

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 02-158195

Employee: Robert Taylor
Employer: QuikTrip
Insurer: QuikTrip Corporation, Self-Insured

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. We have reviewed the evidence, read the briefs, heard the parties' argument, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated November 6, 2009.

Preliminaries

The issues at the hearing were whether employee sustained an injury by accident arising out of and in the course of employment; whether employee provided notice to employer in accordance with the requirements of section 287.420 RSMo; whether employee is entitled to temporary total disability benefits from October 31, 2002 through December 30, 2002; whether employee is entitled to reimbursement of past medical expenses totaling \$27,488.32; whether employee is entitled to future medical care; whether employee sustained any disability, and if so, the nature and extent of disability; and medical causation.

The administrative law judge determined and concluded that employee sustained an injury due to an accident arising out of and in the course of employment on October 31, 2002; that employer was not prejudiced by employee's failure to provide notice under section 287.420; that employee is entitled to temporary total disability benefits from October 31, 2002 to November 17, 2002; that employee is not entitled to reimbursement for his self-directed past medical treatment; that employee is not entitled to future medical care from employer; that employee suffered a 5% permanent partial disability of the right ankle; and that the 5% permanent partial disability of the right ankle was caused by the accident of October 31, 2002.

Employer submitted a timely Application for Review with the Commission alleging that the award issued by the administrative law judge was erroneous because the overwhelming evidence demonstrated that employee failed to prove he sustained a compensable injury on October 31, 2002; and because employee failed to provide proper written notice of the injury as required by section 287.420 RSMo.

For the reasons set forth in this award and decision, the Commission reverses the award of the administrative law judge.

Findings of Fact

Employee started working for employer in November 2001. Employee worked as an extra relief person (ERP). As an ERP, employee worked in different stores on different

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nights, depending on the personnel needs of the particular store. Employee's duties included running a cash register, stocking products on shelves, stocking the beverage coolers, stocking cups and lids for the fountain drink area, making coffee, cleaning the Smoothie machine, cleaning the bathrooms, mopping the store, emptying trash cans, power washing the parking lot, and assorted other duties. Employee was on his feet the entire time he was at work.

The cash register area in each of employer's stores rests on a platform approximately six inches above floor level. To enter or exit the cashier's platform, employees traverse a single step. Employee claims that on October 30, 2002¹, he stepped off the cashier's platform and twisted his right ankle and fell to the ground.

When employee filed his initial claim for compensation on September 24, 2004, he indicated that the October 2002 incident occurred at employer's store number 168 on Wornall Road, Kansas City, Missouri. Employee did not specify a date but rather listed "October 2002" as the date of accident or occupational disease. On September 18, 2009—only three days before the September 21, 2009, hearing in this matter—employee amended his claim for compensation to change the location where the alleged incident occurred. Employee's amended claim, and his testimony at the hearing, indicated that the October 2002 incident took place at employer's store number 208 on Woods Chapel Road, Lee's Summit, Missouri. Employee's amended claim listed a date of accident or occupational disease of October 30, 2002.

Employee testified that Mr. Jeremy Donnelly, a manager, was present and that employee "fell down right in front of him." Mr. Donnelly's testimony was entered into the record via deposition. Mr. Donnelly testified that he did not remember employee ever stumbling or having difficulty on the step of the cashier's platform. We find the testimony of Mr. Donnelly credible. We find that Mr. Donnelly did not witness employee stumble or fall off the cashier's podium.

After the alleged ankle twisting incident, employee continued to work the rest of the night. Employee did not ask employer for medical treatment. In fact, employee had already been seeing Dr. Raymond Rizzi for right ankle pain at the time of the alleged October 2002 incident (see our Award in the companion case for Injury No. 02-126399). Dr. Rizzi determined that employee's problems were related to loosening of hardware in employee's right ankle connected with an extensive surgery following an injury sustained in a motor vehicle accident in 1990.² On November 19, 2002, Dr. Rizzi

¹ At the hearing before the administrative law judge, employee's counsel stipulated an alleged injury date of October 31, 2002. Employee's counsel then took a direct examination from employee referencing an alleged injury date of October 30, 2002. When the administrative law judge issued her award, she made findings referencing an injury date of October 31, 2002.

² Employee injured his right ankle in a motor vehicle accident in 1990. Employee suffered a comminuted intra-articular fracture and dislocation of the right ankle. On October 5, 1990, employee underwent an open reduction and internal fixation, including repair of the posterior tibialis tendon, repair of the anterior and posterior tibiofibular ligaments, and curettement of an osteochondral fracture of the lateral talar dome.

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performed surgery to remove some of that hardware. There is no history of a work-related injury or an ankle-twisting incident contained in the notes from the surgery. Instead, the records reference the 1990 motor vehicle accident and surgery and indicate employee has been having increasing pain over the last few years.

After the surgery, employee saw Dr. Rizzi for follow-up on November 26, 2002, December 5, 2002, December 12, 2002, December 16, 2002 and December 30, 2002. Dr. Rizzi's treatment notes from each of the aforementioned visits contain no mention of a work-related injury or an ankle-twisting incident in October 2002. The notes from the December 16, 2002, visit contain the following observation: "new complaint of pain in posterior aspect of [employee's] right ankle ... [employee] states he did not notice anything he was doing that caused this, he just woke up with a lot of pain in his ankle area."

