

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

Injury No.: 06-104405

Employee: Charity Stricker

Employer: Children's Mercy Hospital

Insurer: Self-Insured

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

Date of Accident: September 23, 2006

Place and County of Accident: Kansas City, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 3, 2008. The award and decision of Administrative Law Judge Carl Mueller, issued July 3, 2008, 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 23rd day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

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

Section 287.020.3(2) sets forth a two-part test for determining when an injury arises out of and in the course of employment.

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

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and,

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Employee's injury does not satisfy the second prong of the arising out of and in the course of test. Employee testified unequivocally that the clogs she was wearing caused her to turn her ankle. Employer did not require employee to wear the clogs. Employee alone made the choice to wear the clogs. Employee's injury comes from a hazard unrelated to employment (employee's personal choice to wear clogs). It makes no matter that the clog manufacturer marketed the clogs to nurses with a sales pitch declaring that the clogs are safe for nursing work. Employer has no control over the clog manufacturer's sales pitches and is not bound by the promises therein. Workers who choose to wear clogs in the normal nonemployment life are equally exposed to the risk of turning an ankle on even pavement as the employee in this case.

I reject any suggestion that the employee's choice of the clogs mutually benefited employer. Employee has not shown that flat nurse shoes would have provided the same level of professionalism, comfort, and ease of maintenance as the clogs. Flat nurse shoes would likely have provided greater safety than the clogs as evidenced by employee's testimony that the clogs caused her to turn her ankle. I find no benefit to employer from employee's choice of the clog. Instead, employee's choice of the clogs was a detriment.

I conclude that employee's injury did not arise out of and in the course of her employment. I would deny compensation. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member

FINAL AWARD

Employee: Charity Stricker

Injury No: 06-104405

Dependents: N/A

Employer: Children's Mercy Hospital

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: May 12, 2008

Briefs Filed: May 27, 2008

Checked by: RCM/rm

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 23, 2006
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee tripped and fell in parking garage owned and/or controlled by employer while reporting for work.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left ankle at the 155 week level
14. Nature and extent of any permanent disability: Twenty-five percent (25%) – left ankle at the 155 week level
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? \$7,279.00
18. Employee's average weekly wages: \$877.68
19. Weekly compensation rate: \$585.06
20. Method wages computation: Mo. Rev. Stat. §287.250.1(4) & (7) and Mo. Rev. Stat. §287.250.4.
21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred \$7,279.00
 Less credit for expenses already paid (\$0.00)
 Total Medical Owing \$7,279.00

Temporary Disability
 6 and 6/7s weeks (09/23/2006 to 11/10/2006) \$4011.84
 Less credit for benefits already paid (\$0.00)
 Total TTD Owing \$4,011.84

Permanent Partial Disability
 25% left ankle (25 x 155 weeks) x \$376.55/week \$14,591.31

Total Award: \$25,882.15

22. Second Injury Fund liability: N/A

23. Future requirements awarded: Yes: removal of left ankle fracture metal implants.

Said payments to begin as of date of this award 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 twenty-five percent (25%) lien totaling \$6,470.54 in favor of Ross S. Myers, Attorney, for reasonable and necessary attorney's fees pursuant to Mo.Rev.Stat. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charity Stricker	Injury No: 06-104405
Dependents:	N/A	
Employer:	Children's Mercy Hospital	
Additional Party:	N/A	
Insurer:	Self-Insured	
Hearing Date:	May 12, 2008	
Briefs Filed:	May 27, 2008	Checked by: RCM/rm

On May 12, 2008 the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mrs. Charity Stricker, Claimant, appeared in person and with counsel, Ross Myers. The employer appeared through counsel, Peter Chung. The Second Injury Fund did not attend. The issues the parties requested the Division to determine were whether or not Mrs. Stricker suffered an accident arising out of and in the course of her employment, what degree of disability she sustained, her average weekly wage, the time she lost from work due to the accident, whether her past and future medical expenses should be paid by the employer and whether the employer should pay the costs of this proceeding in accordance with MO.REV.STAT. §287.560. For the reasons noted below, I find that Mrs. Stricker sustained a compensable accident on September 23, 2006, and that her disability is twenty-five (25%) of her left lower extremity at the one hundred fifty-five (155) week level.

