

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

Injury No.: 08-122998

Employee: Cathy Werner
Employer: Madison Warehouse Corp.
Insurer: Zurich American Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Denied)

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 denying 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

Accident

The parties dispute whether employee sustained an accident when she fell while descending restaurant stairs on July 10, 2008. The administrative law judge determined that employee "did not sustain an accident during a single work shift." *Award*, page 8. We disagree. The version of § 287.020.2 RSMo applicable to this claim provides the following definition of an "accident" for purposes of the Missouri Workers' Compensation Law:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

It's clear that employee's suffering a fall while descending restaurant stairs on July 10, 2008, amounted to an "unexpected" and "traumatic event," that is "identifiable by time and place of occurrence," and that the event produced "objective symptoms of an injury caused by a specific event."

Employee testified that the purpose behind meeting her coworkers at the restaurant was to discuss the work to be done the next day. Employee explained that she and her coworkers were otherwise occupied during the day, and that a dinner meeting provided the only time available to engage in the planning and discussions needed to move the work forward. Employee further explained that such dinner meetings are a frequent and regular aspect of her duties when she's working out of town for employer.

Given these facts, we believe that employee was unquestionably in the service of her employer both during the business dinner, and for a reasonable time thereafter, such

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that her fall while exiting the restaurant occurred “during a single work shift.” We conclude employee sustained an accident for purposes of § 287.020.2.

Injury arising out of and in the course of employment

The parties dispute whether employee proved that her injuries arose out of and in the course of employment for purposes of § 287.020.3(2) RSMo, which provides, as follows:

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.

The courts have interpreted the foregoing language to involve a “causal connection” test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012). The *Johme* court held that an employee who fell and suffered injuries while making coffee “failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal nonemployment life.” *Id.* at 512.

Here, employee’s injuries resulted from the risk of descending a single step at a Paula Deen restaurant in Savannah, Georgia. Employee testified that she simply didn’t see the step and she fell. Employee did not identify any abnormally hazardous aspect of the step as contributing to her fall. Employee was certainly engaged in an activity related to her work in that she was exiting a restaurant where she’d gone for a business dinner. But under the causal connection test described in the *Johme* decision, the fact that an employee’s injury occurs during the performance of a work-related activity is not determinative:

It is not enough that an employee's injury occurs while doing something related to or incidental to the employee's work; rather, the employee's injury is only compensable if it is shown to have resulted from a hazard or risk to which the employee would not be equally exposed in normal nonemployment life.

Johme, 366 S.W.3d at 511.

Absent any evidence suggesting that the step at the Paula Deen restaurant was abnormally hazardous or posed some particular danger to employee, we discern no basis for a conclusion that employee’s work exposed her to a greater hazard or risk than she would otherwise face when descending such a step in her normal nonemployment life.

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We must conclude, therefore, that employee's injuries did not arise out of and in the course of her employment.

Conclusion

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

The award and decision of Administrative Law Judge Suzette Carlisle, issued December 18, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 18th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Cathy Werner

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 administrative law judge's award denying benefits is in error, and should be reversed.

I agree with the majority to the extent that I am convinced that employee suffered an accident, and that the outcome of this case turns on whether employee's injuries arose out of and in the course of her employment. I disagree, however, with the majority's conclusion that employee's injuries resulted from a hazard or risk unrelated to the employment for purposes of § 287.020.3(2) RSMo.

In *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012), the Missouri Supreme Court held that an employee who fell while making coffee at work did not sustain a compensable injury. *Id.* at 512. The *Johme* employee fell in her office kitchen after making a new pot of coffee, per workplace custom, to replace a pot of coffee from which she had taken the last cup. *Id.* at 506. The *Johme* court found that the risk or hazard that resulted in the employee's fall was "turning and twisting her ankle and falling off her shoe." *Id.* at 511. The Court concluded that the employee "failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal nonemployment life." *Id.* at 512.

In so holding, and in specifically contrasting a "work-related risk" versus a "risk to which the employee was equally exposed" outside of work, the *Johme* decision implies that our analysis under § 287.020.3(2)(b) must begin with an identification of the risk or hazard that resulted in the employee's injuries, followed by a quantitative comparison whether employee was equally exposed to that risk in her own normal nonemployment life. Following the Court's reasoning, the result of that comparison should tell us whether the risk is related or unrelated to employee's work, and in turn, whether the employee's injuries arose out of and in the course of the employment.

Here, I agree with the majority that the risk or hazard that resulted in employee's injuries is that of descending a single step at a Paula Deen restaurant in Savannah, Georgia. The next question is whether employee was equally exposed to that risk or hazard in her normal nonemployment life. I find that employee was not so exposed.

Employee's uncontested testimony reveals that when she traveled out of town for employer, she conducted regular business dinners with her associates, as this was typically the only time available to go over the next day's business. In the course of attending these business dinners, employee was necessarily exposed to the hazards of navigating an unfamiliar environment. The majority ignores the increased danger that results from such circumstances. Employee testified that she didn't see the single step immediately outside of the restaurant exit, and that this is what caused her to fall. Employee's right ankle injury is thus a direct result of the fact that employee was unfamiliar with her environment.

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The majority would require employee to show some abnormally hazardous aspect of the step. I believe the majority misreads the *Johme* decision. The Missouri Supreme Court in *Johme* did not suggest that an employee is required to demonstrate some irregularity or environmental risk as a causative factor in order to secure workers' compensation benefits for injuries sustained in a workplace fall. The *Johme* decision merely stands for the proposition that where an employee's fall is a direct product of her foot slipping off her non-work sandals, the employee has failed to demonstrate a causal connection between her injuries and her employment. The majority also overlooks the more recent decision of *Pope v. Gateway to the W. Harley Davidson*, No. ED98108 (Oct. 23, 2012).¹ In *Pope*, the court found that an employee who fell down stairs while working for employer suffered a compensable workers' compensation injury where there was no evidence that employee was equally exposed to the risk involved in descending those stairs in his normal nonemployment life. *Id.* at pg. *16-17. The court noted that employee was carrying a work-related helmet while descending the stairs, but did not suggest that employee was required to demonstrate some abnormally hazardous aspect of the stairs themselves in order to meet his burden of proof. *Id.*