Employee never asked employer for medical treatment in 2003. Employee resumed intermittent treatment with Dr. Rizzi for right ankle complaints on May 30, 2003. Employee saw Dr. Rizzi again on August 29, 2003, October 23, 2003, January 15, 2004, January 30, 2004 and February 23, 2004. On February 25, 2004, Dr. Rizzi performed a debridement and distraction of the right ankle with external fixator. Employee saw Dr. Rizzi for follow-up on March 5, 2004 and March 12, 2004. On March 14, 2004, Dr. Rizzi removed the external fixator. Employee saw Dr. Daniel Geha on March 25, 2004, for an infection employee developed following the surgery. Employee continued to follow up with Dr. Rizzi with visits on March 19, 2004, March 23, 2004, March 30, 2004, April 8, 2004 and April 21, 2004.

We have carefully reviewed Dr. Rizzi's notes from the 22 separate examinations following the alleged injury date of October 30, 2002. During the entire course of treatment for employee's right ankle condition, Dr. Rizzi never recorded any history of a trip, fall, twisted ankle, or any other history of a work-related injury in October 2002. Employee testified that he believed he told Dr. Rizzi about the alleged October 2002 event. We find employee's testimony lacking in credibility. Dr. Rizzi first saw employee on October 24, 2002. Employee claims he was injured at work a few days later on October 30, 2002. Employee next saw Dr. Rizzi on November 19, 2002, when Dr. Rizzi performed surgery to remove some of the hardware in employee's right ankle. It strains credibility that Dr. Rizzi would fail to note an intervening injury, especially when he was preparing to perform surgery on the right ankle.

Employee also sought treatment for various complaints in 2005 at the Kansas City Veteran's Administration Hospital. None of these treatment records contain any mention of a work-related injury or ankle-twisting incident in October 2002—although they do contain references to the 1990 motor vehicle accident and surgery.

The administrative law judge found employee a credible witness and found that he fell and injured his right ankle on October 31, 2002, when he stepped down from the cashier's platform. We disagree with the credibility determination of the administrative law judge.

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Employee's testimony that he fell and twisted his ankle on October 30, 2002, is not supported by the records from his primary treating physician or any other medical treatment record in this case.³ Employee was the only witness to the alleged fall, as we have found Mr. Donnelly's denial that he witnessed the fall to be credible. We are also concerned that employee changed his theory as to the location of the alleged fall nearly five years after he filed his initial claim for compensation. Given the foregoing factors, we are not persuaded by employee's testimony regarding the alleged October 2002 event.

We find that employee did not fall or twist his ankle stepping off the cashier's platform at work on October 30 or October 31, 2002.

Conclusions of Law

Under the Missouri Workers' Compensation Law, employers are liable to furnish compensation when an employee sustains personal injury by accident arising out of and in the course of employment. Section 287.120.1 RSMo states, in pertinent part:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment ...

It is employee's burden to prove all of the elements of his claim to a reasonable probability. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). This includes the burden of establishing the threshold factual proposition that an injury by accident occurred at work. *Clayton v. Langco Tool & Plastics, Inc.*, 221 S.W.3d 490, 492-93 (Mo. App. 2007).

We have found employee's testimony regarding the October 2002 incident lacking in credibility. Specifically, we have found that employee did not fall or twist his ankle stepping off the cashier's podium. Our finding is based on our review of the medical treatment records, the credible testimony of Mr. Donnelly, and employee's amending his claim three days before the hearing in this matter to allege an entirely different location of injury. We conclude that employee has failed to meet his burden of proving he sustained an injury by accident at work that is compensable under the Missouri Workers' Compensation Law.

Because we have concluded that the employee did not sustain an injury by accident, the award of the administrative law judge is reversed, and all other issues are moot.

³ Employee did provide testimony from his evaluating physicians, Dr. Edward Prostic and Dr. P. Brent Koprivica; both indicated that employee sustained a work injury in October 2002. (Dr. Prostic appears to have believed the date of injury to be October 13, 2002). Dr. Koprivica did not examine employee until June 5, 2005. Dr. Prostic did not examine employee until April 4, 2007. We find the testimony of both doctors lacking in credibility as to the factual proposition whether employee twisted his ankle at work on October 30, 2002.

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Conclusion

Based on the foregoing, the Commission concludes and determines that employee failed to demonstrate that he sustained a compensable injury by accident on October 30, 2002. Accordingly, employee's claim for benefits on Injury No. 02-158195 is denied.

The award and decision of Administrative Law Judge Emily S. Fowler, issued November 6, 2009, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 4th day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Robert Taylor

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in the decision to reverse the award of the administrative law judge on a finding that employee failed to meet his burden of proof that he sustained a compensable injury by accident at work.

William F. Ringer, Chairman

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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 affirmed.