STIPULATIONS

The parties stipulated that:

- On or about September 23, 2006 Children's Mercy Hospital was an employer operating subject to the Missouri's Workers' Compensation Law and its liability was fully self-insured;
- Charity Stricker was its employee working subject to the law in Kansas City, Jackson County, Missouri;
- Charity Stricker notified Children's Mercy Hospital of her alleged injury and filed her claim within the time allowed by law;
- Children's Mercy Hospital has not provided Charity Stricker with TTD or medical care; and,
- Charity Stricker injured her left ankle in an employee parking garage owned and/or controlled by the employer immediately before her shift started.

ISSUES

The parties requested the Division to determine:

- Whether Ms. Stricker sustained an accident arising out of and in the course of employment?
- Determining Ms. Stricker's average weekly wage and compensation rates?
- Whether Ms. Stricker is entitled to temporary total disability benefits from September 23, 2006 through November 10, 2006 representing six and six-seventh's (6 6/7) weeks?
- Whether Children's Mercy Hospital must reimburse the employee for medical expenses totaling \$7,279.00?
- Whether Children's Mercy Hospital must provide the employee with additional medical care?
- Whether Ms. Stricker suffered any disability and, if so, the nature and extent of the Employee's disability?
- Whether Children's Mercy Hospital must reimburse to Ms. Stricker the cost of this proceeding for defending the claim without reasonable ground pursuant to §287.560?

FINDINGS OF FACT

Mrs. Stricker testified on her own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- A - Children's Mercy Hospital Injury Form, Sept. 30, 2006
- B - Employee Paycheck Stub, November 30, 2006
- C - Dansko Clog Photos and Nursing Uniform
- D - Medical Records
- E - Medical Bills
- F - Summary of Out of Pocket Payments by Employee
- G - Narrative Report, James A. Stuckmeyer, MD, Aug. 31, 2007
- H - Letter dated April 3, 2007 from Myers to Peter Chung
- I - Expert Witness Fee Statement as per §287.560
- J - Attorney's Fee Statement as per §287.560

The employer called Janet Klein as a witness and presented the following exhibits, all of which were admitted into evidence without objection:

- 1 - Narrative Report, David J. Clymer, MD, April 20, 2008
- 2 - Children's Mercy Hospital Injury Form, Sept. 30, 2006
- 3 - Form 1 Report of Injury, November 28, 2006
- 4 - Employee Earnings History

Based on the above exhibits and the testimony of the witnesses, I make the following findings. Charity Stricker is a married 38-year old female, who lived in Pleasant Hill, Missouri at the time of the accident. She has a four year college degree and is a registered nurse. Mrs. Stricker started work for Children's Mercy Hospital on August 19, 2006. Prior to working for Children's Mercy Hospital, she worked at other hospitals.

On September 23, 2006, Mrs. Stricker drove into the covered, attached employee parking lot for Children's Mercy Hospital to park her car and start her work on the evening shift, which started at 7:00 p.m. At 6:55 p.m. Exhibit 3 documents -- and she testified -- that after parking the car she exited the same on the driver's side and walked around to the passenger side to open the passenger door. As she walked around the car, she testified that she tripped and fell. She felt immediate pain in her left ankle. Employee's Exhibit A, which also was entered into evidence by the Employer as Exhibit 2, documents that when asked "[h]ow could this have been prevented?" she replied "never wearing Dansko clogs."

Mrs. Stricker testified that she was unable to get up because of the pain and severity of the break. She used her cell phone to call the hospital security personnel who assisted her to the emergency room at Children's Mercy Hospital. There her injury was stabilized, her ankle was x-rayed and was she given an initial diagnosis of fractured left ankle. Because Children's Mercy only treated children, she was transferred to the emergency room at St. Luke's Hospital in Lee's Summit, Missouri. As documented by Exhibit D, her medical records, she was subsequently seen by Dr. Gary Go of Rockhill Orthopaedics on September 26, 2006 and given a diagnosis of left trimalleolar ankle fracture. On the same day she underwent surgery, specifically an open reduction, internal fixation, left ankle trimalleolar fracture without fixation of the posterior malleolus under fluoroscopy.

The operative report documents that because of the nature of the fracture, it was a difficult procedure in which metal implants were used to repair the injury, specifically, a syntheses titanium small fragmentary set, seven hole plate on the fibula with six screws and one 4 mm cannulated screw. Over the next six weeks she transitioned from a wheel chair to crutches to weight bearing boot.