The *Pope* decision also makes clear that we are not to presume facts not in evidence in analyzing the issue of equal exposure: "Moreover, the record contains no evidence that Pope normally carried his motorcycle helmet while descending stairs in his normal, non-employment life. Even if Pope were an avid motorcyclist, we will not presume facts not found in the record. Given the absence of such facts, we find little factual basis for the argument that Pope was equally exposed to the risk of walking down stairs while holding a motorcycle helmet in his normal, non-employment life." *Id.* at pg. *16. Here, the majority's finding that employee was equally exposed, in her nonemployment life, to the risk of descending the single step outside the Paula Deen restaurant in Savannah, Georgia, seems to me to be premised on nothing more than speculation and conjecture. The majority fails to identify any evidence to support its finding that employee was so exposed. This is not surprising, because there is no such evidence on this record. Instead, the uncontested evidence reveals that the only reason that employee was descending that step—and was thus exposed to the risk of missing it and falling—was because her work for employer put her there.

In sum, I believe the majority's analysis runs contrary to the recent and controlling case law on the issue whether an employee's injuries arise out of and in the course of employment. I am convinced that employee's work for employer on July 10, 2008, placed her in an unfamiliar setting, and exposed her to the particular risk or hazard that caused her to fall. I conclude that employee's injuries arose out of and in the course of employment.

¹ The Missouri Court of Appeals, Eastern District, published the *Pope* decision on the day it was issued, and an application for transfer to the Missouri Supreme Court was denied on January 29, 2013, so I believe the decision has precedential and binding effect, although it has not yet been assigned a West's Southwestern Reporter number.

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I would award permanent partial disability benefits commensurate with a finding that employee suffered an injury amounting to a 25% permanent partial disability of the right ankle, as well as temporary total disability benefits to cover employee's healing period following the right ankle surgery.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

| | | |
|-------------------|---|---|
| Employee: | Cathy Werner | Injury No.: 08-122998 |
| Dependents: | N/A | Before the |
| Employer: | Madison Warehouse Corporation | Division of Workers' |
| Additional Party: | Second Injury Fund (Denied) | Compensation |
| Insurer: | Zurich American Insurance Company c/o Specialty Risk Services, LLC | Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri |
| Hearing Date: | September 17, 2012 | Checked by: SC |

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: July 10, 2008
5. State location where accident occurred or occupational disease was contracted: Savannah, Georgia
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? No
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 leaving a restaurant, Claimant missed a step, fell, and injured her right ankle.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right ankle
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$205.00

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$954.80
- 19. Weekly compensation rate: \$636.53/\$404.66
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|---|------|
| -0- weeks of permanent partial disability from Employer | None |
|---|------|

22. Second Injury Fund liability: Denied

| | |
|--------|------|
| TOTAL: | None |
|--------|------|

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Brian Dean

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|---|---|
| Employee: | Cathy Werner | Injury No.: 08-122998 |
| Dependents: | N/A | Before the |
| Employer: | Madison Warehouse Corp. | Division of Workers' Compensation |
| Additional Party: | Second Injury Fund (Denied) | Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri |
| Insurer: | Zurich American Insurance Company C/o Specialty Risk Services, LLC | Checked by: SC |

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on September 17, 2012 for a hearing for a final award at the request of Cathy Werner (“Claimant”) to determine the liability of Madison Warehouse Corporation (“Employer”) and Zurich American Insurance Company (“Insurer”), for permanent partial disability (PPD) benefits. Attorney Brian Dean appeared for Claimant. Attorney Julie Madsen appeared for Employer.¹ The Second Injury Fund is a party but did not participate in the proceeding. The record closed after presentation of the evidence. Venue is proper and jurisdiction lies with the Division of Workers’ Compensation.

Claimant submitted two separate claims for disposition, 08-122998 and 09-081180. Although separate awards were issued for each injury number, the body of each award contains similar evidence as the issues raised in each claim are closely related.

The parties stipulated that on or about July 10, 2008, Claimant was employed by Employer and was in Savannah, Georgia at the time of the alleged accident; Claimant was employed in St. Louis County where the contract of employment was made; Employer and Claimant operated under the Missouri Workers’ Compensation Law²; Employer’s liability was fully insured, and the claim for compensation was timely filed, Claimant’s average weekly wage was \$954.80 which resulted in a temporary total disability (“TTD”) rate of \$636.53 and a permanent partial disability (“PPD”) rate of \$404.66, Employer has paid no TTD benefits, and Employer paid medical benefits totaling \$205.00.

The parties identified six issues for disposition:

1. Did Claimant sustain an accident?
2. If so, did it arise out of and in the course of employment?
3. Did Employer receive proper notice?
4. Is Employer liable for past medical expenses totaling \$9,661.00 and out of pocket expenses totaling \$500.00?

¹ All references in this award to Employer also include Insurer.

² All statutory references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

5. Is Employer liable for TTD benefits from March 25, 2010 to June 25, 2010?
6. What is the nature and extent of Employer's liability for PPD benefits, if any?

EXHIBITS

Claimant's Exhibits A through C were offered and received into evidence over Employer's objections to all three exhibits.³ Employer's Exhibits 1 and 3 through 10 were offered and received into evidence.⁴ Any objections contained in the depositions or made during the hearing but not expressly ruled on in this award are now overruled. To the extent that marks or highlights are contained in the exhibits, those were made prior to becoming part of this record and were not placed there by the undersigned administrative law judge.

FINDINGS OF FACT

All evidence was reviewed but only evidence needed to support this award will be summarized below.

Live testimony

1. At the time of the hearing, Claimant was married and had two independent, adult children.
2. Employer hired Claimant in October 1989 as an executive assistant, and she was later promoted to corporate HR and payroll manager. As a manager, she supervised payroll and all employee benefits for 13 facilities located in Illinois, Texas, Maryland, Georgia and Missouri.
3. Claimant, a salaried employee, did not clock in or out.
4. In 2003 a bone spur was surgically removed from Claimant's right heel.⁵

The primary injury

5. On July 10, 2008, Claimant was in Savannah, Georgia to open a new facility. Claimant hired and trained employees and explained their benefit packages. Claimant operated out of a trailer located at the warehouse location.
6. Claimant was not required to have dinner with employees; however, as a general rule Claimant took employees to dinner when she visited out-of-state facilities.⁶
7. At the end of the day Claimant returned to the hotel before she left to meet colleagues for dinner.

³ Employer objected to the admission of Claimant's Exhibits A and B based on foundation for the medical bill summary, and Exhibit C, a letter, was objected to based on foundation and it was seen for the first time on the day of the hearing.

⁴ Claimant objected to the admission of Employer's Exhibit 2, Claimant's deposition, because Claimant testified at the hearing. Exhibit 2 was excluded. Select portions of Claimant's deposition were read into the transcript.

⁵ Dr. Beyer's pre-surgical note from June 18, 2009 showed debridement of the right Achilles tendon in 2003.

⁶ During Claimant's deposition, she testified: "I could've blew them off. It would have been kind of rude as an HR manager to have done that to colleagues."

8. That evening, Claimant and two associates met for dinner at Paula Deen's Restaurant and discussed hiring activities during the day, and planned the interview schedule for the next day. They were unable to meet during the day because of their schedules. The meeting lasted 90 minutes.
9. While leaving the restaurant, Claimant walked out the door, missed a step, and fell to the ground, injuring her right foot. At the time of the accident, it was dark and drizzling rain outside. However, there was nothing on the step that caused Claimant to fall.
10. Claimant was diagnosed with an ankle sprain at Savannah Memorial Hospital, prescribed medication, an air cast and exercises and provided instructions for crutch use and rest.
11. X-rays of the right foot taken on July 10, 2008, revealed a tiny density area of the lateral alveolus, and an avulsion fracture was not ruled out. Claimant was diagnosed with a right ankle sprain, and prescribed medication and crutches. Dr. Pope prescribed pain pills, crutches, and an air cast. Claimant refused the crutches.
12. Later the same night, Claimant left a message for Mr. Jack Lipin, president of the company and her immediate supervisor.
13. The next day Claimant called Mr. Lipin again and spoke to him directly. Workers' compensation was not discussed by either Claimant or Mr. Lipin.
14. Also, Claimant contacted Mr. Bill Willenbrink, a vice-president and controller, and he was in charge of workers' compensation injuries for Employer. Claimant informed Mr. Willenbrink she planned to follow up with her physician.
15. Claimant was aware of Employer's policy to report injuries sustained on the job, but did not mention the right foot injury was work related until after she received injections in April 2009 for her left foot.
16. On July 24, 2008, Dr. Anderson provided follow-up treatment at Southern Illinois Orthopedics Group. Dr. Anderson prescribed physical therapy for Claimant's right foot.
17. On November 18, 2008, Claimant received treatment from Dr. Craig Beyer for both feet. Dr. Beyer reported a history of "post lateral pain on the left," and development of Achilles tendinitis on the right that required surgery, with identical symptoms on the left, and Achilles tendinitis on the opposite side.⁷
18. In December 2008 Scott Knox, PA-C to Dr. Beyer, reported persistent left Achilles tendinitis, despite conservative treatment.
19. On March 2, 2009, Claimant reported residual tenderness and start-up pain in the morning, but Dr. Beyer released her from care.⁸
20. Claimant continued to have right foot problems through 2009, but suspended treatment

⁷ Dr. Krause testified it was unclear from Dr. Beyer's November 18, 2008 record which foot he diagnosed with Achilles tendinitis. However based on subsequent medical records, Dr. Krause concluded Dr. Beyer's note referred to the development of Achilles tendinitis on the left.

⁸ Dr. Beyer did not mention either foot specifically in his report.

after she began treatment for her left foot in 2009.

21. On April 14, 2009, Claimant gave Dr. Beyer a history of right ankle complaints. Examination revealed peroneal tendon subluxation, which he opined can cause peroneal tendinitis. Claimant decided to pursue treatment on her left foot at that time.
22. Claimant's last day of work was June 5, 2009. She received unemployment of \$320.00 per week until at least June 5, 2010.
23. An MRI of the right ankle dated January 27, 2010, revealed disruption of the peroneus longus and peroneus brevis tendons.
24. Dr. Beyer performed a tenosynovectomy and debridement and tenodesis to the peroneus longus on March 25, 2010, and discharged Claimant on July 6, 2010. The operative note revealed the peroneus longus tendon was intact. However, the peroneus brevis was 50% torn.
25. Claimant identified an Excel spreadsheet that she prepared which reflects providers and dates of service for medical treatment she received. (Exhibit B) Charges from March 25, 2010 to July 6, 2010 reflect out-of-pocket expenses for the July 2008 accident. (Second page). The amounts listed on the far right side of each charge represent payments made by Claimant.⁹
26. Claimant never asked her Employer to submit the claims through workers' compensation, and Mr. Willenbrink did not suggest that she submit the bills. Claimant did not submit the bills because the Employer was self-insured and she did not have out-of-pocket expenses.
27. Right foot complaints include daily pain with walking and swelling each week with prolonged standing, cramps, weakness, and decreased range of motion. Dr. Harmon, Claimant's primary care physician, prescribes Flexeril and Hydrocodone to relieve pain.
28. Dwight Woiteshek, a board certified orthopedic surgeon, performed an Independent Medical Examination ("IME") on December 17, 2010, and testified at the request of Claimant's attorney.
29. During examination, Dr. Woiteshek found 10 percent decreased range of motion of the right ankle, and a 25% decrease in range of motion of the left ankle.
30. Dr. Woiteshek diagnosed a severe right ankle sprain and partial tear of the peroneus brevis tendon and opined the July 10, 2008 injury was the prevailing factor that caused the condition. Dr. Woiteshek concluded Claimant reached maximum medical improvement, and rated 35% PPD of the right foot. He further found the disability to be a hindrance to Claimant's employment or reemployment.

⁹ The total dollar amount contained in Exhibit B for Injury Numbers 08-122998 and 09-081180 is \$59,436.86. Also, the last column of the document contains out-of-pocket expenses. The medical bills and receipts are not in evidence.

31. Dr. Woiteshek opined Claimant should have been off work three months for the right ankle sprain, and her medical treatment was reasonable and necessary to relieve the effects of the work injury.
32. Dr. Woiteshek opined Claimant's fall on July 10, 2008 was the prevailing factor that caused a severe right ankle sprain and partial tear to the peroneus brevis tendon that required surgery on March 25, 2010.
33. Dr. Woiteshek further opined the combination of Claimant's injuries to both feet produced more disability to her employment or reemployment than their simple sum, due to multiple injuries.
34. Dr. Woiteshek opined Claimant's left heel became symptomatic during right foot treatment because she shifted her weight to her left side. However, no rating of disability was provided.
35. After a review of Claimant's Exhibit B, Dr. Woiteshek opined Claimant's medical care for both feet was reasonable and necessary.
36. John Krause, M.D., a board certified orthopedic surgeon, performed an IME and testified at the request of the Employer's attorney.
37. Dr. Krause diagnosed a right ankle sprain with a peroneus brevis tear, and opined the fall was the prevailing factor that caused the conditions, as it is typical to tear the peroneal tendon with an ankle sprain. Dr. Krause rated 10% PPD of the right ankle.
38. Dr. Krause opined the surgery to repair the peroneous brevis tendon was reasonable and necessary to cure and relieve the effects of the July 10, 2008 injury.
39. Dr. Krause recommended a cast after three days, and return to light duty, sitting, non-weight bearing, and full duty within three and a half months. Specifically, he expected six weeks of non-weight bearing and light duty if available.

ADDITIONAL FINDINGS OF FACT and RULINGS OF LAW

Claimant did not sustain an accident

Claimant asserts she sustained an accident to her right ankle that arose out of and in the course of employment. The Employer denies Claimant sustained an accident that arose out of and in the course of employment.

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of the claim... . *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). Proof of the cause of injury is based on reasonable probability *Smith v. Terminal Transfer Company*, 372 S.W.2d 659, 664(7) (Mo.App.1963)). 'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277(Mo.App. 1996).

An employer is "liable, irrespective of negligence, to furnish compensation under the [Worker's Compensation Law] for personal injury ... of the employee by accident arising out of

and in the course of the employee's employment.” *Strieker v. Children's Mercy Hospital*, 304 S.W.3d 189, 192 (Mo.App.2010) (citing § 287.120.1).

Section 287.020.2 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*. An injury is not compensable because work was a triggering or precipitating factor. (Emphasis added) Section 287.800 requires strict construction of the provisions contained in Chapter 287.

I find Claimant to be generally credible. However, I find Claimant’s injury to her right ankle on July 10, 2008 was not caused by a specific event during a single work shift. Claimant was not an hourly employee, and worked over forty hours per week as needed. But at the end of the work day, she returned to the hotel, and later met colleagues for dinner, where they discussed work. She was not required to discuss work at dinner, but she did. When the accident occurred, the discussions were over, and she was leaving the restaurant to sightsee. Based on these facts, I find Claimant did not sustain an accident during a single work shift as defined in Section 287.020.2.

The right ankle injury did not arise out of and in the course of employment

Section 287.020.3(2) states: An injury shall only 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...

In this case, there is no dispute Claimant’s fall caused an injury to her right ankle. Claimant’s testimony is credible about the circumstances surrounding the event, and Drs. Woiteshek and Krause agree the fall caused a right ankle sprain and partial tear of the peroneus brevis tendon. Here the issue is whether the injury came from a hazard or risk related to her employment that she would not have been equally exposed to outside of work, under Section 287.020.3(2) (b).

I find Claimant’s injury did not arise out of her employment. Claimant did not fall because of a condition of her employment or because of being in an unsafe location due to her employment. There was no substance on the step and she did not trip. She missed one of the steps when she walked out of the restaurant. The risk associated with this injury, walking down steps, is unrelated to Claimant’s employment and one she would have been equally exposed to in normal nonemployment life.

I further find the extended premises doctrine does not apply. Section 287.020.5 states in part: The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get

to and from their place of employment. Here, the record contains no evidence the Employer owned or controlled the property where the restaurant was located.

CONCLUSION

Claimant did not sustain an accident that arose out of and in the course of her employment. All other issues are moot. The Second Injury Fund case is denied.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 09-081180

Employee: Cathy Werner
Employer: Madison Warehouse Corp.
Insurer: Zurich American Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties submitted the following issues for determination by the administrative law judge: (1) whether employee sustained an accident; (2) whether employee's injuries arose out of and in the course of employment; (3) whether employer received proper notice; (4) whether employee's fall is the prevailing factor in causing her left ankle injury; (5) whether the employer is liable for employee's past medical expenses; (6) whether employer is liable for past temporary total disability benefits during the time period from September 8, 2009, through January 8, 2010; and (7) whether employer is liable for permanent partial disability benefits. At the outset of the hearing, the administrative law judge noted that the Second Injury Fund is a party to this claim but would not participate in the hearing and that the claim against the Second Injury Fund is to remain open.

The administrative law judge concluded that employee did not sustain an accident and that all other issues are moot.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in failing to specifically identify Employee's Exhibit C in her Exhibit section or to refer to this evidence in her findings of fact or rulings of law; (2) in failing to consider the contents of Employee's Exhibit C; (3) in failing to consider all the credible evidence relative to § 287.020 RSMo; and (4) in misstating or omitting critical facts in her findings of fact and rulings of law.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Employee began working for employer in October 1989. She last worked as a human resources and payroll manager. On or about February 28, 2009, employee left her office at employer's premises and walked outside and toward her car which was parked in an assigned parking space on employer's parking lot. Snow and ice covered the

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ground because the sidewalk had not been properly cleared. As employee was walking on the sidewalk, she slipped on ice and felt a twisting sensation and pain in her left foot. Employee went home and iced and elevated her foot and took some non-prescription pain medications.

Employee testified that she reported her left foot injury to Bill Willenbrink, employer's vice president and the person in charge of handling workers' compensation matters, the day after the incident occurred. Employee's testimony is corroborated by Employee's Exhibit C, a letter authored by Mr. Willenbrink wherein he recounts employee's reporting to him an injury to her foot when she slipped on ice and snow in employer's parking lot in early 2009. See *Transcript*, page 175. We find that the day after the incident, employee told Mr. Willenbrink that she'd slipped on the sidewalk and that she'd hurt her left foot, and that she had not sought medical treatment. We find that employee did not provide any written notice of her fall to employer.

Employee sought medical care for her left foot with Dr. Craig Beyer. After conservative treatments failed to relieve employee's symptoms, Dr. Beyer performed a fluoroscopic guided injection of platelet-rich plasma into employee's left foot on April 27, 2009, after which employee developed a serious infection requiring subsequent surgeries on June 18, 2009, July 30, 2009, and September 8, 2009.

During the course of her treatment, employee kept track of the medical bills she received. But employee has not offered any of her medical bills into evidence. Instead, employee has submitted a spreadsheet she created that purports to show the dates of service and the amounts charged to her.

Employee claims temporary total disability benefits from September 8, 2009, through January 8, 2010. On cross-examination, employee acknowledged that she claimed and received unemployment compensation benefits for approximately a year after her last day of work on June 5, 2009. In her deposition taken on November 15, 2010, employee provided testimony that suggested she was still, at that time, receiving unemployment benefits. When confronted with this testimony from her deposition, employee agreed that she may have been receiving unemployment benefits at least up until that date. We find that employee claimed and received unemployment benefits from June 6, 2009, through at least November 15, 2010.

Employee continues to suffer from pain and numbness in her left foot. The numbness affects the bottom of employee's heel and toes and causes her toes to feel constantly cold. Employee can't wear shoes with backs because they irritate the area where she had the surgery and skin graft. Employee has pain in her ankle all the time, and suffers from soreness and tenderness in the back of her ankle. Employee takes hydrocodone and Flexeril for pain. The range of motion in employee's foot is very limited, and navigating stairs is difficult.

Expert medical opinions

Employee presents the expert medical testimony of Dr. Dwight Woiteshek, an orthopedic surgeon. Dr. Woiteshek opined that employee's slipping on ice on February 28, 2009, is

Employee: Cathy Werner

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the prevailing factor in causing her to suffer traumatic Achilles tendinitis of the left heel and a 50% permanent partial disability of the left lower extremity at the 150-week level. Dr. Woiteshek explained that traumatic Achilles tendinitis can result from a twisting injury. Dr. Woiteshek opined that the treatment employee received for her left foot was reasonable and necessary to relieve the effects of the injury; he opined that the infections employee suffered were caused by the platelet-rich plasma injections that Dr. Beyer performed in April 2009.

Employer presents the expert medical testimony of Dr. John Krause, an orthopedic surgeon. Dr. Krause found no evidence in the medical record that employee suffered a significant injury on February 28, 2009, and opined that any injury on that date is not the prevailing cause of her left Achilles tendonitis or need for treatment. It appears to us that the crux of Dr. Krause's opinion is his own determination that employee did not really slip on ice in February 2009. We have credited employee's testimony and found that she did, in fact, slip on ice on or about February 28, 2009. Dr. Krause's opinions in this matter thus appear to be premised upon an incorrect version of the facts.

We find more persuasive Dr. Woiteshek's testimony and opinions in this matter, and we adopt as our own his opinions as to medical causation and employee's need for treatment.

Conclusions of Law

Accident

The administrative law judge concluded that employee did not sustain an accident. We disagree. Section 287.020.2 RSMo provides, as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

We have credited employee's testimony and found that on or about February 28, 2009, employee slipped and fell while traversing employer's icy sidewalk. We have found that employee felt an immediate twisting sensation and pain in her left foot. We are persuaded that these facts satisfy each of the foregoing criteria for an "accident."

We acknowledge that Dr. Beyer's contemporary treating records do not reflect a history of the February 2009 fall. But as the courts have specifically instructed, "[t]here is no requirement that the medical records report employment as the source of injury." *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 259 (Mo. App. 2010). We conclude employee suffered an accident for purposes of § 287.020.2.

Medical causation

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

Employee: Cathy Werner

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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.

We have found persuasive and adopted the testimony from Dr. Woiteshek that the February 2009 accident is the prevailing factor causing employee to suffer traumatic Achilles tendinitis of the left heel. Given our findings, we conclude that the February 2009 accident is the prevailing factor causing both the resulting medical condition of traumatic Achilles tendinitis of the left heel and permanent partial disability to the extent of 35% of the left lower extremity at the 150-week level.

Injury arising out of and in the course of employment

The parties dispute whether employee proved that her injuries arose out of and in the course of employment for purposes of § 287.020.3(2) RSMo, which provides, as follows:

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.

We have already determined that the February 2009 accident is the prevailing factor in causing employee's injuries; thus employee has satisfied subsection (a) above. With respect to subsection (b), we note that the courts have recently interpreted the foregoing language to involve a "causal connection" test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012). The *Johme* court held that an employee who fell and suffered injuries while making coffee "failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal nonemployment life." *Id.* at 512.

Here, employee's injuries resulted from the risk of traversing employer's icy sidewalk outside the office where she worked. Employee explained that the sidewalk had not been properly cleared, resulting in a covering of ice and snow. The record contains no evidence that would support a finding that employee was equally exposed to the risk of crossing employer's icy sidewalk in her normal nonemployment life.

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

Employee: Cathy Werner

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Notice

Section 287.420 RSMo sets forth the requirements for the notice employees must provide employers regarding a work injury, and provides, in relevant part, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

We have found that employee did not provide employer with a written notice meeting all of the elements of the statute within thirty days of the February 28, 2009, accident. The next question is whether employee can prove employer was not prejudiced by her failure to provide the written notice specified by statute. We have found that employee provided actual notice of her accident to Bill Willenbrink, employer's vice president and the individual in charge of workers' compensation matters. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994).

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo. App. 2000)(citations omitted).

Because we have found that employer had actual notice of employee's accident the day after it occurred, employee has made a prima facie showing of absence of prejudice and the burden shifts to employer to show it was prejudiced.

We note that employer failed to brief the issue of notice or to provide any argument that would support a finding it was prejudiced by employee's failure to provide the written notice described in the statute. After a careful review of the transcript, we can find no evidence to suggest that employer was prejudiced. Employer had an opportunity to investigate the accident and to send employee for evaluation and treatment the very next day after the accident occurred. We are convinced employer had a fair opportunity to investigate employee's claim, have her treated to minimize her injuries, and gather evidence for its defense, despite employee's failure to provide a written notice meeting each of the elements of the statute. For the foregoing reasons, we conclude that employee's claim is not barred by § 287.420.

Past medical expenses

The parties dispute whether employee is entitled to her past medical expenses. Section 287.140.1 RSMo provides, as follows:

Employee: Cathy Werner

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In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

It is employee's burden to produce for each medical expense claimed: 1) the medical bill, 2) the medical record reflecting the treatment giving rise to the bill, and 3) testimony establishing that the treatment flowed from the compensable injury. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

Employee failed to provide any of her past medical bills or any testimony identifying them. Instead, employee has provided a spreadsheet that she created to keep track of her medical bills. Employer objected to this evidence, on the basis that it lacks foundation where employee failed to provide the bills themselves. We agree that the spreadsheet is of little probative value. While it would be a convenient summary for purposes of reference, it cannot substitute for the bills themselves.

We note that Employer's Exhibit 10 contains some bills from Dr. McKee for treatment of employee's left ankle injuries from July 7, 2009, through September 8, 2009, totaling \$2,370.00. Employee did not provide any testimony specifically identifying these bills, but her summary does include these charges, and she testified that she created the summary based upon bills that she received. Dr. McKee's records reflecting the treatment giving rise to these bills are in evidence and reveal that the treatment he provided was rendered in connection with employee's left ankle surgeries and related complications. Given these circumstances, and because we have found persuasive Dr. Woiteshek's testimony that this treatment was reasonably required to cure and relieve the effects of the work injury, we conclude that a sufficient factual basis exists for an award of these expenses.

We conclude employer is liable for \$2,370.00 in past medical expenses for treatment provided by Dr. McKee in connection with the left ankle injury. But because employee failed to provide her other medical bills, we deny her claim for any additional past medical expenses.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. But § 287.170.3 provides that: "An employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation."

Employee claims temporary total disability benefits from September 8, 2009, through January 8, 2010. But we have found, based on employee's testimony, that she claimed and received unemployment compensation benefits from June 6, 2009, through at least November 15, 2010. It follows that, under § 287.170.3, employee is disqualified from receiving temporary total disability benefits during the entire time period at issue. We conclude, therefore, that employer is not liable to pay any temporary total disability benefits.

Employee: Cathy Werner

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Nature and extent of permanent disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that the February 2009 accident resulted in injury and disability amounting to a 35% permanent partial disability of the left lower extremity at the 155-week level. This amounts to 54.25 weeks of permanent partial disability benefits at the stipulated rate of \$404.66. We conclude, therefore, that employer is liable for \$21,952.81 in permanent partial disability benefits.

Award

We reverse the award of the administrative law judge. Employer is liable for \$21,952.81 in permanent partial disability benefits, and \$2,370.00 in past medical expenses.

Employee's claim for temporary total disability benefits is denied owing to her disqualification pursuant to § 287.170.3 RSMo.

This award is subject to a lien in favor of Brian Dean, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Suzette Carlisle, issued December 18, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 18th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

| | | |
|-------------------|---|---|
| Employee: | Cathy Werner | Injury No.: 09-081180 |
| Dependents: | N/A | Before the |
| Employer: | Madison Warehouse Corp. | Division of Workers' |
| Additional Party: | Second Injury Fund (Denied) | Compensation |
| Insurer: | Zurich American Insurance Company c/o Specialty Risk Services, LLC | Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri |
| Hearing Date: | September 17, 2012 | Checked by: SC |

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged February 28, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant alleged she injured her left foot when she fell while walking to her car on snow and ice.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged left foot
14. Nature and extent of any permanent disability: None
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? None
- 18. Employee's average weekly wages: \$846.56
- 19. Weekly compensation rate: \$564.37/\$404.66
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

0 weeks of permanent partial disability from Employer None

22. Second Injury Fund liability: Dismissed

TOTAL: None

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Brian Dean

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|---|---|
| Employee: | Cathy Werner | Injury No.: 09-081180 |
| Dependents: | N/A | Before the |
| Employer: | Madison Warehouse Corp. | Division of Workers' Compensation |
| Additional Party: | Second Injury Fund (Denied) | Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri |
| Insurer: | Zurich American Insurance Company c/o Specialty Risk Services, LLC | Checked by: SC |

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on September 17, 2012 for a hearing for a final award at the request of Cathy Werner ("Claimant") to determine the liability of Madison Warehouse Corporation ("Employer") and Zurich American Insurance Company ("Insurer"), for permanent partial disability (PPD) benefits. Attorney Brian Dean appeared for Claimant. Attorney Julie Madsen appeared for Employer.¹ The Second Injury Fund is a party but did not participate in the proceedings. The record closed after presentation of the evidence. Venue is proper and jurisdiction lies with the Missouri Division of Workers' Compensation.

Claimant submitted two separate claims for disposition, 08-122998 and 09-081180. Although separate awards were issued for each injury number, the body of each award contains similar evidence as the issues raised in each claim are closely related.

The parties stipulated that on or about February 28, 2009: Claimant was employed by Employer, Employer and Claimant operated under the Missouri Workers' Compensation Law,² Employer's liability was fully insured, a claim for compensation was timely filed, Claimant's average weekly wage was \$846.56 which resulted in a temporary total disability rate ("TTD") of \$564.37 and a permanent partial disability ("PPD") rate of \$404.66, Employer paid no TTD benefits or medical benefits.

The parties identified the following issues for disposition:

1. Did Claimant sustain an accident?
2. If so, did it arise out of and in the course of employment?
3. Was Claimant's fall the prevailing factor that caused her left ankle injury?
4. Did Employer receive proper notice?

¹ All references in this award to Employer also include Insurer.

² All statutory references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

5. Is Employer liable for past medical expenses totaling \$49,775.86 and out-of-pocket expenses totaling \$2,723.97?
6. Is Employer liable for TTD benefits from September 8, 2009 to January 8, 2010, for 16 weeks?
7. What is the nature and extent of Employer's liability for PPD benefits, if any?

EXHIBITS

Claimant's Exhibits A through C were offered and received into evidence over Employer's objections to all three exhibits.³ Employer's Exhibits 1 and 3 through 10 were offered and received into evidence.⁴ Any objections contained in the depositions or made during the hearing but not expressly ruled on in this award are now overruled. To the extent that marks or highlights are contained in the exhibits, those were made prior to becoming part of this record and were not placed there by the undersigned administrative law judge.

SUMMARY OF EVIDENCE

1. At the time of the hearing Claimant was married and had two independent, adult children.
2. Employer hired Claimant in October 1989 as an executive assistant, and she was later promoted to corporate HR and payroll manager. As a manager, she supervised payroll and employee benefits for 13 facilities located in Illinois, Texas, Maryland, Georgia and Missouri. Claimant hired and trained employees, and explained benefit packages.
3. Claimant, a salaried employee, did not clock in or out.

Preexisting disabilities

4. In 2003 a bone spur was surgically removed from Claimant's right foot.
5. On July 10, 2008, Claimant was in Savannah, Georgia for the opening of a new facility. That evening, Claimant and two associates met for dinner and discussed hiring activities that occurred during the day. While leaving the restaurant, Claimant walked out the door, missed a step, fell to the ground, and injured her right foot.
6. X-rays of the right foot taken on July 10, 2008, revealed a tiny density area of the lateral alveolus, and an avulsion fracture was not ruled out. Claimant was diagnosed with a right ankle sprain, and prescribed medication and crutches. Dr. Pope prescribed pain pills, crutches, and an air cast. Claimant refused the crutches.
7. On July 24, 2008, Dr. Anderson provided follow-up treatment at Southern Illinois Orthopedics Group. Dr. Anderson prescribed physical therapy for Claimant's right foot.

³ Employer objected to the admission of Claimant's Exhibits A and B based on foundation for the medical bill summary, and Exhibit C, a letter, was objected to based on foundation and it was seen for the first time on the day of the hearing.

⁴ Claimant objected to the admission of Employer's Exhibit 2, Claimant's deposition, because Claimant testified at the hearing. Exhibit 2 was excluded.

8. On November 18, 2008, Dr. Beyer reported a history of “post lateral pain on the left,” and development of Achilles tendonitis on the right that required surgery, with identical symptoms on the left, and Achilles tendonitis on the opposite side.⁵
9. In December 2008 Scott Knox, PA-C to Dr. Beyer, reported persistent left Achilles tendinitis, despite conservative treatment.

Primary Injury

10. In February 2009, Claimant testified she left the office, locked the door, and walked on a snow and ice covered sidewalk from the office to the parking lot. While walking, she slipped and twisted her left foot.⁶ Claimant went home, elevated her foot and iced it.
11. The next morning, she notified Bill Willenbrink that she fell and injured herself because no one cleaned the sidewalk, and he should have had someone salt the sidewalk. Mr. Willenbrink did not ask Claimant if she needed treatment.
12. Claimant testified she sought treatment from Dr. Beyer several weeks later. On March 2, 2009, Dr. Beyer’s records show Claimant reported a history of residual tenderness and start-up pain in the morning. Dr. Beyer released her from care.⁷ Claimant testified she told Dr. Beyer about the slip and fall in February 2009, although none of his records reflect an accident at any time in February 2009.
13. On April 14, 2009, Dr. Beyer reported Claimant’s left heel had flared up again. Although Claimant’s symptoms had improved a week later, he suspected they could recur “with a vengeance.”
14. He decided to inject platelet-rich plasma (PRP”), a “somewhat new and novel approach” with promising results. On April 27, 2009, Dr. Beyer’s records showed Claimant had a “chronic ongoing history of pain with ambulation and range of motion” related to her left heel and Achilles tendon. Dr. Beyer made three injections into Claimant’s left heel, and took her off work for three weeks. During that time, Claimant worked from home.
15. In May 2009, Claimant informed Employer the 2009 fall was work related. She did not submit the injury under workers’ compensation because it was not her responsibility to do so.
16. On June 5, 2009, Employer released Claimant, and she applied for and received unemployment benefits.

⁵ Dr. Krause testified it was unclear from Dr. Beyer’s November 18, 2008 note which foot he diagnosed with Achilles tendinitis. However based on subsequent medical records, Dr. Krause concluded Dr. Beyer’s note referred to the development of Achilles tendonitis on the left.

⁶ Claimant was not sure what day she fell, but she knew it was a snowy day. Mr. Dean provided the February 28, 2009 date of injury during Claimant’s testimony. Also, reports from Drs. Woiteshek and Krause show the February 28th date of accident.

⁷ Dr. Beyer’s report did not mention either foot specifically.

17. Following complications, Dr. Beyer performed a second surgery on June 18, 2009. Claimant developed a staph infection, and used a portable wound V.A.C. for more than four months.⁸ Claimant sought employment using the V.A.C. machine, but received no offers.
18. On July 30, 2009, Claimant's left heel was debrided for an ulcerated left ankle.
19. On September 8, 2009, Dr. McKee, a plastic surgeon, debrided the left ankle and performed a skin graft from Claimant's left upper thigh to fill a hole in her left heel caused by the infection. Dr. McKee discharged Claimant on February 25, 2010.
20. On February 4, 2010, Omer Badahman, M.D., examined Claimant's left lower extremity for infection due to her concerns. Dr. Badahman repeatedly referred to Claimant's right Achilles tendon infection, but ordered an MRI of the left ankle.
21. Claimant produced an excel spreadsheet to show the providers and dates of service for medical treatment she received. (Exhibit B) Charges from April 2009 to March 1, 2010 reflect out-of-pocket expenses for the February 2009 accident. (Page1). The amounts listed on the far right side of each charge represent payments made by Claimant.
22. Claimant never asked her Employer to submit the claims through workers' compensation, because the company was self-insured and she had no out-of-pocket expenses. The Employer did not offer to submit the bills under workers' compensation.
23. Current complaints include numbness on her heel and toes, her toes feel cold even when she sweats, she cannot wear shoes with a back because it rubs her heel. Claimant is careful to avoid blisters on her heel because it can cause recurrent infection. Claimant has constant left ankle pain, muscle spasms above the surgery site, shooting pains on a regular basis, and difficulty climbing stairs. Now she shops online because she cannot carry items. It is painful to walk on sand. She needs help getting in and out of her husband's boat. Her husband drives when they leave town because it is too painful for her to walk through airports. She cannot carry her grandson on stairs or walk and hold him. It is difficult to garden because she cannot get off the ground. Her left foot swells.
24. Current medications include Flexeril and hydrocodone for both feet. She also takes Tylenol Arthritis strength as needed.
25. Dwight Woiteshek, a board certified orthopedic surgeon, performed an Independent Medical Examination on December 17, 2010, and testified at the request of Claimant's attorney. Claimant provided accident dates of July 10, 2008 and February 28, 2009.
26. Dr. Woiteshek diagnosed a left traumatic Achilles tendonitis of the left ankle, and opined Claimant's fall on February 28, 2009 was the prevailing factor that caused the condition. He concluded Claimant reached maximum medical improvement, and rated 50% PPD of the left foot at the 150 week level, for residual disability.