First, I disagree with the majority that employee's confusion over the location of the October 2002 accident provides a compelling basis for reversing the award of the administrative law judge. As the majority notes, employee's work as a relief employee meant that he sometimes worked in a different store every night of the week. Employee received a call from his supervisor an hour before his shift directing him to report to whatever store might need him on a particular night. Employee explained that the interior of each store is identical. The location of products is the same in each store. The cash registers are set up in exactly the same way. Employee explained that it was easy to forget which store he was working at unless he looked outside. Employee's confusion over whether the accident happened at store 208 or store 168 is perfectly understandable and does nothing to negate his credible testimony that he fell and twisted his ankle coming down from the cashier's platform on October 30, 2002.

Likewise, I am convinced that the testimony of the witness Jeremy Donnelly does not provide a compelling basis for reversing the award of the administrative law judge. Mr. Donnelly testified via deposition on November 28, 2006. Mr. Donnelly protested multiple times throughout the course of the deposition that the events of 2002 were too remote for him to remember clearly. When asked whether employee ever worked for him in the fall of 2002, Mr. Donnelly answered:

- A. That may be, sir. Like I said, I do not remember exact dates. That's been many years ago.

When asked whether he ever witnessed employee stumble or have difficulty traversing the step to the cashier's platform, Mr. Donnelly answered:

- A. Not that I can remember.

When asked whether he ever saw employee "wince" or anything coming off of that step, Mr. Donnelly answered:

- A. Not that I – not that I can remember. It doesn't mean it didn't happen, but that's several years back. I have no idea.

As Mr. Donnelly himself explained, just because he doesn't remember employee falling, that doesn't mean it did not happen. Here, the majority has credited the deposition testimony of a witness who affirmed over and over that he could not remember what happened in 2002, and who even testified that employee *could have* fallen. The majority has credited this testimony over the live testimony of the employee that was observed and found credible by the administrative law judge. I am convinced it doesn't matter whether Mr. Donnelly is credible or otherwise because there is nothing in his

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testimony that directly contradicts employee's claim that he fell down the step in October 2002. Whether Mr. Donnelly witnessed it or remembers it happening is a separate question that has nothing to do with whether employee met his burden of proving he sustained a compensable injury by accident at work.

Finally, I am convinced that the various notations in the treatment records are not worthy of the weight that the majority gives them. Employee reported to his treating doctors that he was experiencing right ankle pain. Employee also told his treating doctors that he had hardware in his ankle from reconstructive surgery following a motor vehicle accident in 1990. Any reasonable patient would tell his treating doctors about (and perhaps emphasize) the 1990 accident, because it was a serious traumatic injury that required extensive surgery. Employee was off work six months following that surgery, and he still had the pins and screws in his right ankle. It is understandable that the treating doctors would focus on the 1990 motor vehicle accident and the pins and screws in employee's ankle, and perhaps neglect to note that employee mentioned he might also have recently sprained his ankle.

To find that employee did not sustain a work injury based on the absence of such a notation in the treatment records is to reject the best evidence on record. The best evidence, of course, is employee's firsthand testimony of what occurred on October 30, 2002. Employee testified that he fell on that date and that he told Dr. Rizzi about it. The administrative law judge observed employee's testimony and found employee to be a credible witness.

The Commission should take into consideration the credibility determinations made by the ALJ. Obviously, when the ALJ is presented with live testimony, he or she is in a better position to judge a witness's credibility rather than the Commission in examining a cold record.

Gibson-Knox v. Classic Print, 184 S.W.3d 201, 204 (Mo. App. 2006) (citation omitted).

Here, the majority has inferred from the treatment records that employee did not tell his doctors about the October 30, 2002, right ankle injury. The majority has inferred from that finding that employee did not fall at work at all. I believe the majority failed to give appropriate consideration to the credibility findings of the administrative law judge.

I find employee's testimony credible. I find employee fell at work and injured his ankle when he was stepping down from the cashier's platform on October 30, 2002.

Because I otherwise agree with the administrative law judge on the other disputed issues, I would affirm the finding of the administrative law judge that employee is entitled to compensation from the employer consistent with a 5% permanent partial disability to the right lower extremity at the 155-week level. I would also affirm the award of temporary total disability benefits from October 31, 2002 through November 17, 2002.

Because the majority has decided otherwise, I respectfully dissent.

John J. Hickey, Member

FINAL AWARD

Employee: Robert Taylor

Injury No. 02-158195

Dependents: N/A

Employer: QuikTrip

Insurer: QuikTrip Corporation, Self-Insured

Additional Party: N/A

Hearing Date: September 21, 2009

Checked by: ESF/pd

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: October 31, 2002.
5. State location where accident occurred or occupational disease was contracted: Lee's Summit, 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? No.
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: While in the course and scope of his employment, Employee was stepping down from a cashier podium when he twisted his right ankle causing his injuries.
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 lower extremity at the ankle.
14. Nature and extent of any permanent disability: 5 percent permanent partial disability to the right lower extremity 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? \$27,488.32
18. Employee's average weekly wages: \$724.04
19. Weekly compensation rate: \$482.72/\$340.12
20. Method wages computation: By agreement of parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employer shall pay to Employee permanent partial disability benefits of 5 percent to the right lower extremity at the 155-week level equaling 7.75 weeks of compensation rate of \$340.12, equating to \$2,635.93.