Mrs. Stricker was released for return to work on November 3, 2006 though the records reflect that she was still wearing a weight bearing boot. Mrs. Stricker immediately called her supervisor and asked to return to work. The supervisor did not allow her to return to work until November 10, 2006. Because she was not receiving income during the course of her recovery, Mrs. Stricker asked her employer to return to work approximately three weeks after the accident, during which time she was still using a wheel chair and crutches. Children's Mercy Hospital refused to allow Mrs. Stricker to return to work as it determined that she was unable to fulfill the duties of the position at that time; Mrs. Stricker admitted at hearing that it would likely have been foolish to attempt to return to work only three weeks after the surgery. However, Mrs. Stricker felt compelled to attempt to return to work because of her loss in income.

At the time of the accident Mrs. Stricker was initially told by the hospital's safety office that the employer was denying any worker's compensation liability because the injury occurred before her shift started, that it was not considered a worker's compensation injury and that she must look to her husband's health insurance carrier.

The Employer has subsequently, after Mrs. Stricker retained legal counsel and filed a Claim for Compensation, taken the position that her worker's compensation claim is not compensable, not because the injury occurred before her shift started, as originally claimed, but because, as both the employer and Mrs. Stricker assert, the employee's wearing of Dansko clogs caused the trip and fall in the employer owned and/or controlled parking garage immediately prior to the start of her shift. Indeed, both parties submitted the Children's Mercy Hospital Injury Form as Claimant's Exhibit A

and Employer's Exhibit 2, which documents this as the cause of the accident. The employer asserts that the wearing of Dansko clogs was not related to her employment but offered no evidence that they were not.

Mrs. Stricker testified that the reason she slipped and fell in the parking lot was because of the shoes. Because they are clogs, the foot is held higher off the ground compared to tennis shoes and the heel is raised. Mrs. Stricker testified that the shoe's height caused sideways instability that resulted in her ankle rolling as she walked around her car. She also testified that she believed the raised heel caught on something on the garage floor. Thus, it is uncontroverted that the wearing of the Dansko clogs caused the accident.

With regard to the Dansko clogs, Mrs. Stricker has submitted Claimant's Exhibit C, which documents that these shoes are nursing shoes. The exhibit includes photographic representations of the shoes she was wearing. The photos represent the very plain, all white "Professional" model. Even the employer's witness, Janet Klein, a nurse supervisor, testified that these are indeed nursing shoes. As Exhibit C documents, the shoes have been tested for slip resistance by the American Society for Testing and Materials and are exhaustively marketed by Dansko and hundreds of nursing uniform businesses as nursing shoes. They are white leather, stain resistant and, as Mrs. Stricker testified, a very large percentage of nurses wear them. Because of their design the shoes make it more comfortable for nurses to stand for long periods of time, they are all white and have a professional appearance and she was told in nursing school and by many co-workers to wear these shoes.

I find that the wearing of the shoes, because of their professional appearance, their slip resistance, and because of the comfort they give the nurses while wearing them, was of benefit to and promoted the interest of the employer and that Mrs. Stricker wore them for purposes of and because of her employment. Mrs. Stricker testified that she has never worn the shoes for any other purpose, that because of their plain, professional appearance they are not worn for social occasions and that she purchased them for her job duties and for no other reason. Both Mrs. Stricker and Janet Klein testified that hospitals have slick linoleum floors that are conducive to keeping clean, that many fluids, including, blood, urine and vomit, are present on the floors until they are cleaned up and that the fluids splatter on shoes, that it is important that the shoes nurses wear be clean, can be easily cleaned and be slip resistant.

Presently Mrs. Stricker's ankle swells as the day goes on, there is pain at the injury site, stiffness at the ankle joint and she cannot run. She also has difficulty with prolonged standing and walking. Previously Mrs. Stricker had none of these limitations. During the hearing I observed Mrs. Stricker's ankle and noted an approximately eight (8) inch long surgery scar at the injury site. The employee submitted as Claimant's Exhibit G the medical narrative report of Dr. James Stuckmeyer, M.D. The employer has submitted as Employer's Exhibit 1 the medical narrative report of Dr. David Clymer, M.D. Both reports document essentially the same symptoms and limitations. They also both state future medical care will be required for removal of the metal implants at some time. Dr. Clymer took an x-ray at the time of his exam and the same documented that one of the surgical screws has fractured and is now displaced, which further documents the need for future medical care to remove the hardware.