⁸ Initial physical therapy records dated June 19, 2009 show the date of onset for the left Achilles tendonitis was eight months earlier.

27. Dr. Woiteshek further opined the combination of Claimant's injuries to both feet produced more disability to her employment or reemployment than their simple sum, and a loading factor should be applied.
28. After a review of Claimant's Exhibit B, Dr. Woiteshek opined Claimant's medical care for both feet was reasonable and necessary.
29. On June 11, 2012, John Krause, M.D., a board certified orthopedic surgeon, performed an IME and testified at the request of the Employer's attorney.
30. Dr. Krause diagnosed left Achilles tendonitis, concluded Claimant had reached maximum medical improvement, and rated 5 to 8 percent PPD of the left ankle.
31. Dr. Krause testified the ulcer was caused by a skin breakdown, and the MRSA (staph infection) was caused by the PRP injections.
32. Dr. Krause opined Claimant's left Achilles tendonitis was not caused from overuse as a result of the right ankle condition. Dr. Krause opined Achilles tendonitis can occur spontaneously or from using crutches to hop on a good foot over a period of time. Also, Achilles tendonitis may develop and/or be aggravated from a slip and fall.
33. However, Dr. Krause concluded the Achilles tendonitis was not work related because there was no history of a work accident on February 28, 2009 in her treatment records. Also, Dr. Beyer's record dated November 18, 2008 reported left Achilles tendonitis symptoms, without any indication what caused it. Claimant received conservative treatment for left Achilles tendonitis until March 2, 2009, when Dr. Beyer released her. However, at the time of Claimant's release, she did not report a new injury on February 28, 2009.
34. Dr. Krause did not recommend the platelet-rich plasma ("PRP") injections to treat Achilles tendonitis. He referred to the treatment as "out of the norm." However, he conceded the treatment is accepted and may be reasonable for this condition.
35. Dr. Krause expected Claimant to miss substantial time for treatment of the left Achilles tendonitis.

FINDINGS OF FACT and RULINGS of LAW

Claimant asserts she sustained an accident to her left ankle that arose out of and in the course of employment. The Employer denies an accident occurred.

Claimant did not sustain an accident

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim... . *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). Proof of the cause of injury is based on reasonable probability *Smith v. Terminal Transfer Company*, 372 S.W.2d 659, 664(7) (Mo.App.1963)). 'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277(Mo.App. 1996).

An employer is “liable, irrespective of negligence, to furnish compensation under the [Worker's Compensation Law] for personal injury ...of the employee by accident arising out of and in the course of the employee's employment.” *Strieker v. Children's Mercy Hospital*, 304 S.W.3d 189, 192 (Mo.App.2010) (citing § 287.120.1).

Section 287.020.2 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*. An injury is not compensable because work was a triggering or precipitating factor. (Emphasis added) Section 287.800 requires strict construction of the provisions contained in Chapter 287.

In this case, I do not find Claimant to be generally credible. Claimant worked as a manager and knew Employer's policy for reporting work injuries. However, she waited until May 2009 to report the alleged February injury, after she received PRP injections. She decided not to submit her medical bills through workers' compensation because Employer was self-insured.

During the hearing, Claimant did not know the date she was injured but was certain it happened in February 2009. Attorney Dean provided the February 28, 2009 date during examination. If that date is correct, Claimant saw Dr. Beyer two days after the accident, on March 2, 2009, but the record contains no history of a recent fall. Based on minimal complaints to both feet on that date, Dr. Beyer released Claimant from care. If Claimant needed treatment, it is unlikely Dr. Beyer would have released her.

Claimant testified Dr. Beyer told her the left foot problems were caused by overuse during right foot treatment. However, Dr. Beyer's records contain no record of this conclusion during nine months of treatment. I find Dr. Krause's opinion more credible that it is rare for a person to be on crutches for an ankle fracture on one side and then develop Achilles tendonitis on the other side, particularly using crutches for a short time. Claimant testified she was on crutches one week after the 2008 injury and one week in November 2008.

Moreover, evidence revealed Claimant saw Dr. Anderson one time after the July 2008 injury and he released her to return as needed with no mention of crutches. Follow-up visits with Dr. Beyer in November 2008 and December 2008 did not mention crutches.

I find Dr. Woiteshek's opinion is not credible that the fall on February 28, 2009 was the prevailing factor that caused Achilles tendonitis. I find Dr. Krause's opinion is more credible that the Achilles tendonitis was not work related because there was no history of a work accident on February 28, 2009, and Dr. Beyer's November 18, 2008 report did not include a history of a new injury. The medical evidence contains no report of a February 28, 2009 accident until December 2010, when she reported it to Dr. Woiteshek, her expert medical physician.

Based upon credible testimony by Dr. Krause, medical records and reports, and less than credible testimony by Claimant and Dr. Woiteshek, I find Claimant did not meet her burden to show she sustained an accident pursuant to Section 287.020.2. Having found no accident occurred, all other issues are moot.

CONCLUSION

Claimant did not meet her burden to show she sustained an accident. All other issues are moot. The Second Injury Fund claim is denied.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation