

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

Injury No.: 07-125897

Employee: Tracy Whorton
Employer: Silgan Container
Insurer: Zurich American Insurance Co.

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, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Injury arising out of and in the course of employment

Section 287.020.3(2) RSMo 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 a risk specific to her employment activities on December 27, 2007. Employee slipped and fell in employer's icy parking lot while on her way to her car to obtain her work gloves.¹ There is no evidence on this record that would support a finding that employee was equally exposed to the unique risk of falling in employer's icy parking lot in her normal nonemployment life. We conclude that employee's injuries arose out of and in the course of her employment. See *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012), and *Dorris v. Stoddard County*, No. SD32830 (Jan. 31, 2014), holding that a worker's injuries arise out of and in the course of employment when they result from the worker's exposure to an unsafe location as a function of the employment.

¹ We defer to the administrative law judge's determination that employee, and her coworker Cora Evans, provided credible testimony regarding employee's purpose in traversing employer's icy parking lot shortly after the beginning of her work shift on December 27, 2007.

Employee: Tracy Whorton

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In light of the foregoing analysis, we discern no need to discuss or consider the continued applicability (if any) of the mutual benefit doctrine under the 2005 amendments to the Missouri Workers' Compensation Law; accordingly, we hereby disclaim the administrative law judge's analysis and comments on that topic.

Nature and extent of permanent partial disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with a compensable work injury. The administrative law judge credited and adopted the ratings from employee's expert, Dr. Stuckmeyer, as to the extent of permanent partial disability employee suffered as a result of her work injury. Employer complains that these ratings are too high.

It is well-settled in Missouri that the issue of the nature and extent of permanent disability resulting from a compensable work injury is within the "unique province" of the fact-finder to decide. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007). After careful consideration, we will defer to the findings of the administrative law judge on this issue, because in his brief and at oral argument before the Commission, employer's counsel declined to provide a compelling reason to disturb these (or any other) findings, instead choosing to level personal attacks at the administrative law judge, assert factual propositions not shown to be supported by the record, and advance legal arguments that, as counsel conceded at oral argument, find no support in the language of Chapter 287 or relevant case law.

Conclusion

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

The award and decision of Administrative Law Judge Lawrence G. Rebman, issued December 6, 2013, is attached and incorporated by this reference.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 1st day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

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

Attest:

Secretary

Employee: Tracy Whorton

SEPARATE OPINION

(Concurring in Part and Dissenting in Part)

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I agree with the decision by the majority, but I would increase employee's award of compensation in this matter consistent with Dr. Stuckmeyer's credible opinion that the multiplicity of employee's injuries justifies the application of a 10% augmentation, or multiplicity factor.

This employee suffered an array of debilitating injuries when she fell in employer's icy parking lot, including a right trimalleolar ankle fracture, a chronic lumbosacral strain and right sacroiliac dysfunction with radicular symptoms into the right lower extremity, and a likely meniscal tear in her right knee. As employee credibly testified, and the administrative law judge detailed in his award, employee's recovery following these multiple serious injuries was substantially hindered when employer's insurer failed to authorize treatments recommended by the doctors it selected to care for employee, even going so far at one point as to require the providers to stop physical therapy for employee's back right in the middle of a session.

I pause to note that employer's counsel affirmatively misstated the record in this matter when, at oral argument, he asserted that employee did not have right knee complaints until "years" after the work injury. To the contrary, the January 28, 2008, and February 1, 2008, records from Dr. Smith reflect that employee complained of low back, hip, and right knee pain after her first attempts to bear weight on her right lower extremity. See *Transcript*, pages 212, 177. I find counsel's lack of candor toward this tribunal to be emblematic of employer's overall approach to this case. It appears that employer's insurer unilaterally decided, without any medical opinion to back it up, that this was merely an ankle fracture case, and that employee was not going to get any other treatment, despite the existence in the earliest medical records of substantial back, hip, and right knee complaints.

As a result of the failure on the part of employer and insurer to recognize their "absolute and unqualified" duty under the law to provide medical treatment, see *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007), employee suffered a needlessly prolonged recovery period, and as detailed by Dr. Stuckmeyer, has been left with enhanced permanent partial disability. For this reason, I would apply a 10% multiplicity factor and increase employee's compensation for permanent partial disability to \$81,309.36.

Because the majority did not award a 10% multiplicity factor to account for employee's multiple injuries, I respectfully dissent from that aspect of the Commission's decision; otherwise, I concur in the result.

Curtis E. Chick, Jr., Member

FINAL AWARD

Employee: Tracy Whorton Injury No: 07-125897
Employer: Silgan Container
Insurer: Zurich American Ins. Co.
Hearing Date: October 3, 2013
Briefs Filed: November 4, 2013 Checked by: LGR/lh

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: December 27, 2007
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee went to get her gloves from the car and fell on ice in the parking lot of her employer.
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: lower back, left hip.

14. Nature and extent of any permanent disability:

40% permanent partial disability to her right ankle at the 155 week level or 62 weeks of disability;
30% permanent partial disability to Ms. Whorton's right knee at the 160 week level or 48 weeks of disability; and,
20% permanent partial disability to the body as a whole at the 400 week level or 80 weeks of disability.
15. Compensation paid to-date for temporary total disability: \$9,005.29
16. Value necessary medical aid paid to date by employer/insurer? \$31,913.56
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: \$705.07
19. Weekly compensation rate: \$470.07/ \$389.04
20. Method wages computation: Stipulation of the parties
21. Employer-Insurer amount of compensation payable:
22. Future requirements awarded: Ms. Whorton is awarded future medical for the removal of the hardware in her right ankle.

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of Kathleen McNamara, Attorney, for reasonable and necessary attorney's fees pursuant to §287.260.1. RSMo.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tracy Whorton Injury No: 07-125897
Employer: Silgan Container
Insurer: Zurich American Ins. Co.
Hearing Date: October 3, 2013
Briefs Filed: November 4, 2013 Checked by: LGR/lh

On October 3, 2013, Ms. Tracy Whorton and Employer-Insurer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. Ms. Tracy Whorton, appeared in person and with counsel, Katheen McNamara. The Employer-Insurer appeared by their counsel, Thomas D. Billam.

STIPULATIONS

The parties stipulated that:

1. On or about December 27, 2007, (“the injury date”), Silgan Container. (“Silgan” or “Employer”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by Zurich American Insurance Company;
2. Ms. Whorton was its employee working subject to the law in St. Joseph, Buchanan County, Missouri, and that for purposes of hearing, the venue was proper in St. Joseph, Buchanan County, Missouri.
3. Ms. Whorton notified Silgan of her injury and filed her claim within the time allowed by law;
4. Silgan provided Ms. Whorton with medical care costing \$31,913.56; and
5. Silgan provided St. Joseph, Buchanan County, Missouri with temporary total disability in the total sum of \$9,005.29.

ISSUES

The parties stipulated that the issues before the Division are:

1. Whether the accident arose out of Claimant’s work;
2. Nature and extent of injuries; and
3. Future medical care.

FINDINGS OF FACT & RULINGS OF LAW

Ms. Whorton offered the following exhibits which were admitted.

- Exhibit A – Complete Medical Records of Dr. Stuckmeyer
- Exhibit B – Photo of Ankle
- Exhibit C – Photo of Ankle

The Employer-Insurer did not call any witnesses, and offered the following exhibits, all of which were admitted into evidence without objection. Employer-Insurer's Exhibit Nos. 1 and 2 were incorrectly marked October 2, 2013 when actual trial was heard on October 3, 2013. All other exhibits are properly marked October 3, 2013.

- Exhibit 1 – Medical Records of Dr. Kneidel
- Exhibit 2 – Medical Records of Dr. Clymer
- Exhibit 3 – Social Security disability doctor, Dr. Bingham
- Exhibit 4 – Written statement of Cora Evans

Based on the above exhibits and the testimony of all witnesses, I make the following findings of fact and rulings of law.

Ms. Tracy Whorton was present at the hearing and her testimony was credible. Ms. Whorton had worked for Employer since 1997 and was classified as a general laborer on December 27, 2007, the date of her injury. Upon reporting for work at 6 AM, Ms. Whorton noticed that one of her tires appeared to be going flat. She entered the building and mentioned the flat tire to Ms. Cora Evans. Ms. Evans told Ms. Whorton that she had a can of "Fix-A-Flat" in her car that she could use. After this conversation, Ms. Whorton went to clock in and see what her assigned duties were that day. Ms. Whorton testified that her assigned duties were cleaning tasks which would require her to use gloves that she stored in her vehicle. Ms. Evans testified personally at the hearing and her testimony was credible and consistent with her signed statement of April 11, 2008.

Both Ms. Evans and Ms. Whorton testified that they had a locker at the plant; however, it was the custom of many employees to store their gloves in their vehicles because employee lockers were located much farther away from the actual work location than the parking lot. In fact, the employer indicated at the hearing that Ms. Whorton was terminated for keeping gloves in the car despite warnings not to do so. According to the testimony of Ms. Whorton, Ms. Evans was working an earlier shift and got off at 7:30 AM.

Upon learning of her assigned duties, Ms. Whorton returned to tell Ms. Evans that she needed to get her gloves from her car. Both Ms. Whorton and Ms. Evans left the building and went to the parking lot to get the fix-a-flat and to retrieve the work gloves. While walking to the vehicle, Ms. Whorton slipped on the ice in the employer's parking lot and fell, injuring her back,

hip, right knee, right ankle and right foot. She was unable to get up and the Ms. Evans summoned help.

Ms. Whorton was transported by ambulance to Heartland Hospital where it was determined that she suffered a trimalleolar fracture with dislocation of the ankle which necessitated an open reduction and internal fixation of the right ankle with plate and screw fixation. This surgery was performed by C. Daniel Smith, D.O., who also provided treatment for the next several weeks.

On January 28, 2008 Nurse Eagleburger noted that "...since she has tried to weight bear her hip and knee are hurting, and that 3 toes and top of her foot is [sic] numb..." (Ex 1, p.59). On February 1, 2008 Dr. Smith noted that "She says it is not her ankle that hurts, but her hip and knee seems stiff and sore." (Ex. 1, p. 46).

Despite the complaints of knee and hip pain the Employer's insurer did not authorize these injuries to be treated. On February 22nd, after Dr. Smith's nurse notified the insurance case worker that Ms. Whorton was coming in to address these problems she noted "...Stephanie notified that Tracy is coming in. she states she is not okay her [sic] to be seen for her back, hip or knee." (Ex 1, p.59).

Dr. Smith commented in his note of February 22, 2008:

Tracy Whorton returns. She is now eight weeks post surgery. She is now describing right knee pain as well as right lower leg pain and pain up into the low back and hip area as well. She said this all began Wednesday after therapy. She tried walking full weight-bearing on Wednesday, but unfortunately this has produced too much pain in the ankle.

In the office today, I focused entirely on her ankle fracture. Under Work Comp, we are not authorized to treat for any other problems other than her ankle.

(Ex 1, p. 45)

Ms. Whorton testified that she did not understand why Dr. Smith was not treating all of her symptoms and lost confidence in his care. Ms. Whorton's care was transferred to Dr. Matthew Kneidel who determined that Ms. Whorton was a very active, heavy laborer who was unable to meet her occupational duties. Under Dr. Kneidel's care, Ms. Whorton went through Work Hardening and remained off work until she was able to get around without crutches. On June 11, 2008, Ms. Whorton was told that she had reached maximum medical improvement and was given a permanent work restriction of 100 pounds.

Ms. Whorton continued to have pain radiating from her low back, through her right hip down to the knee, as well as muscle spasms. On August 25, 2008, she was seen by David Clymer, M.D. for her low back. Dr. Clymer ordered physical therapy. (Ex A, p. 177). On September 16, 2008, Ms. Whorton was seen by Dr. Clymer but noted that Physical Therapy had not yet been approved or initiated. (Ex. A, p. 166). On January 7, 2009, Dr. Clymer notes that Ms. Whorton had shown improvement with Physical Therapy and Relafen. Also: "Apparently,

the therapy was discontinued back in early December. Now she is having more significant discomfort and feels as though she would benefit from a few more sessions of therapy. The therapist's last note also suggested continuing her therapy at that point." ... "In general, I would agree that some ongoing therapy would be appropriate if she is clearly seeing lasting symptomatic improvement. (Ex. A, p.162). On February 4, 2009, Dr. Clymer notes Ms. Whorton was not approved for physical therapy. (Ex. A, p. 161).

On May 15, 2009, Dr. Clymer notes that Ms. Whorton returns for a routine follow-up following a few weeks of physical therapy. "The note from the therapist suggests good participation and good progress. She still has some lower back discomfort and some stiffness. There is also a little bit of mild dysesthesia in the right leg, although this is not too severe. (Ex 2, p. 15).

Ms. Whorton worked from July 2008 until August 2009 when she was terminated for an alleged theft because she kept her work gloves in her car. Ms. Whorton testified that this cause for her termination was overturned. Ms. Whorton is no longer employed by Silgan and since her employment at Silgan ended, the Ms. Whorton has not worked anywhere for pay.

In July 2010, Dr. Kneidel recommended removal of the hardware in her ankle and this was approved by the Employer/Insurer. While Ms. Whorton is not comfortable with having the hardware removed at the present time, she would like to have this option available in the future in the event that the hardware does become a problem.

Ms. Whorton testified that she notified her treating physicians of the knee complaints caused by the accident and made repeated requests directly to her Employer, no treatment has ever been offered. Ms. Whorton reported that when she fell on her back, her knee hyperextended to the side. Her right knee feels like it will give out on her and she has constant pain on the inside of her knee which is alleviated a little with rest and elevation. The Employer's insurer has refused to authorize treatment for her knee. At her own expense she obtained brief relief from a cortisone injection administered by Dr. Humphrey, but she has been advised that she needs an MRI to explore the suspicion that she has a medial meniscal tear which requires treatment.

Ms. Whorton testified that she continues to have significant problems with her right ankle and foot as well. She has the feeling of pins and needles in her foot. Her foot is inverted, and she walks with an altered gait. Her foot swells daily; the swelling progresses throughout the day, as does a marked discoloration of her foot. The metal in her ankle causes her problems due to cold weather and she has to wear leg-warmers from October through April to combat these problems. If her foot gets cold, it throbs. She has a constant ache and pain in her ankle. She has no strength in her foot, and very limited range of motion, which she feels stems from the lack of therapy provided. She needs to elevate her foot to relieve the pain and has to sleep with her foot elevated. She is limited in how long she can walk or stand to about 5 minutes. She has tried to adapt to her disability as well as she can. For instance, at home, to allow her to accomplish a simple task such as cooking, she places a step stool next to her stove so she can rest her foot on it while she cooks. The use of a walking stick also provides some assistance.

Because of her limited range of motion, Ms. Whorton has a problem walking. In addition to limited standing and walking, Ms. Whorton testified that she cannot run and has to go up and down stairs one at a time. She has had to obtain a handicapped sticker to allow her to function in the community.

Ms. Whorton testified that her low back constantly aches and she gets occasional spasms. She is unable to get comfortable. She has pain which radiates from her low back down through her right hip and down to her right knee. She feels that she is getting worse as time goes by. She has a difficult time bending and lifting due to her back problems. Her problems are exacerbated by sitting too long or standing too long or lifting too much. She tries to alleviate her pain with heat and deep breathing. Although she never sought chiropractic care prior to this accident, she occasionally seeks some temporary relief with chiropractic care, but tries not to go too often due to the expense.

Dr. Stuckmeyer examined Ms. Whorton on January 4, 2009. He opined that due to the work accident on December 27, 2007, Ms. Whorton has right sacroiliac dysfunction, chronic lumbosacral strain and radicular symptoms, and recommended an MRI and a series of right SI injections. He rated this disability at 20% of the lumbosacral spine. Dr. Stuckmeyer also diagnosed her with status post open reduction, internal fixation trimalleolar fracture with ongoing limitations in range of motion, persistent symptoms of pain and dysfunction and swelling, and rated her at 40% of the right ankle. He felt that hardware removal is appropriate. Finally, Dr. Stuckmeyer diagnosed her with a possible medial meniscus tear due to her work accident which should be treated but, lacking treatment, he rated this at 30% disability at the knee.

Dr. Kneidel rated the Ms. Whorton according to the AMA Guides on Impairment as 8% to the whole person, 25% to the lower extremity and 35% to the foot. Dr. Clymer rated her as a 5% disability to the body as a whole.

Ms. Whorton is not requesting any additional treatment from "work comp" doctors for any of her ongoing problems. She simply desires just compensation for her permanent disability. Ms. Whorton is currently receiving social security disability benefits and she is in vocational rehabilitation.

COMPENSABILITY

Section 287.020.3(2)(b) governs whether an injury arises out of and in the course of employment. The statute states that an injury shall be deemed to arise out of and in the course of employment only if 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 and normal non-employment life.

The terms 'out of' and 'in the course of' the employment are not synonymous but are separate tests for compensability and both must be satisfied before the claimants here may prevail." *Blatter v. Missouri Department of Social Services, Division of Aging, 655 S.W.2d 819*

(*Mo.App.1983*)(*overturned on unrelated grounds, Hampton v. Big Boy Steel*) “There is no all embracing definition of the phrase ‘arising out of and in the course of his employment,’ and every case involving the phrase should be decided upon its own particular facts and circumstances and not by reference to some formula.” *Id.* “Where, as here, there is no significant factual dispute, the issue of whether an accident and the consequent injury or death arose out of and in the course of employment is ultimately a question of law.” *Id.*

In *Blatter*, an employee's widow and son sought compensation for the employee's death that occurred while he was walking across a busy street to his hotel from a non-mandatory social function held in conjunction with a mandatory out-of-town training conference. The state argued that the fatal accident did not arise out of and in the course of the employee's employment. *Id.*

The Court of Appeals in *Blatter* opined that: “A claim is not compensable if, at the time of the injury, the employee is engaged in pleasure purely his own.” *Id.* “On the other hand, [a]n injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment.” *Id.* (*citation omitted*). “Accordingly an injury resulting from such an act arises out of and in the course of the employment; and this rule is applicable even though the advantage to the employer is slight.” *Id.* at 823–24. “The ‘concurrent benefit’ principle cannot be applied without limitation. Eventually, the indirect benefit to the employer becomes so tenuous as to be imperceptible.” *Id.* at 824.

Employer/Insurer assert that Ms. Whorton fell in the parking lot on December 27, 2007 on a personal errand, and not doing any activity to support Employer's business interests. Employer/Insurer assert Ms. Whorton was going back to her car to fix a tire on her car that was either flat or going flat. The evidence in this case by Ms. Whorton and Ms. Evans indicates that Ms. Whorton was obtaining a can of fix-a-flat for her car and retrieving work gloves for assigned cleaning duties.

The employer and insurers brief concedes that Whorton had “clocked in” to work that morning, satisfying the “in the course of” portion of that statute. However, the dispute the “arising out of” prong of the statute requires that Ms. Whorton be pursuing the business interests of the employer, and not pursuing a purely personal interest.

The uncontroverted evidence in this case was that Ms. Whorton notice the flat tire upon her arrival at work on December 27, 2007. She immediately told her co-worker, Ms. Evans about the flat tire and that Ms. Evans offered her a can of fix-a-flat that was stored in her car. Ms. Whorton did not immediately take Ms. Evans up on the offer of assistance and return to her car on a purely personal errand but instead went to clock in and find out what her job duties were that day. Upon learning of her duties, Ms. Whorton returned to inform Ms. Evans that she needed to get her gloves from her car. Once again, Ms. Evans offered her can of fix-a-flat and went with Ms. Whorton to the parking lot.

Both witnesses testified that employees at Silgan Containers routinely kept gloves in their car because they would have to walk a long distance across the plant to a locker area to get them. The evidence was that proper fitting gloves were difficult to find or that an employee would often discover gloves missing from where they had been stored. There is no evidence or argument contesting the testimony that it was appropriate for Ms. Whorton to want the protection of gloves for the duty she was assigned on the day of the injury. The evidence in this case is that these gloves were provided by the employer and the employer was unhappy with the numbers of gloves that the employees used. Accordingly, the use of the gloves was in the employer's interest and the employees' habit of employees storing them in their cars to reduce the number of gloves that were lost or wasted was in furtherance of the employer's interests.

Based upon the evidence, this court finds that Ms. Whorton was not merely taking care of personal business to address her flat tire but was also acting in furtherance of the employer's interests by getting gloves from her car to perform her assigned duties.

Nature and Extent of Injury

Section 287.140. 1. R.S.MO. states:

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.

Section 287.020. 1 3. (1) R.S.Mo state:

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

Missouri law defines the term "accident" as an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. Section 287.020.2 R.S.Mo. In order for an injury to be compensable, the employment must have been the prevailing factor in causing the injury.

An employer is responsible for medical treatment if the care flows from the accident, via evidence of a medical causal relationship between the condition and the compensable injury. *Tillotson v. St. Joseph Medical Center*, 347 S.W. 3d 511, 520 (Mo.App. 2011).

Employer/Insurer contests the nature and extent of the disability to the right ankle and the low back, and has denied that the right knee complaints were medically caused by the fall in the parking lot. As such, each issue will be address separately:

Right Ankle

The evidence in this case is uncontested that on December 27, 2007, Ms. Whorton suffered a right malleolar fracture that was treated with surgical plate and screws. Ms. Whorton testified that she continues to have significant problems with her right ankle and foot as well. She testified that she has no feeling in her foot—in fact she has no feeling in her right leg below her knee. Ms. Whorton produced photos and testified that her foot swells daily; the swelling progresses throughout the day, as does a marked discoloration of her foot. The metal in her ankle causes her problems when cold weather arrives and she has to wear leg-warmers from October through April to combat these problems. If her foot gets cold, it throbs. She has no strength in her foot, and very limited range of motion. She needs to elevate her foot to relieve the pain and has to sleep with her foot elevated. She is limited in how long she can walk or stand to about 5 minutes. The right malleolar fracture was treated with surgical plate and screws, and has healed. Dr. Kneidel rated Ms. Whorton at 35% permanent partial disability to the ankle based upon the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition*. Dr. Stuckmeyer gave 40% permanent partial disability to Ms. Whorton's right ankle.

While both doctors' reports are credible this court gives greater weight to Dr. Stuckmeyer's based upon Ms. Whorton's complaints and the medical evidence. Therefore, this court finds that Ms. Whorton suffers from a 40% permanent partial disability to her right ankle. Both Drs. Kneidel and Stuckmeyer have opined that it's appropriate to have the hardware removed, accordingly she is awarded future medical for the removal of the hardware in her right ankle.

Right Knee

Ms. Whorton testified that when she fell on her back, her knee hyperextended to the side. Her right knee feels like it will give out on her and she has constant pain on the inside of her knee which is alleviated a little with rest and elevation. The Employer's insurer has refused to authorize treatment for her knee. At her own expense she obtained brief relief from a cortisone injection administered by Dr. Humphrey, but she has been advised that she needs an MRI to explore the suspicion that she has a medial meniscal tear which requires treatment.

The evidence in this case indicates that the injury occurred on December 27, 2007. That same day, Dr. C. Daniel Smith, D.O., performed an open reduction and internal fixation of the right ankle with plate and screw fixation. Following the surgery, Ms. Whorton was non-ambulatory for an extended period of time.

On January 25, 2008, Dr. Smith ordered physical therapy and immediately Ms. Whorton began to complain of knee and hip pain. (Ex. 2, p. 62.) On February 22, 2008, after Dr. Smith's nurse notified the insurance case worker that Ms. Whorton was coming in to address these

problems she noted "...Stephanie notified that Tracy is coming in. She states she is not okay her [sic] to be seen for her back, hip or knee." (Ex 2, p. 57)

Dr. Smith commented in his note of February 22, 2008:

Tracy Whorton returns. She is now eight weeks post surgery. She is now describing right knee pain as well as right lower leg pain and pain up into the low back and hip area as well. She said this all began Wednesday after therapy. She tried walking full weight-bearing on Wednesday, but unfortunately this has produced too much pain in the ankle.

In the office today, I focused entirely on her ankle fracture. Under Work Comp, we are not authorized to treat for any other problems other than her ankle.

(Ex 1, p. 45)

Based upon the evidence, it appears the employer-insurer have refused to provide medical care to Ms. Whorton to address complaints regarding her right knee. Given the uncontroverted medical evidence that Ms. Whorton suffered from a right knee injury and the uncontroverted opinion of Dr. Stuckmeyer, this court assess a 30% permanent partial disability to Ms. Whorton's right knee injury. Ms. Whorton has sought a final award and does not want further medical treatment from the employer/insurer. No future medical is awarded for the right knee.

Low Back

Despite her repeated complaints of pain in her knee and hip, it was not until August 25, 2008, that Ms. Whorton was seen by David Clymer, M.D. for her low back. Dr. Clymer ordered physical therapy. (Ex. A, p. 177). On September 16, 2008, Ms. Whorton was seen by Dr. Clymer but noted that Physical Therapy had not yet been approved or initiated. (Ex. A, 166). On January 7, 2009, Dr. Clymer notes that Ms. Whorton had shown improvement with Physical Therapy and Relafen. Also: "Apparently, the therapy was discontinued back in early December. Now she is having more significant discomfort and feels as though she would benefit from a few more sessions of therapy. The therapist's last note also suggested continuing her therapy at that point." ... "In general, I would agree that some ongoing therapy would be appropriate if she is clearly seeing lasting symptomatic improvement. (Ex. A. p.162). On February 4, 2009, Dr. Clymer notes that Ms. Whorton was not approved for physical therapy. (Ex. A, p. 161).

On May 15, 2009, Dr. Clymer notes that Ms. Whorton returns for a routine follow-up following a few weeks of physical therapy. "The note from the therapist suggest good participation and good progress. She still has some lower back discomfort and some stiffness. There is also a little bit of mild dysesthesia in the right leg, although this is not too severe." (Ex 2, p. 15).

Ms. Whorton testified that her low back constantly aches and she gets occasional spasms. She is unable to get comfortable. She has pain which radiates from her low back down through her right hip and down to her right knee. She feels that she is getting worse as time goes by. She

has a difficult time bending and lifting due to her back problems. Her problems are exacerbated by sitting too long or standing too long or lifting too much. She tries to alleviate her pain with heat and deep breathing.

Dr. Clymer's rating report of July 17, 2009 indicated that Ms. Whorton was at maximum medical improvement, that her symptoms were "...consistent with a simple lumbar strain and possibly some mild degenerative disc disease and a little bit of nerve root irritability." (Ex A, p. 13) Dr. Clymer did not see any need more aggressive or surgical measures. Dr. Clymer stated that Ms. Whorton had a low back strain, contusion, and mild nerve root irritation, for which he gave her 5% permanent disability to the body as a whole. Dr. Clymer's reports and ratings appear to dismiss Ms. Whorton's complaints regarding her back injury. This fact combined with the unexplained refusal to provide care for Ms. Whorton's knee complaints and denials and delays in providing physical therapy call into question the credibility of his report.

Dr. Stuckmeyer examined Ms. Whorton on January 4, 2009. He opined that due to the work accident on December 27, 2007, Ms. Whorton has right sacroiliac dysfunction, chronic lumbosacral strain and radicular symptoms, and recommended an MRI and a series of right SI injections. He rated this disability at 20% of the lumbosacral spine. I find Dr. Stuckmeyer's opinion to be credible.

The evidence in this case appears to indicate that Ms. Whorton may have some significant problems with her low back; however, there has been little interest on the part of the employer/insurer to definitively determine what problems she may have. Ms. Whorton does not want further medical treatment from employer for her low back and therefore it is not awarded. Accordingly, this court finds that Ms. Whorton suffers from a 20% permanent partial disability to the body as a whole.

Conclusion

Ms. Whorton suffers from: 40% permanent partial disability to her right ankle at the 155 week level or 62 weeks of disability; 30% permanent partial disability to Ms. Whorton's right knee at the 160 week level or 48 weeks of disability; and, 20% permanent partial disability to the body as a whole at the 400 week level or 80 weeks of disability. Based upon these findings, the Employer-Insurer is ordered to pay Employee benefits of \$73,917.60. Furthermore, Ms. Whorton is awarded future medical for the removal of the hardware in her right ankle.

Finally, this Court awards to Employee's attorney Kathleen McNamara, a fee of 25% percent of all benefits awarded herein, as representative of necessary legal services rendered to Ms. Whorton.

Issued by Division of Workers' Compensation
Employee: Tracy Whorton

Injury No.: 07-125897

Made by: _____

Lawrence Rebman
Administrative Law Judge
Division of Workers' Compensation