The reports reflect that Mrs. Stricker underwent an epiphyseodesis procedure in 1969. However, there were no significant limitations because of that procedure. Indeed, Mrs. Stricker served on active duty with the U.S. Navy for four years, serving at sea on combat ships and deploying for lengthy periods of time. While on active duty, Mrs. Stricker passed all of the military service's strict physical fitness and health requirements. I believe her testimony is entirely credible that all of her present symptoms and limitations arise from her ankle injury of September 23, 2006. Dr. Stuckmeyer assessed her disability at 25% to the left ankle at the 155 week level. Dr. Clymer assessed disability at 10%.

The employee has submitted into evidence Claimant's Exhibit E, which constitute the medical bills arising from the September 23, 2006 accident in the amount of \$7,279.00 I find that that they represent medical expenses in that amount that were incurred by Mrs. Stricker because of the accident and are reasonable and necessary.

RULINGS OF LAW

I find that the employee sustained an accident arising out of and in the course of her employment and that this injury is entirely compensable under the Missouri Worker's Compensation Law for the following reasons:

MO. REV. STAT. §287.020 states, in pertinent part, that:

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

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

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

I find that the accident and injury fully comply with all subsections of MO. REV. STAT. §287.020.3 as set out above. The injury clearly arose "out of and in the course of employment" and based on the evidence and testimony it is unquestionably clear that "[i]t does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life." MO. REV. STAT. §287.020.3. Also, I find that the employer in no uncertain terms was put on notice of this. *See Exhibits C and H.*

I decline to find that the employer defended the proceedings "without reasonable ground" or to order that the "whole cost of the proceedings" be paid by the employer. Mo. Rev. Stat. §287.560. Missouri's Workers' Compensation Law underwent a substantial revision with the enactment of Senate Bills 1 and 130 which became effective on August 28, 2005. This hearing is simply one of the many hearings that have resulted from attorneys attempting to interpret and apply the new provisions. Although I do not agree with the Employer's application of the new law, I do not find or believe that its argument was unreasonable.

Regarding wage and compensation rate considerations, Mrs. Stricker began working for Children's Mercy Hospital on August 20, 2006, less than five weeks before her injury. As Mrs. Stricker testified, at the time of her injury and when she returned to work on November 10, 2006, she earned \$20.88 per hour with an additional \$3.50 per hour night shift differential and would work 36 hours per week, with an average of two hours per week overtime at time and a half Exhibits, B, F, 3 and 4. The employer's own Exhibit 3, Report of Injury, has the employee's wage at \$751.68 per week. I find the employee's average weekly wage to be \$877.68 per week. *See* MO. REV. STAT. §287.250.1(4) & (7) and MO. REV. STAT. §287.250.4. Mrs. Stricker's compensation rate for temporary total disability is thus \$585.06 per week and her compensation rate for permanent partial disability is \$376.55 per week.

I also find that Mrs. Stricker was not able to return to work until November 10, 2006. Though Dr. Go released her on November 3, 2006, it was while she was still wearing a weight bearing boot. Furthermore, though the employee again, to her credit, requested permission to immediately return to work the employer refused to allow her to return to work until November 10. Therefore, I order the employer to provide her with temporary total disability benefits for that 6-6/7th week period for temporary compensation totaling \$ 4,011.84.

I further find that the employer is liable for and is hereby ordered to pay Mrs. Stricker \$7,279.00 as and for reasonable and necessary medical care incurred arising from the accident.

I further find that future medical care is necessary and order the employer to provide future medical care to remove the medical implants that were inserted during the surgery to employee's left ankle when it is medically appropriate to do so.

Because of the severity of the injury to Mrs. Stricker's left ankle, the extensive use of hardware to repair the same and

Mrs. Stricker's entirely credible testimony concerning her present symptoms and limitations, I find that she has incurred permanent partial disability of 25% to her left ankle at the 155 week level. Thus, I order the employer to provide Mrs. Stricker with thirty-eight and $\frac{3}{4}$ (38 $\frac{3}{4}$) weeks permanent partial disability benefits for permanent disability compensation totaling \$14,591.31.

Thus, the total award due Mrs. Stricker is \$25,882.15. Claimant's attorney requested a fee equal to twenty five percent (25%) of all amounts awarded. I find that such request is fair and reasonable and order a lien attached to this award for 25% (\$6,470.54) of the total amount.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation