankle throughout the rest of her life. Also on cross examination, Dr. Krause testified that the screws in the fibula “can cause problems” and that he “take[s] them out in about 20 to 25 percent of the patients”. Finally, on cross examination, Dr. Krause testified that although he allows his patients to return to restricted work such as sitting work or desk work if the employer can accommodate, “most of the time, they’re not on full duty until about three months”.

Dr. Oscar Schwartz, a physician board certified in internal medicine, pulmonary disease and sleep medicine, prepared a report, an amended report, and gave his deposition testimony on January 30, 2013, on behalf of the employee. Dr. Schwartz never examined or spoke personally with the employee. Dr. Schwartz’s initial report, set out as Employer’s Exhibit 1 in the deposition, indicates that he was unable to opine “beyond a reasonable doubt” that work-related sleep deprivation caused the syncopal episode. However, a review of page 5 of that reports indicates that Dr. Schwartz had plotted incorrect data. Specifically, he had the time of accident at 3:30 p.m. (just 1 hour after arriving at work) instead of 3:30 a.m. (some 12 hours into her second consecutive overnight shift). Therefore, Dr. Schwartz had no information accounting for the 12-hour period after the fall and before she was admitted to the emergency room at approximately 4:30 a.m. Eventually, Dr. Schwartz prepared a new report based on the corrected data and based on the doctor’s statement on page 7 that he reserves the right to change or modify his opinion based upon the availability of new information.

Dr. Schwartz’s amended report sets out his opinions that the employee’s work schedules contribute to changes in the sleep-awake pattern referred to as a circadian disorder consistent with a Circadian Misalignment Syndrome. Dr. Schwartz opined that “sleep deprivation can be attributed to the work schedule documented by the time sheets”, and that Circadian Misalignment with shift work schedule can also be inferred using the data from the employee’s time sheets. Dr. Schwartz’s report notes that neither the records from Perry County Memorial Hospital nor St. Francis Medical Center suggest a medical process to explain the episode of loss of consciousness. Dr. Schwartz’s conclusion states that “Circadian Misalignment Syndrome associated with a shift work schedule fostering inadequate sleep time between work shifts is “clearly documented”. He further opined that “sleep deprivation resulting from shift work and circadian misalignment has been implicated with inappropriate sleep onsets and can resemble syncope. Dr. Schwartz’s opinion was that the prevailing issues related to the employee’s loss of consciousness include shift work disorder with circadian misalignment and sleep deprivation.

Dr. Schwartz's deposition testimony was consistent with his reported findings and opinions as set out in his amended report above. He described that the study of sleep medicine looks at the work cycle to determine if one is a regular worker or a shift worker and whether or not the shifts allow sufficient time for sleep. He described the purpose of plotting work schedules and how he plotted the employee's work schedules. He discussed the complications caused by sleep deprivation including people falling asleep while driving, falling asleep while doing other functions, falling asleep in any posture, and that the early morning hours are the most difficult period of time for shift workers. He testified that despite multiple emergency room examinations, preoperative consultations, and lab results, no apparent reason for a loss of consciousness was found. Dr. Schwartz testified that based upon the lack of evidence of other prevailing factors, he believes that the shift-work issues as well as the circadian misalignment issues contributed to her episode of syncope or loss of consciousness. On cross examination, Dr. Schwartz testified that he had prepared an initial report where his causation assessment was inconclusive; however, he testified that report was based on incorrectly plotted work time due to the blurry, handwritten time sheet records. Also on cross examination, Dr. Schwartz explained that he did not include the emergency room consultation notes regarding suspected conditions such as orthostatic hypotension versus vagal response as an impression in his report because they were not diagnoses, rather it was conjecture. Also on cross examination, Dr. Schwartz testified that "[i]f you're asking me whether or not I believe that she fell asleep and that resulted in her fall, yes." Finally on cross examination, Dr. Schwartz testified that Circadian Misalignment Syndrome associated with shift disorder has been associated with syncope.

Dr. Rhody Eisenstein prepared two letters dated August 9, 2013, and September 19, 2013, at the request of the employer-insurer. He did not give any deposition testimony. In response to the employer-insurer's question about Dr. Schwartz's diagnosis of Circadian Misalignment Syndrome, Dr. Eisenstein stated that he does not believe there is adequate evidence to diagnose a Circadian Misalignment Syndrome. Dr. Eisenstein states that the employee did not have a shift-work disorder because the definition of shift-work disorder includes both (a) a complaint of insomnia or excessive sleepiness and (b) a shift-work schedule over the course of at least one month. In Dr. Eisenstein's response to the employer-insurer's question #3, he states that the employee was likely sleep deprived, but that there is no evidence that she had a "disorder". When questioned about the consulting hospitalist's suspicion of orthostatic hypotension, Dr. Eisenstein stated that orthostatic hypotension "might lead" to a syncopal loss of consciousness and was "reasonable but does not explain the event". Dr. Eisenstein further stated that he was not surprised that the employee could not account for her loss of consciousness and that her employment records do not shed light on the cause of her syncopal episode. Finally, Dr. Eisenstein stated that he did "not have adequate information from the medical documents to assess whether the patient has [other conditions] such as obstructive sleep apnea, narcolepsy, significant sleep deprivation . . ."

The employee saw her family practitioner on January 13, 2011 – two months before the work injury. That record indicates no history or complaints of syncope, black-outs, or seizures. The record does, however, indicate that the employee responded "several days" to the statement "feeling tired or "having little energy".

## **RULINGS OF LAW:**

### **Issues 1 and 2: Accident and Medical Causation:**

Section 287.020.2 RSMo. defines “accident” as “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.”

Section 287.020.3 RSMo. defines the term “injury”. That section states:

...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.

Section 287.020.3(2) RSMo. explains that an injury shall be deemed to arise out of and in the course of employment only if:

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

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

With regard to §287.020.2, there is no question here that an “accident” took place. The employee testified, and all of the evidence supports, the fact that the employee suffered an ankle injury as a result of an unexpected traumatic event. The event is identifiable by time and place in that it occurred in a My Camp client’s home in the early morning hours of March 16, 2011. The employee further testified, and the medical records support, that the employee had objective symptoms of an ankle injury such as positional deformity, pain, and fractures of the lower shafts of both leg bones verified by x-rays. Finally, the injury was caused by a specific event, a fall, during a single work shift, March 15, 2011, at 2:30 p.m. through March 16, 2011, at 8:00 a.m. Therefore, the employee has met her burden with regard to “accident” as defined by §287.020.2.

With regard to §287.020.3, the employee’s burden is more difficult. This statute explains that a compensable “injury” requires the accident causing the injury to be the prevailing factor causing both the resulting medical condition and the disability. In the instant case all of the medical evidence supports the fact that the employee’s fall on March 16, 2011, the “accident”, was the

prevailing factor causing the resulting medical condition – the right ankle bimalleolar fracture. The employee’s testimony and the medical treatment records all discuss a fall that resulted in the ankle injury. Also here, there is no evidence disputing the fact that the injury and the surgery required to repair the injury left the employee with some disability caused by the “accident”. Although the degree of disability is disputed, the fact the disability resulted from the “accident”, is not disputed. Specifically, the employee’s expert, Dr. Poetz, opined that the injury which occurred on March 16, 2011, is the substantial and prevailing factor to the 35% permanent partial disability to the lower right extremity. The employer-insurer’s expert, Dr. Krause, opined that the patient is at maximum medical improvement regarding her injury dated 3/16/2011 and that she has an 8% permanent partial disability as a result of her right bimalleolar ankle fracture and surgical treatment to repair the fracture. Therefore, the employee has met her burden with regard to this portion of the statute.

Section 287.020.3 RSMo., however, goes on to mandate in part (2) that the “injury” must also arise out of and in the course of employment. This element requires two findings: (a) that the accident is the prevailing factor in causing the injury, and (b) that 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. As set out in the analysis above, the statutory “accident” is the fall and all of the evidence supports the fact the fall—the “accident”—is the prevailing factor in causing the ankle injury. Moreover, there is no evidence that anything other than a fall on March 16, 2011, caused the employee’s injury. Therefore, the employee has met her burden for part (a).

With regard to part (b), the Missouri Supreme Court has provided some guidance. In May of 2012 the Court ruled that §287.020.3(2)(b) RSMo requires the employee to “show a causal connection between the injury at issue and the employee’s work activity” *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 510 (Mo. 2012). Discussing *Miller*, the *Johme* Court explained that the focus should be on whether the “risk source of [the] injury” is a risk to which one is exposed equally in normal nonemployment life. *Id.* at 511. Here, the employee asserts that the “risk source” causing her fall was her work schedule, specifically, the extensive overnight shifts she was required to work making it impossible for her to get adequate sleep. The evidence shows that on the days leading up to the accident, the employee worked a 17.5-hour overnight shift from 2:30 p.m. on March 14 to 8:00 a.m. on March 15. She testified that she got home and in bed on March 15 at about 9:00 a.m. and got up at about 1:30 p.m. to return back to work at 2:30 p.m. The accident took place more than 12 hours later around 3:30 a.m. on March 16. This means that in the 37 hours before the accident, the employee had worked about 30.5 of those hours and slept only 4.5 of those hours. This court finds that these extremely long overnight work shifts are a risk source to which the employee was not equally exposed in her normal nonemployment life. Therefore, a causal connection between the injury and the work activity exists.

The employer asserts that the instant case can be analogized to *Miller v. Missouri Highway and Transp.*, 287 S.W.3d 671 (Mo. 2009) where the claimant’s injury sustained merely by walking at work was held non-compensable. Specifically, the *Miller* Court held:

An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved—here, walking—is one to which the worker would have been exposed equally in normal non-employment life. The injury here did not occur because Mr. Miller fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment.

*Id.* at 674. The instant case; however, can be easily distinguished from *Miller* using that court’s own words. Here, the employee’s injuries did occur because of a fall. Moreover, the employee alleges that fall was a result of a condition of her employment—namely 17.5-hour overnight shifts.

The employer also asserts that the instant case can be analogized to *Bivins v. St. John’s Regional Health Center*, 272 S.W.3d 446 (Mo. App. 2008) where the claimant’s injury from an unexplained fall was held non-compensable. Specifically, the *Bivins* Court held:

...the employee was walking in a hallway on the premises of the employer when the employee “just fell”, meaning that she simply or merely fell, without explanation. The Commission does not find credible employee’s trial testimony that her foot stuck to the floor immediately prior to falling. The Commission specifically finds that most credible version of what transpired, is that employee “just fell”, i.e., the injury simply was the result of an unexplained fall.

Due to the fact that the injury was the result of an unexplained fall, the Commission is unable to determine or conclude there was any unique condition of employment which contributed to the resultant injury.

The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be issued if the injury were a rational consequence of some hazard connected with employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and as a part of employment. It is not sufficient that the employment may simply have furnished the occasion for an injury for some unconnected source.

The employee argues, and this court agrees, that the instant case can be distinguished. First, the *Bivins* Court did not find that claimant’s inconsistent recount of events credible. Here, the employee’s reports of the accident are identical in all sources including the recorded statement, the deposition, the medical records, and her live testimony. Second, in *Bivins*, the court was unable to determine “whether there was any unique condition of employment”. Here, the unique

condition of employment—17.5-hour overnight shifts—was evident by the employee’s testimony and documented by the employer’s time sheets, and not contested by the employer-insurer. Finally, the *Bivins* Court explained that the claimant did not show evidence of a hazard connected with employment or that the employment in some way exposed the claimant to an unusual risk not shared by the general public. Here, the employee’s evidence documents the hazard of 17.5-hour overnight shifts—an unusual risk not shared by the general public.

Therefore, the Court finds that the employee has met her burden as set out in §287.020.3(2)(b).

Finally, the employer-insurer argue that this case is not compensable because the employee’s fall was the result of an idiopathic cause or condition. As set out above, §287.020.3(3) clearly states that an injury resulting directly or indirectly from idiopathic causes is not compensable. There are two recent cases interpreting this statute.

In 2008 the Eastern District of the Missouri Court of Appeals ruled a claimant’s fall idiopathic, and therefore, not compensable. *Ahern v. P & H, LLC*, 254 S.W.3d 129, (Mo. App. 2008). The *Ahern* Court also ruled that the definition of “idiopathic” as traditionally defined through case law as “peculiar to the individual, innate” good law. *Id.* at 133. In *Ahern*, the evidence revealed that the claimant’s fall was due to a seizure condition caused by a prior motorcycle accident. *Id.* at 132. In short, the claimant in *Ahern* suffered from an “innate” pre-existing condition that was “peculiar to the individual”, and therefore, his fall at work caused by that condition was not compensable pursuant to §287.020.3(3).

In the instant case, there is no evidence of any pre-existing condition that is innate or peculiar to the employee *and* that caused her fall. While the employee admits, and the medical records support, pre-existing diagnoses including type II diabetes and C.O.P.D., there is no evidence that either of these medical conditions caused the fall. To the contrary, examinations by two emergency room physicians and one cardiologist, determined that neither of the employee’s pre-existing medical conditions, nor any undiagnosed medical condition, caused the fall.

The employer-insurer points out that Dr. Davis, the consulting physician at St. Francis Medical Center, suspected orthostatic hypotension as the cause of the fall; however, employer-insurer’s own expert states that “the consideration of orthostatic hypotension in the differential diagnosis was reasonable but does not explain the event”. The employer-insurer’s expert goes on to state in #3 that although the employee “was likely sleep deprived intermittently” that “tiredness is unlikely to be the main factor that led to her loss of consciousness on March 16, 2011.” Dr. Eisenstein did not, however, opine as to what the main factor might have been.

Dr. Eisenstein opined in #2 that the employee did not suffer from a shift-work disorder. He based that opinion on a definition of shift-work disorder which includes: (a) a complaint of insomnia or excessive sleepiness that is temporally associated with a recurring work schedule that overlaps the usual time for sleep, and (b) the symptoms are associated with the shift-work schedule over the course of at least one month. Because there was only one complaint of sleepiness in the documents Dr. Eisenstein reviewed, he opined that the diagnosis was not met. However, the employee testified to her excessive sleepiness that associated her recurring 17.5-

hour overnight shifts, and the employee's complaints to her family practitioner are documented. In addition, the employee's time sheets document that her 17.5-hour shift-work schedule was much longer than one month in duration.

The only physician discussing the likely cause of the employee's fall is Dr. Schwartz, the employee's expert. Dr. Schwartz opined in his corrected report that sleep deprivation resulting from shift work and circadian misalignment has been implicated with inappropriate sleep onsets and can resemble syncope. Dr. Schwartz further explained in his deposition testimony that people fall asleep while driving, while doing other functions, and that they can fall asleep in any posture. Dr. Schwartz concluded that the prevailing factors leading up to the employee's episode of syncope causing her fall were circadian misalignment syndrome and sleep deprivation from shift work schedules fostering inadequate sleep time between work shifts. On cross examination, Dr. Schwartz specifically stated that he believes the employee "fell asleep and that resulted in her fall". Moreover, the fact that Dr. Schwartz was only able to diagnose sleep deprivation resulting from shift-work disorder *after* he realized his 12-hour plotting mistake, from the time sheets which are very difficult to read, shows the independence and credibility of his testimony.

The employer-insurer also argues that the employee's fall was caused by an idiopathic coughing condition. The Missouri Court of Appeals, however, has recently addressed this issue in *Taylor v. Contract Freighters, Inc*, 315 S.W.3d 379 (Mo. App. 2010) . The *Taylor* Court reversed the Commission's finding that a claimant's cough was an idiopathic condition. The *Taylor* Court instructed that evidentiary support is required to successfully claim an event is entirely idiopathic, that the event results from some cause personal to the individual, such as a physical defect or disease. *Id.* at 381. The *Taylor* Court specifically held:

We find that there is no evidence that Claimant had an idiopathic condition, specifically, even if Claimant coughed while driving the truck, there was no evidence that the cough was an idiopathic condition as defined under the workers' compensation law.

*Id.* The *Taylor* Court concluded by stating that to hold that a cough is an idiopathic condition strains beyond recognition the definition of idiopathic condition. *Id.* at 383.

In the instant case, although the employee admits that she coughed before the accident, she specifically denied a "coughing episode". The employee also testified that she had never before experienced a syncope or syncope-like event. Furthermore, the employer-insurer put forth no evidence that the employee was diagnosed with any innate conditions that cause syncope or syncope-like events in an attempt to prove that the accident was entirely idiopathic. When the employee's expert was cross examined on the issue of cough syncope, Dr. Schwartz opined that there are people who clearly state and know that when they have coughing paroxysms, and they cough very hard, that they get near syncope, as well as syncope, and that is a medical issue. Normally there's a clear association and the people know that they have it. The employer-insurer's expert either was not asked, or declined, to opine on this issue.

Based on all of the evidence presented, I find that the employee sustained an injury by accident and that the injury arose out of and in the course of her employment and not from an idiopathic cause.

Based on all of the evidence presented, I find that the opinion of Dr. Schwartz is more credible than the opinion of Dr. Eisenstein on the issue of whether the employee had shift-work deprivation. Based on all of the evidence presented, I find that the employee has met her burden in proving that her accident and injury were not the result of an idiopathic cause.

I find that the employee's injury was medically causally related to the employee's accident. I further find that the employee's work was the prevailing factor in causing the injury to the employee's right lower extremity.

**Issue 3: Additional Medical Aid – Past:**

The parties agree that the employee has past medical expenses in the amount of \$64,879.94. The employer only disputes these bills in that they were not authorized. The applicable statute states:

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.

Section 287.140.1 RSMo

The intent of this statute was explained by the Missouri Court of Appeals in 1995. The *Blackwell* Court stated that an employer is charged with the duty of providing the injured employee with medical care, but when the employer fails to provide such care, the employee is free to pick his own provider and assess the costs against his employer. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment and the employer refuses or fails to provide the needed treatment. *Id.*

Here, the evidence is clear that the employer-insurer had notice of the employee's injury and need for treatment in that the employee's supervisor was called onto the scene following the accident and contacted emergency personnel to take the employee to the hospital. Furthermore, the employee testified that she was informed that the workers' compensation carrier had denied her case. She further testified that she had no health insurance and has not been able to pay her outstanding medical bills. Therefore, I find that the cost of the employee's medical treatment in the amount of \$64,879.94 shall be assessed to the employer. The employer-insurer is directed to pay to the employee the sum of \$64,879.94 for previously incurred medical expenses.

**Issue 4: Additional Medical Aid – Future:**

The employee is making a claim for future medical aid as necessary to cure and relieve the effects of the work-related injury. The employee carries the burden to show that there is “reasonable probability” that she will require additional medical treatment related to the work injury for future or additional medical care to be awarded. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996). “Probable means that it is founded on reason and experience which inclines the mind to believe but leaves room for doubt.” *Id.*

Here, the employee is not asking for immediate medical treatment, rather she seeks protection from future expenses that may arise as a result of her surgical ankle. The medical records reflect that the employee has an implanted metal plate affixed with nine screws holding her fibula in place. She also has two additional screws on the other side of her ankle holding the tibia in place. The employee’s expert, Dr. Poetz, opined that there is a risk that the hardware may become painful or begin to migrate or back out from the ankle, just as screws become loose in wood or metal. The employer-insurer’s expert, who testified that he does exclusively lower extremity surgery twice a week, opined more specifically. Dr. Krause testified that he takes “them out in about 20 to 25 percent of the patients”.

In further support of an award of future medical, Section 287.140.8 RSMo states: The Employer may be required by the division or the commission to furnish an injured employee with artificial legs, arms, hands, surgical orthopedic joints, or eyes, or braces, as needed, for life whenever the division or the commission shall find that the injured employee may be partially or wholly relieved of the effects of a permanent injury by use thereof.

Based on this evidence, I find that the employee is entitled to an award of future medical aid. The employer-insurer is therefore directed to furnish all additional medical aid, reasonable and necessary to cure and relieve the employee from the effects of her March 16, 2011 injury in accordance with the provisions of §287.140 RSMo. Also pursuant to §287.140 RSMo this file shall remain open and the Division and Commission shall retain jurisdiction over this file for the purpose of resolving any questions or disputes that may arise on the issue of future medical aid.

#### **Issue 5: Nature and Extent of Disability – Past TTD:**

The employee is seeking temporary total disability benefits in the amount of \$2,333.36 covering the period beginning on March 16, 2011 and ending on May 4, 2011—a period of 50 days or 7 and 1/7 weeks. Section 287.170.1 RSMo states that the employer shall pay compensation for temporary total disability during the continuance of such disability. Here, the records show that the employee’s treating physician, Dr. Trueblood, kept her off work until the May 4, 2011 appointment when Dr. Trueblood allowed her to return to work in her protective boot. The employee also testified that she was not allowed to work from the date of the injury until May 5, 2011, and that she has not received any TTD benefits from the employer-insurer. Therefore, I find that the employee was temporarily and totally disabled for the 7 and 1/7 week period beginning on March 16, 2011, and ending on May 4, 2011 and, consequently, the employer-insurer is ordered to pay TTD benefits to the employee in the amount of \$2,333.36.

#### **Issue 6: Nature and Extent of Disability – PPD:**

With regard to PPD, the records reveal that the employee had a four day inpatient hospital stay and extensive surgery to repair both of the bones in her lower extremity. The fibula, or the lateral malleolus, was repaired with a plate and nine screws. The tibia, or the medial malleolus, was repaired through a separate incision with two additional screws. The initial emergency room x-rays showed 50% displacement of the tibial fracture.

As set out above, the employee testified that she continues to have pain both in the ankle and on the top of the foot; she rated her pain as a 6/10. The employee testified that she continues to have swelling of the ankle that varies in correlation to her activity level. She further testified that she has lost the feeling in her last two toes and that she has a restricted range of movement of the ankle. Specifically, she testified that she cannot bend her foot to put it into a boot and that she still takes stairs one-at-a-time. She further testified that she can no longer run or take long walks with her grandchildren. She further testified that she usually wears shoes with no back year round, despite the weather, because shoes that touch the ankle area, such as tennis shoes, cause increased pain and swelling. She testified that her medical treatment required an inpatient stay and over seven weeks off work with no weight bearing or very little weight-bearing activities allowed. At the hearing the employee also demonstrated the difference in the size and movement of her ankles.

Dr. Poetz testified that the employee's injury has resulted in a PPD of 35% based on her loss of range of motion, implanted hardware, continuing symptoms and consideration of future medical care. Dr. Kraus testified that the employee's injury has resulted in a PPD of 8% which takes into account the risk of arthritis "down the road".

Based on the evidence as set out above, I find that the employee has suffered a 30% permanent partial disability of her right lower extremity at the 155-week level. The employer-insurer is therefore directed to pay the employee the sum of \$326.67 per week for 46.5 weeks for a total award of permanent partial disability equal to \$15,190.16.

**ATTORNEY'S FEE:**

Sarah Elfrink, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Martha (Sampley) Riggins

Injury No. 11-019035

Made by:

---

Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*