Employer shall pay to Employee Temporary Total Disability Benefits from October 31, 2002 to November 17, 2002 at the rate of \$482.72 per week.

22. Second Injury Fund liability: N/A
23. Future requirements awarded: NA

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Michael Knepper, Employee's attorney, for necessary legal services rendered.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Taylor Injury No. 02-158195
Dependents: N/A
Employer: QuikTrip
Insurer: QuikTrip Corporation, Self-Insured
Additional Party: N/A
Hearing Date: September 21, 2009 Checked by: ESF/pd

On September 21, 2009, Employee and Employer/Insurer appeared for a final hearing. The Employee appeared in person and through his counsel, Michael Knepper. The Employer/Insurer appeared through its attorney, Brian Fowler. The Division had jurisdiction to hear this case pursuant to Section 287.110 RSMo.

STIPULATIONS

The parties stipulated to the following:

- 1) that the Employer were operating under and subject to Missouri's Workers' Compensation Law on October 31, 2002 and the Employer was fully insured through self-insurance;
- 2) that Robert Taylor was its Employee and was working subject to the law in Lee's Summit, Jackson County, Missouri;
- 3) that Employee's contract of employment was made in Missouri;
- 4) that Employee's claim was filed within the time allowed by law;
- 5) that Employee's average weekly wage was \$724.04, resulting in a compensation rate of \$482.72 for temporary total and \$340.12 for permanent partial disability compensation;
- 6) that the Employer has paid no temporary total disability compensation nor any medical care to date.

ISSUES

The parties request the Division to determine the following:

- 1) whether the Employee sustained an accident or occupational disease arising out of and in the course of his employment;
- 2) whether the Employee notified the Employer of the injuries as required by law;
- 3) whether the Employee is entitled to temporary total disability benefits from October 31, 2002 through December 30, 2002
- 4) whether the employer must reimburse Employee for medical expenses totaling \$27,488.32;
- 5) whether the Employer must provide Employee with additional medical care;
- 6) whether the Employee suffered any disability and, if so, the nature and extent of Employee's disability;
- 7) whether the accident or occupational disease caused the disability of which the Employee complains.

FINDINGS OF FACT AND RULINGS OF LAW

Employee testified on his own behalf and presented the following exhibits, which were all admitted into evidence.

Claimant's Exhibit A – Medical Records of Dr. Larry Cordell, 8/29/83 – 4/16/91
Claimant's Exhibit B – Medical Records of Dr. Dan Geha, 3/25/04-4/6/04
Claimant's Exhibit C – Medical Records of Dr. Michael Hughes, 7/1/99-8/4/99
Claimant's Exhibit D – Medical Records of Medical Center of Independence, 2/25/04
Claimant's Exhibit E – Medical Records of Dr. Raymond Rizzi, 10/16/02-4/21/04
Claimant's Exhibit F – Medical Records of St. Joseph Hospital, 7/28/99-3/25/04
Claimant's Exhibit G – Medical Records of St. Mary's Hospital, 10/4/90-3/30-04
Claimant's Exhibit H – Medical Records of V.A. Medical Center, 12/1/04-3/18/09
Claimant's Exhibit I – Deposition of Dr. Edward Prostic, 3/24/09
Claimant's Exhibit J – 60-Day Letter of P. Dr. Brent Koprivica
Claimant's Exhibit K – Medical Report of Dr. Koprivica, dated 6/1/05
Claimant's Exhibit L – Curriculum Vitae of Dr. Koprivica
Claimant's Exhibit M – Claim for Compensation, DOI: 9/30/02
Claimant's Exhibit N – Amended Claim for Compensation, DOI: 9/30/02
Claimant's Exhibit O – Claim for Compensation, DOI: 10/31/02
Claimant's Exhibit P – Answer to Claim for Compensation, DOI: 10/31/02
Claimant's Exhibit Q – Amended claim for Compensation, DOI: 10/31/02
Claimant's Exhibit R – Claim for Compensation, DOI: through 10/13/03
Claimant's Exhibit S – Amended Claim for Compensation, DOI: 10/13/03
Claimant's Exhibit T – Report of Injury, DOI: 10/13/03
Claimant's Exhibit U – (Not offered)
Claimant's Exhibit V – Incident Report, 9/30/02
Claimant's Exhibit W – Recorded Statement, 10/29/02
Claimant's Exhibit X – Report of Injury, 9/30/02
Claimant's Exhibit Y – Vocational Rehabilitation Records
Claimant's Exhibit Z – St. Mary's Medical Center Billing Statement

Claimant's Exhibit AA – Medical Center of Independence Billing DOS: 2/25/04
Claimant's Exhibit BB – Dr. Raymond Rizzi's off-work note
Claimant's Exhibit CC – Fax to Doug Schimiel
Claimant's Exhibit DD – QuikTrip Adjuster Letter dated 11/20/02
Claimant's Exhibit EE – Primax Recoveries Letter dated 12/12/03
Claimant's Exhibit FF – Coventry Recovery Letter
Claimant's Exhibit GG – Anesthesia Associates of K.C. Billing
Claimant's Exhibit HH – Jackson County Orthopedics Billing
Claimant's Exhibit II – Dr. Dan Geha's Billing

The Employer/Insurer offered no live testimony but offered the following exhibits which were admitted into evidence:

Employer/Insurer's Exhibit 1 – Deposition of Jeremy Donnelly, 11/28/06
Employer/Insurer's Exhibit 2 – Deposition of Kevin Bergman, 3/2/07
Employer/Insurer's Exhibit 3 – Medical Records of Dr. Yost
Employer/Insurer's Exhibit 4 – Claimant's Employment Application
Employer/Insurer's Exhibit 5 – Vocational Rehabilitation records, 10/12/00
Employer/Insurer's Exhibit 6 – (Not offered)
Employer/Insurer's Exhibit 7 – Claim for Compensation, DOI: 10/31/02
Employer/Insurer's Exhibit 8 – Dr. Raymond Rizzi's medical records
Employer/Insurer's Exhibit 9 – St. Mary's Hospital medical records, 11/19/02
Employer/Insurer's Exhibit 10 – Dr. Raymond Rizzi's report, 10/23/03
Employer/Insurer's Exhibit 11 – Dr. Dan Geha's report, 3/25/04
Employer/Insurer's Exhibit 12 – Claim for Compensation, DOI: 10/13/03
Employer/Insurer's Exhibit 13 – Claim for Compensation, DOI: 9/30/02
Employer/Insurer's Exhibit 14 – Short-term disability payments

Robert Taylor, hereinafter referred to as Employee, is a 49-year-old male who has worked for QuikTrip Corporation since November of 2001. His job duties during this time working for QuikTrip included Assistant Manager as well as an employee in what is referred as the ERP program. His alleged injuries occurred during the time period when he was in the ERP program. His typical day included emptying all the trash cans, both inside and out, picking up the lot and the grass area around the store. He would stock the shelves, coolers and the grocery aisles. He would face all product labels out so that everything looked good. He would go in the back room and get the cups and lids that were necessary and stack them. In order to get to the tall shelves, he would sometimes have to use a ladder to get cases of coffee off of them. He would clean the bathrooms and sweep and mop them. He would make the coffee. Then he would audit, which entailed checking the money in the register for the new shift. This he would all get done in approximately 30 to 45 minutes. Then he would check the coffee again and he would work the cash register. Other duties included cleaning the coffee aisle and power washing the parking lot.

Prior to his working for QuikTrip, Employee was involved in a serious motor vehicle accident in 1990. He had serious injuries to his right ankle which required plates and screws to stabilize his ankle.

Employee testified that on September 30, 2002 when he was working his shift at the QuikTrip store at 10232 Wornall Rd., Kansas City, Missouri, he was standing on the podium where the cash registers were and went to step off the podium to the main floor. When he did so, he twisted his ankle, causing immediate pain and discomfort to his ankle. He said he sat down and rubbed his ankle for a while. The manager on duty, Mr. Kevin Bergman, witnessed this incident. He stated that Mr. Bergman saw him fall to the floor and that he asked him if he would be all right and Employee told Mr. Bergman; "I will be in a minute." He sat and rubbed his ankle for a while and then got up and started getting back to work. After a short time, the ankle started feeling better and he was able to continue his duties. He stated it was Mr. Bergman's job to report an accident. He never asked for medical care from Mr. Bergman. He just wanted to see if he could start walking and he did and he thought he could just shake it off. He did not want to leave and miss work due to this injury. He said the ankle was sore for the next couple of weeks, but he kept working on it. He felt like something was rubbing in his ankle, but he was not concerned enough to see a doctor at the time; he just thought it was sore.

As time went on, however, Employee started having more problems with his ankle with more pain. He eventually went to see Dr. Downs, his regular physician, who referred him to a Dr. Rizzi, who is a podiatrist. Dr. Rizzi saw him on October 24, 2002 and noted radiographic evidence of loosening of the hardware in his ankle and recommended removal of his hardware. On the initial visit, Dr. Rizzi noted considerations for future intra-articular steroid injection as well as ultimate need for a fusion.

On October 31, 2002 while Employee was working for QuikTrip at a store in Lee's Summit, Jackson County, Missouri, he once again was stepping from the cashier podium when he misstepped, twisting his ankle, causing additional pain to his ankle. Employee noted that when he fell on October 31, 2002, this was witnessed by Mr. Donnelly who was the store manager at the time. Employee stated he fell right in front of Mr. Donnelly, but at that time he did not ask for any medical care. He stated that he was already seeing a doctor at that point and he did not want to lose his job.

Dr. Rizzi ultimately removed the hardware from Employee's right ankle in November of 2002. Employee returned to Dr. Rizzi on December 16, 2002 who noted that the Employee had a new complaint of pain in the posterior aspect of his right ankle. "He states he did not notice anything he was doing that caused this, he just woke up with a lot of pain in his ankle area." Dr. Rizzi also noted that Employee was walking on the ankle pain free and was able to do a normal stride. Upon examination, Dr. Rizzi noted there was no pain in the ankle but significant pain along the posterior aspect of the Achilles. Employee had less pain with plantar flexion and more pain with dorsal flexion as far as passive range of motion. Dr. Rizzi felt that Employee was suffering from Achilles tendonitis secondary to increased motion available in his ankle. He put him in a CAM walker to alleviate the symptoms and allowed him to progressively start ambulating without stressing his Achilles tendon. He was also given a heel lift in his shoe so when he was not wearing the CAM walker he could wear the shoe with the heel lift. He wanted Employee to return to the clinic in two weeks and gave him Vioxx samples as well as a home exercise program. Dr. Rizzi wanted him to do a physical therapy program but noted that Employee could not afford the co-pay.

Dr. Rizzi saw Employee again on December 30, 2002 where he released Employee regarding his injuries. He did recommend that Employee cut his hours or change his job at the time.

On May 30, 2003, Employee returned to Dr. Rizzi, who noted that there had been a progression of the degenerative joint disease of the ankle at that point with increasing pain.

Dr. Rizzi saw Employee again on August 20, 2003 when Employee was having pain affecting his low back and left lower extremity due to overcompensation. Dr. Rizzi recommended rocker bottom soles on Employee's shoes. However, those were never obtained. He also recommended orthotics, and Employee finally received orthotics when he went to the Veteran's Administration.

In October of 2003, Dr. Rizzi noted that Employee was suffering difficulties in attempting to do his job and he recommended changing to a sitting job. He also recommended that Employee see Dr. Horton regarding a possible implant arthroplasty.

Ultimately, Employee was suffering from so many problems due to pain in his ankle and low back that he quit working at QuikTrip on October 13, 2003. Employee ultimately underwent debridement of the heterotopic bone with an external fixator for arthrodiastasis which was performed on February 25, 2004. He was seen for follow-up on March 5, 2004 and March 12, 2004 at which point a pin site infection was noted and the pins were removed. Employee was placed on heavy antibiotics, including Vancomycin starting March 25, 2004 by Dr. Geha. He continued on antibiotics through April 6, 2004 and was ultimately released by Dr. Rizzi on April 21, 2004.

Employee has continued to have problems with his right ankle and has gone to the Veteran's Administration System for treatment beginning March 4, 2005.

Employee stated that he filed a Report of Injury after his first injury of September 30, 2002. According to Claimant's Exhibit V, there is an employee accident/injury report dated November 7, 2002. Prior to this time, he was contacted by an Amy Enright on October 29, 2002 wherein he gave a statement regarding his injury of September 30, 2002. He did not know why she called him as his Report of Injury was filled out after his statement was taken. However, he gave her the information as he recalled it, including his prior injuries. He was not used to using the form on the computer and, therefore, the report, Exhibit V, was submitted as a handwritten form. He stated he submitted the form by computer but made a handwritten version which he put in the check-up folder. He stated he did this prior to his first surgery. Employee also noted that he faxed a copy of the off-work statement signed by Dr. Rizzi to a Doug Schimiel at QuikTrip corporate headquarters (Ex. BB and CC). In this note, it is stated that Employee was seen by Dr. Downs on October 16, 2002 and had hardware removal on November 19, 2002 and has been off work since October 31, 2002. This is dated December 5, 2002.

After Employee's return to work, he felt that his ankle was better and was relieved from a lot of the pain he had had prior to the removal of his hardware. However, as time went on, his ankle started to deteriorate and, also, he was no longer given Vioxx or any of the anti-inflammatories that had helped him with pain prior to that. He felt the aggravation to his ankle was caused by standing on cement, climbing ladders, power washing, and the constant walking

and standing he did throughout his work day. As stated previously, Employee ultimately left employment with QuickTrip on October 13, 2003.

Employee's current problems with his ankle include pain when standing for long periods of time. He cannot walk on unlevel surfaces. He cannot climb ladders. He no longer goes to concerts or sports games because of the standing and walking on concrete. He currently goes to the VA for his medical care. He has been given orthotics and arch supports, but he does not wear them. He wears tennis shoes, which are the most comfortable for him. He notes that none of the current anti-inflammatories he has been given helped. He has been told that he can either undergo an ankle replacement or a fusion. He believes that Dr. Rizzi wanted him to do a replacement first and, if that did not work, then move on to a fusion. At this time, he is uncomfortable about getting additional surgeries. Employee is asking for QuikTrip to pay for the surgeries he has already had and the temporary total disability that he was not paid during his time off work, as well as permanent partial disability.

Employee stated that he did not file a Report of Injury on his second injury because he did not want to lose his job. He did apply for short-term disability because he needed some kind of paycheck at that time.

On cross-examination, Employee admitted that he tried to work for a limousine service after he left QuickTrip but had difficulty driving and sitting in the vehicle throughout the day. Also, his hearing impairment gave him difficulty with passengers. He attempted work at Apple Market in Customer Service as an assistant manager. He admitted to a history of right ankle problems. In 1983 he twisted his ankle when he fell and then, again, the injury in 1990 when he had the surgery with the rods put in. He admitted that he went through orientation with QuikTrip and understood that when someone was hurt, it was the manager's job to report it. He discussed the confusion with the claims, noting his first claim on the September 30, 2002 injury was noted at the wrong store location. He apparently got the store locations mixed up between the two injuries. He stated that he never asked QuikTrip in 2002 for treatment with a doctor. He does not know why the doctors did not put in their reports that he was injured on the job because he believes he told them he had hurt his ankle while working. He admitted he did not pay for his short-term disability insurance; that was provided solely by QuikTrip Corporation.

Employee was seen by Dr. Koprivica on June 1, 2005 for a disability rating. Dr. Koprivica reviewed Employee's medical records and did a medical examination of him. He felt that as a direct and proximate result of Employee's work injury of September 30, 2002 and October of 2002, it was his opinion that Employee sustained a permanent aggravating injury to the right ankle, that both of these injuries contributed to the loosening of the hardware that necessitated the ultimate surgical intervention that was performed. He felt that the removal of the hardware as well as the debridement was medically reasonable and a direct necessity of the injuries of September 30 and October 31 of 2002. He felt that the two injury dates required an apportionment of 10 percent permanent partial disability to the right lower extremity at the ankle. He would attribute 50 percent of that permanent partial disability to the September 30, 2002 injury and then the other 50 percent of permanent partial disability would be assigned to the October 2002 injury. This would give Employee 5 percent permanent partial disability of the right lower extremity at the ankle at a 155-week level for the September 30, 2002 injury and 5 percent permanent partial disability at the right lower extremity at the ankle at a 155-week level for the October 31, 2002 injury.

Dr. Koprivica continued to state that Employee's ongoing employment activities after his surgery where he was working on his feet for extended hours were felt to be a substantial factor leading to progression of degeneration of the right ankle and the development of severe disability from symptomatic severe post-traumatic degenerative osteoarthritis of the right ankle. In addition, he felt that as a direct and natural consequence of the severity of the further aggravating injury and development of disability from symptomatic degenerative joint disease of the right ankle that Employee had developed compensatory left ankle, left knee, left hip and low back pain. Employee was temporarily and totally disabled from his last date of employment in October of 2003 until his release by Dr. Rizzi on April 21, 2004. He felt this was medically reasonable and a direct necessity of the injuries sustained from the repetitive trauma associated with his employment activities at QuikTrip through his last date of employment of October of 2003. He felt that Employee sustained a 25 percent permanent partial disability to the right foot at the level of the ankle at the 155-week level for further aggravating injury to the right foot and ankle region. He also felt that he would separately apportion a 5 to 7-12 percent permanent partial disability to the body as a whole for the additional compensatory low back, left hip, left knee and left foot and ankle pain. He felt globally for the cumulative injury through October 13, 2003 that he would assign Employee 15 percent permanent partial disability to the body as a whole. He felt Employee should be restricted from squatting, crawling, kneeling and climbing. Dr. Koprivica also believes that Employee requires future treatment, including surgical intervention on the right ankle, including implant arthroplasty versus an arthrodesis. He would tend to recommend arthrodesis at this point.

There is also a report and deposition of Dr. Edward Prostic. Dr. Prostic feels that Employee's injuries were due to the two accidents as well as the continued standing, walking, etc., Employee encountered while employed by Quiktrip. He apportioned a 5 percent permanent partial disability to the right lower extremity to Employee's accident of September 30, 2002 but did not apportion any of the remaining 30 percent permanent partial disability between Employee's accident of October 31, 2002 and his continued physical wear and tear caused by his work activities.

Employer's witnesses included Rick Reasby, who has worked for QuikTrip for 20 years. His current position requires him to check compliance with rules and deals with discipline. He notes that in September 2002 Employee never reported an injury on the job, and that was true for the time period from 2002 to 2004. He stated that he saw Employee during that time period and knew him, and he also knew that he was missing time due to problems with his ankle and that he had had prior problems with his ankle and a prior injury. He stated there was video technology at the time at the stores, but the tapes were re-recorded over every six hours; and if the Employee had reported it later than six hours after the incident, they would not have been able to view it on the tape. On cross-examination, Mr. Reasby noted that he never asked Employee if he had been hurt on the job. He stated he never had any involved discussion with Employee about his injuries.

Employer's other evidence included medical records and depositions of the two store managers, Jeremy Donnelly and Kevin Bergman. In Kevin Bergman's deposition, he stated that he did not see Employee fall on the September 30, 2002 but did note him sitting on the podium step and asked him what was wrong. He said the Employee made it sound like he was winded, that he would be all right in a minute, to just give him a minute and he would be fine. He asked

Employee if he needed to file a report; is there something wrong? And Employee told him, no, that he would be all right in a minute. He thought Employee was just tired from walking around. He did not recall him hobbling at any time that evening. In Jeremy Donnelly's deposition, who was the manager for the store in Lee's Summit on October 31, 2002, Mr. Donnelly stated that he never saw Employee fall and never noted any problems Employee was having with regard to being able to walk. He simply did not recall any incident where he had a problem after stepping down from the podium.

Employer offered no medical ratings or medical determination with regard to causation. Employer did offer a print out of disability payment of \$240.12 a week from October 31, 2003 to April 16, 2004.

The first issue to be determined by this Court is whether the Employee sustained an accident arising out of and in the course of his employment. Employee states that he was stepping off the cashier podium down to the main floor when he stepped wrong, twisting his ankle, causing injury to his ankle. Employee states that his manager at the time, Jeremy Donnelly, witnessed the accident. However, Mr. Donnelly testified that he does not recall Employee ever falling or witnessing a fall of Employee. However, this Court finds that Employee's testimony is credible and, therefore, this Court believes that Employee did fall off the podium as he had done once before twisting his ankle and causing injury to his ankle. Therefore, this Court finds that Employee suffered an accident arising out of and in the course of his employment.

The next issue to be determined by this Court is whether Employee notified the Employer of injury as required by law. Employee had filed a notice of his September 30, 2002 injury. However, he failed to file any notice of his October 31, 2002 injury until his first filing of a claim on September 27, 2004. The prevailing law at the time was pre-2005 changes wherein Section 287.420 RSMo states:

“No proceedings for compensation 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 have been given to the Employer as soon as practical after the happening thereof but not later than 30 days after the accident unless the Division or Commission finds that there was good cause for failure to give notice or that the Employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the Commission finds that the Employer was, in fact, misled and prejudiced thereby.”

Employer has not shown any prejudice suffered by Employee's failure to notify them of this second incident. There being no evidence of any prejudice against Employer, Employee's failure to give notice to Employer with regard to this injury does not bar his ability to recover herein. The filing of his claim on September 27, 2004 is adequate notice to the employer.

The next issue to be determined herein is whether Employee is entitled to temporary total disability benefits from October 31, 2002 to December 30, 2002. This Court has previously determined that Employee is entitled to temporary total disability benefits from November 18,

2002 to December 30, 2002 due to the previous accident and medical care therein. Therefore, this Court need only make a determination at this point with regard to the time period from October 31, 2002 to November 17, 2002. Employee testified that after he injured his ankle a second time on October 31, 2002 he was unable to stand on it and it was causing him a great deal of pain and was unable to work. He was therefore unable to work after the October 31, 2002. Dr. Rizzi's note (Ex.BB) states that Employee was off work from October 31, 2002. Since this Court finds that Employee's injuries were due to an accident which occurred October 31, 2002, this Court finds that Employee, in fact, is entitled to temporary total disability benefits from October 31, 2002 to November 17, 2002 at a rate of \$482.72 per week.

The next issue to be determined by this Court is whether the Employer must reimburse the Employee for medical expenses totaling \$27,488.32. In reviewing the testimony of Employee, the Employee stated that he never requested medical care from the Employer but sought medical care on his own. Further, it is noted that in none of the Claims for Compensation was there any request for medical care. The only indication of any discussion about medical care was the interview by Amy Enright wherein Employee was asked who his treating physician was. He noted that it was Dr. Rizzi and he had seen him one time and that he was being treated for arthritis which was due to this injury, referring to the injury of September 30, 2002. There is no other indication anywhere that Employee requested medical care from the Employer. This Court does not feel that the mere statement that he was seeing Dr. Rizzi to the adjuster on October 29, 2002 is an acquiescence by the Employer of that medical treatment. Further, since no medical care was requested by Employee either at the time of the injury or any time thereafter, the Employer was unable to provide such medical treatment and all medical treatment herein was unauthorized. Therefore, this Court does not find that Employer must reimburse Employee for medical expenses at this time.

The next issue to be determined herein is whether the Employer must provide the Employee with additional medical care. Although Employee had suffered a serious accident in the years prior to these injuries and had hardware placed in his ankle due to that accident, the necessitation for the removal of his hardware and further degeneration of his ankle was due to the accidents in September and October of 2002 and the continued wear and tear on his ankle thereafter from the standing and walking and other work required on his feet. The only medical opinion herein regarding whether or not Employee's need for additional medical care is related to his job is from Dr. Koprivica. Dr. Koprivica believes that the cumulative injury claim is felt to be a substantial factor in the ultimate need for medical intervention. He does not, however, note that the injury of October 31, 2002 necessitated additional medical care. Therefore, this Court finds that with regard to the injury of October 31, 2002, Employer is not required to offer Employee additional medical care.

The next issue to be determined by this Court is whether Employee suffered any disability and, if so, the nature and extent of Employee's disability. The only determination of disability herein was made by Dr. Koprivica, who determined Employee suffered an additional 5 percent permanent partial disability to the right lower extremity at the ankle. Therefore, there being no other medical evidence or opinion with regard to disability, this Court finds that Employee, in fact, does suffer from a 5 percent permanent partial disability to the right lower extremity at the ankle and orders employer to pay to Employee the sum of \$2,635.93 as and for permanent partial disability benefits.

The next issue to be determined by this Court is whether the accident caused the disability Employee claims. Dr. Koprivica's rating report is the only determination of causation herein as all other treating physicians are silent with regard to this matter. Dr. Koprivica determined that Employee's disability was caused by the accident of October 31, 2002. Therefore, this Court finds that Employee's disability of 5 percent to the right lower extremity was, in fact, caused by his injury of October 31, 2002.

Finally, this Court awards to Employee's attorney, Mr. Michael Knepper, 25 percent as and for attorney's fees herein.

Date: _____

Made by: _____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____
2009, by:

Naomi Pearson
Division of Workers' Compensation