

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

Injury No. 15-046929

Employee: Juanita Wall
Employer: Bass Pro Outdoor World, LLC
Insurer: Travelers Indemnity Company of America

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, 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 (ALJ) with this supplemental correcting opinion.

Employee's brief suggests that the ALJ's award incorrectly references a prior fusion to employee's left ankle.¹ On page 6 of the ALJ's award, the second sentence of the first paragraph under the subtitle *Prior Medical Conditions* states:

Her prior injuries include polio to her left foot and leg in 1955, a right knee replacement in 2008, and a left ankle fusion surgery in 1993. (Exhibit F, p. 865).

Employer's Exhibit F includes Dr. Ted Lennard's March 10, 2017, office clinic notes. Dr. Lennard documents a left ankle fusion in 1993 in employee's procedure/surgical history.² Dr. Bruce Schlafly's report of September 14, 2016, admitted as employee's Exhibit 1, also references a left ankle fusion in employee's medical history.³ Dr. John L. Putnam's July 24, 2015, report, included in Employee's Exhibit 3, records a fusion of the employee's *right* ankle in 1992.⁴ Our observation of these inconsistencies does not detract from or affect the administrative law judge's correct analysis.

Conclusion

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

¹ Employee's brief, received May 31, 2018, p. 14.

² *Transcript*, 453.

³ *Id.* 98.

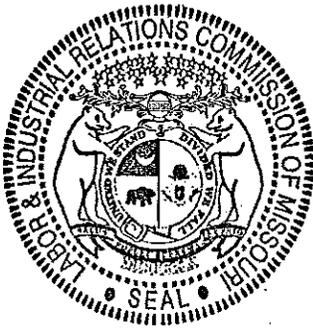
⁴ *Id.* 219.

Employee: Juanita Wall

The award and decision of Administrative Law Judge Kevin A. Elmer, issued January 26, 2018, is attached and incorporated to the extent not inconsistent with this supplemental opinion.

Given at Jefferson City, State of Missouri, this 17th day of August 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



John J. Larsen, Jr.

John J. Larsen, Jr., Chairman

Reid K. Forrester

Reid K. Forrester, Member

Curtis E. Chick, Jr.

Curtis E. Chick, Jr., Member

Attest:

Damela M. Hoyer
Secretary

AWARD

Employee: Juanita Wall

Injury No. 15-046929

Dependents: N/A

Employer: Bass Pro Outdoor World, LLC

Insurer: Travelers Indemnity Company of America

Additional Party: N/A

Hearing Date: September 25, 2017 (Record Closed October 24, 2017)

Checked by: KAE

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 1, 2015
5. State location where accident occurred or occupational disease was contracted: Springfield, Greene 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? 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 employed as a cash office clerk, claimant was pushing a shopping cart filled with coin wrapper boxes through the fishing department. She fell suddenly to her right side, resulting in immediate pain in her right shoulder.

Employee subsequently developed left hand numbness and tingling 4 to 5 weeks after the accident. The claimant alleges they are due to occupational exposure to hand-intensive work activities resulting from modified work mechanics following her right shoulder injury.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right shoulder and left hand.
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? \$7,649.35
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$537.71
19. Weekly compensation rate: \$358.47
20. Method wages computation: Stipulation by the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A

TOTAL: \$0.00

23. Future requirements awarded: None

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jonathan B. Pitts.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Juanita Wall

Injury No. 15-046929

Dependents: N/A

Employer: Bass Pro Outdoor World, LLC

Insurer: Travelers Indemnity Company of America

Additional Party: N/A

Hearing Date: September 25, 2017 (Record Closed October 24, 2017)

Checked by: KAE

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on September 25, 2017. The parties were afforded an opportunity to submit proposed awards, resulting in the record being completed and submitted to the undersigned on or about November 10, 2017. The employee, Juanita Wall appeared personally by and through her attorney, Jonathan Pitts. The employer appeared through its Risk Management Claims Manager, Cheryl Nall, and attorney Todd Johnson appeared on behalf of the employer and insurer.

STIPULATIONS

The parties entered into a stipulation of facts. The stipulation is as follows:

1. On or about July 1, 2015, Bass Pro Outdoor World, LLC was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Travelers Indemnity Company of America.
2. On the alleged injury date of July 1, 2015, Juanita Wall was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
3. The above-referenced employment and alleged accident and/or incident of occupational disease occurred in Springfield, Greene County, Missouri. The parties agree to venue lying in Springfield, Greene County, Missouri. Venue is proper.
4. At the time of the alleged accident and/or incident of occupational disease of July 1, 2015, the employee's average weekly wage was \$537.71, which is sufficient to allow a compensation rate of \$358.47 for permanent partial disability compensation.
5. The employee gave timely notice of the injury to the employer.
6. The claim for compensation filed by the employee was timely.
7. The employer and insurer have not provided temporary total disability benefits to the employee.

8. The employer and insurer have provided medical treatment to the employee in the amount of \$7,649.35, but an additional claim for past medical care has been asserted by the employee.
9. The attorney fee being sought by Jonathan Pitts of Pitts Law Office is 25%.
10. The parties stipulated on a conditional basis to an award of two weeks for disfigurement to Claimant's left hand, but only if the claim, which is specifically denied by the employer, is found compensable.

ISSUES

The issues to be resolved by hearing include:

1. Whether the employee sustained an accident or incident of occupational disease on or about July 1, 2015; and, if so, whether the accident or occupational disease arose out of and in the course of her employment with the employer.
2. Whether the alleged accident or incident of occupational disease caused the injuries and disabilities for which benefits are now being claimed.
3. Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$50,024.00.
4. Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of her injuries.
5. Whether the employee is entitled to temporary total disability compensation. (The employee seeks payment for twelve (12) weeks of temporary total disability compensation in the amount of \$4,301.64, plus future temporary total disability per *Greer v. Sysco Food Service*, 475 S.W.3d 655 (Mo. Banc 2015)).
6. Whether the employee sustained any permanent disability as a consequence of the alleged accident on July 1, 2015; and, if so, what is the nature and extent of the disability.
7. Whether employee sustained any disfigurement to her left hand. (There was a conditional stipulation of two weeks as the award for Claimant's injury to her left hand, if it is determined to be compensable).

EVIDENCE PRESENTED

The employee testified at the hearing in support of her claim. In addition, the employee offered for admission the following exhibits:

- Exhibit 1: Dr. Schlafly's IME and 60 Day Letter
- Exhibit 2: Report of Injury & Claim for Compensation
- Exhibit 3: Medical Records
- Exhibit 4: Mercy medical Records – 6/12/15

- Exhibit 5: Mercy Denial of Records
- Exhibit 6: Medical Bills & Spreadsheet
- Exhibit 7: Claimant's Deposition
- Exhibit 8: Claimant's Recorded Statement
- Exhibit 9: Accident Video
- Exhibit 10: Accident Pictures
- Exhibit 11: Witness Pa Moua Subpoena
- Exhibit 12: Recorded Statement of Pa Moua
- Exhibit 13: Travelers' Denial Letter – 7/29/15
- Exhibit 14: Request for Treatment – 8/19/15 & 12/1/15
- Exhibit 15: Deposition of Pa Moua

The parties stipulated to admission of employee's Exhibits 1-11 and 13-15. The employer/insurer's objection to the admission of Exhibit 12 (Pa Moua Statement) was sustained. The record was left open for 30 days to permit the deposition of witness Pa Moua to occur and be offered into evidence. Exhibit 15 has been offered and admitted into evidence.¹

The employer and insurer presented one witness at the hearing of this case – Cheryl Nall. In addition, the employer and insurer offered for admission the following exhibits:

- Exhibit A: Juanita Wall – Written Statement (07-01-2015)
- Exhibit B: Juanita Wall – Recorded Statement (07-16-2015)
- Exhibit C: Juanita Wall – Deposition (01-19-2017)
- Exhibit D: Photos (1, 2, 3)
- Exhibit E: Surveillance Video (see enclosed zip drive)
- Exhibit F: Dr. Lennard Notice of Complete Medical Report
- Exhibit G: 13-Week Wage Statement
- Exhibit H: Medical Expense Log
- Exhibit I: Excerpt from the record of Dr. Heath Morgan

The employer and insurer presented exhibits A through I. The parties stipulated to the admission of Employer's Exhibits A-H. During the hearing, Employer's Exhibit I, an excerpt from the medical records of Dr. Heath Morgan showing that Claimant had been diagnosed with type II diabetes, was offered into evidence over the objection of Claimant's counsel. The offer included an Affidavit of Dr. Morgan's office identifying the medical records. The Court received and accepted Exhibit I into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of hearing
- Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation

¹ An evidentiary dispute arose during the deposition concerning the examination by claimant's attorney utilizing Exhibit 12 that was previously ruled inadmissible by this court. In preparing this award no weight was given to the examination and responses of Ms. Moua concerning the recorded statement, thus the issue is moot.

- Answer of Second Injury Fund to Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer/Insurer to Amended Claim for Compensation
- Answer of Second Injury Fund to Amended Claim for Compensation
- Report of Injury
- Order of Dismissal of Second Injury Fund

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

Background & Employment

The employee, Juanita Wall, is 68 years of age. She was born on May 29, 1949. Ms. Wall resides in Springfield, Greene County, Missouri. Ms. Wall obtained full-time employment with Bass Pro on March 9, 1998. Since 2008, she has worked as a cash office clerk. (Exhibit C, p. 28). Her responsibilities include maintaining a balanced safe, counting and balancing checkbooks, separating money, answering the phone, and completing computer work (Exhibit B, p. 16; Exhibit C, p. 28).

Prior Medical Conditions

Prior to sustaining the alleged work injury of July 1, 2015, Ms. Wall suffered from several injuries and/or medical conditions. Her prior injuries include polio to her left foot and leg in 1955, a right knee replacement in 2008, and a left ankle fusion surgery in 1993. (Exhibit F, p. 865).

On May 29, 2015, Ms. Wall fell twice during a camping trip one-month prior to her alleged work injury of July 1, 2015. (Exhibit C, pp. 6-16). Ms. Wall fell while walking up a steep hill as she was returning to the campsite from the boat ramp. (Exhibit C, p. 9). She also fell against a picnic table, and stated she had pain in her shoulder. (Exhibit C, p. 15).

Accident

On or about July 1, 2015, Ms. Wall alleges she sustained injury to her right shoulder when she fell while walking down the main aisle of the fishing department in Bass Pro Shops Outdoor World in Springfield, Missouri. (Exhibit 2). Ms. Wall stated she fell forward and jarred her right shoulder and right leg (Exhibit A). The incident was captured on store surveillance footage. (Exhibit E). The video shows Claimant pushing a shopping cart and as she steps to the right of the cart she shifts weight bearing to her left foot at which point she falls beside the cart. (Exhibit E).

When asked how the event occurred, Ms. Wall stated on multiple occasions, "I just fell." (Exhibit A; Exhibit B, p. 3-4; Exhibit C, p. 29-30). Ms. Wall stated she did not trip over anything, and there were no defects in the floor or any other condition of her workplace that caused her to fall. (Exhibit A; Exhibit B, pp. 2-3; Exhibit C, p. 29-30). Subsequently, she alleges she developed a left carpal tunnel condition and a left long trigger finger condition due to post-

accident compensation/overuse when she returned to work. (Exhibit 2).

Medical Treatment

On July 1, 2015, Ms. Wall presented to the Cox Hospital following her alleged work accident. (Exhibit F, p. 828). An X-Ray of the right shoulder showed mild degenerative changes at the AC joint, but no evidence of a fracture or dislocation. *Id.* She was diagnosed with a shoulder sprain and referred to Dr. Hutchinson of Cox Occupational Medicine. (Exhibit F, p. 842-849; 860). Dr. Hutchinson prescribed Percocet and Meloxicam, recommended the use of a sling, and provided the work restriction of no use of the right arm. (Exhibit F, p. 12-13, 15).

On July 8, 2015, Dr. Baehl performed a Magnetic Resonance Imaging (“MRI”), which revealed a rotator cuff tear. (Exhibit F, p. 6-9). On July 24, 2015, Dr. Putnam reviewed the MRI results and diagnosed Ms. Wall with right shoulder impingement syndrome, osteoarthritis of acromioclavicular joint, a high grade torn longhead of the biceps tendon with subluxation, and a complete rotator cuff tear. (Exhibit F, p. 4-5; 789-791). Dr. Putnam recommended surgical intervention. *Id.* He prescribed Percocet and placed Ms. Wall on strict left-hand duty only. *Id.*

On September 4, 2015, Dr. Goodman performed arthroscopic shoulder surgery. (Exhibit F, p. 71-72). The surgery included a mini-open repair of the rotator cuff, a right shoulder arthroscopic subacromial decompression, a coracoacromial ligament release, and resection of distal clavical, and an arthroscopic debridement of the longhead biceps tendon. *Id.* Dr. Goodman noted good progress following surgery on September 15, 2015, and again on October 13, 2015. (Exhibit F, p. 210-212; Exhibit 1).

On November 17, 2015, Dr. Goodman noted that the right shoulder was progressing well with therapy, but he also reported that Ms. Wall complained of numbness in her left hand. (Exhibit F, p. 1-2).

On March 3, 2016, Dr. Kubik diagnosed Ms. Wall with left carpal tunnel syndrome, and on March 9, 2016, Dr. Kubik performed a left carpal tunnel release. (Exhibit F, p. 646-647; p. 685-688). Ms. Wall followed up with Dr. Kubik on March 22, 2016, who reported that her symptoms had significantly improved. (Exhibit F, p. 753-754).

Independent Medical Examinations

Ms. Wall had independent medical examinations (“IME”) with both Dr. Bruce Schlafly and Dr. Ted Lennard. On September 14, 2016, Dr. Schlafly, performed an IME of the claimant, and provided disability ratings of 37.5% permanent partial disability (“PPD”) to the right shoulder, 25% PPD to the left hand at the wrist, and 30% PPD to the left long finger (35-week level) if no future treatment. (Exhibit F, p. 765-766).

Dr. Lennard, a physiatrist with the Springfield Neurological Institute, performed an IME of the claimant on February 22, 2017. (Exhibit F, p. 862-870). Dr. Lennard rated Ms. Wall’s right shoulder at 20% PPD and apportioned 5% of the 20% to a preexisting, degenerative condition. (Exhibit F, p. 870). As to the injury of the left hand, Dr. Lennard stated that her left carpal tunnel syndrome and subsequent surgery is unrelated to her July 1, 2015 work accident or her work as a cash office clerk. *Id.* Dr. Lennard stated that work was not the prevailing factor, noting other non-work related factors for the development of carpal tunnel syndrome, including her age, gender and elevated BMI. *Id.* Dr. Lennard also listed Type II diabetes as a risk factor,

but was not aware that Dr. Morgan had diagnosed her with this condition at the time he performed the IME. (Exhibit I). Dr. Lennard stated that no additional treatment was indicated for either her right shoulder injury or the carpal tunnel syndrome. *Id.*

FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

- 1. Whether the employee sustained an accident or incident of occupational disease on or about July 1, 2015; and, if so, whether the accident or occupational disease arose out of and in the course of her employment with the employer.**

No. Ms. Wall has not sustained injury from an accident or incident of occupational disease that arose out of the course and scope of her employment at Bass Pro Outdoor World, LLC. The right shoulder injury involved a hazard or risk to which Claimant was equally exposed in her normal nonemployment life, and her left hand carpal tunnel complaints were not caused by her work activities. Thus, neither injury arose out of and in the course of her employment, and the injuries and disabilities Claimant is now claiming are not covered under the Missouri Workers' Compensation Law.

Right Shoulder Injury

Claimant's right shoulder injury is not compensable under the Workers' Compensation Law because the alleged hazard or risk -- walking on a dry, flat concrete floor -- was one she was equally exposed to in her normal non-employment life. Pursuant to Section 287.020.3(2), an injury is 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.”

A line of recent Missouri cases makes clear that Claimant's injury is not compensable under Section 287.020.3(2). The Missouri Supreme Court recently addressed a similar case in *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 672 (Mo. Banc 2009). In *Miller*, the claimant sustained injuries while repairing a section of road on Route N in Pike County. As the claimant was walking briskly toward a truck containing repair material, he felt a pop in his knee and began to experience pain. The claimant reported the injury to his employer, the Missouri Highway and Transportation Commission, who denied compensation, finding the injury was not work-related. The Missouri Supreme Court found the claimant's injury did not arise out of employment under Mo. Rev. Stat. § 287.020.3(2)(b). *Id.* At 673. The Court held “an injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor, and the risk involved -- here, walking -- is one to

which the worker would have been exposed equally in normal non-employment life.” *Id.* At 674. The *Miller* Court further held the injury did not occur because the claimant fell due to some condition of his employment; or the claimant’s injuries were worsened due to his employment; or the claimant was in an unsafe location due to his employment. *Id.* The Court stated the claimant was walking on an even road surface when his knee happened to pop, and nothing about work caused it to do so. *Id.* Therefore, “the injury arose during the course of employment, but did not arise out of employment,” to be compensable under the Missouri Workers’ Compensation Law.

Similarly, in *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 505-06 (Mo. Banc 2012), the Missouri Supreme Court found a claimant was equally exposed outside of work to the risk of twisting her ankle while walking to make a pot of coffee. The Court stated that the Legislature had left no doubt the provisions of Mo. Rev. Stat. § 287.020.3(2) were to be construed strictly. *Id.* at 510; Mo. Rev. Stat. § 287.800. The Court held that for an injury to be compensable under Mo. Rev. Stat. § 287.020.3(2)(b) and *Miller*, the “employee must show a causal connection between the injury at issue and the employee’s work activity.” *Id.* The Court held “Miller instructs that 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.” *Id.* at 511. The Court ultimately held the evidence showed the claimant was equally exposed in her normal nonemployment life to the risk - turning, twisting her ankle, or falling off her shoe –when she sustained injuries while walking to make a pot of coffee, and therefore, the injury was not compensable under § 287.020.3(2) and the Missouri Workers’ Compensation Law.

Alternatively, in *Gleason v. Treasurer of State of Missouri- Custodian of Second Injury Fund*, 455 S.W.3d 494 (Mo. App. W.D. 2015), the Western District held that an employee’s risk source of climbing onto railcars was not one the employee was equally exposed to in nonemployment life. In *Gleason*, Edward Gleason, Sr. worked as a transportation coordinator for Ceva Logistics. *Id.* at 496. Part of his job duties included climbing onto railcars to perform inspections prior to shipments. *Id.* On August 5, 2007, Gleason sustained injuries when he fell 20 to 25 feet from atop one of the railcars during an inspection. In finding for the employee, the Court stated, “[finding] a causal connection between a claimant’s work activity and his injury, as would support a workers’ compensation claim, first requires identification of the risk source of a claimant’s injury and then requires a comparison of that risk source or activity to normal nonemployment life.” *Id.* at 500. The Court distinguished *Miller* and *Johme*, by stating that Gleason’s risk source was not walking on a smooth surface at ground level; the risk source was working on a railcar 20 to 25 feet above the ground. *Id.* Because this risk source was plainly not one to which a worker would be exposed in normal nonemployment life, Gleason’s fall establishes “a causal connection between his injuries at issue and work activity.” *Id.* at 502.

This case directly involves an alleged hazard or risk (walking on a dry, flat concrete floor) to which Claimant was equally exposed in her normal non-employment life under Section 287.020.3(2). At the final hearing, Claimant testified that she fell and was injured while walking on the main aisle through the fishing department of Bass Pro Shops Outdoor World in Springfield. Claimant admitted the floor was a flat, concrete surface; that it was well lit; and that she was wearing rubber soled tennis shoes that had a good grip. The fall occurred in the main aisleway through the fishing department, where, Claimant admitted, thousands and even millions of people walk each year. Photographs of the location of the fall were admitted as Employer’s

Exhibit D and a video of the fall itself was admitted as Employer's Exhibit E.

On direct examination at the hearing, Claimant initially testified that she thought her foot caught on an uneven area of the floor, causing her to fall. However, on cross examination Plaintiff admitted to giving three prior statements in which she admitted there was nothing about the floor or any defect in the floor that caused her to fall, and that "she just fell." These include:

- Employer's Exhibit A is an Employee's Statement signed by Juanita Wall immediately after the accident on July 1, 2015. It conveyed the following information:

This is what happened: . . . "Walking down drive aisle in fishing & fell forward & jarred right shoulder & right leg."

Do you recall anything unusual or unexpected that happened?

"No."

Are there work conditions which contributed to this injury?

"No."

How would you explain why you were injured?

"I fell."

- Employer's Exhibit B was a tape-recorded statement Claimant gave to a representative of Travelers Insurance on July 16, 2015. On that day, Claimant was at work answering the telephones. She stated:

Q: Uh-huh. What type of shoes were you wearing at the time?

A: Tennis shoes.

Q: So good grip on them?

A: Yes ma'am.

Q: All right. So no known visible defects that you are aware of?

A: No ma'am.

(Exhibit B, p. 11)

* * *

Q: Okay. Well, first of all, what happened in this particular situation?

A: . . . and on the way back, I don't know if I stepped wrong or whatever. I didn't see anything visible that caused me to trip or fall and . . . that I did.

(Exhibit B, pp. 2-3)

* * * *

Q: Okay. And it says here that you tripped, but that doesn't sound like what you just told me. So you basically just fell?

A: I just fell.

Q: Okay.

A: Yes ma'am.

Q: Okay.

A: And I had another associate right behind me. I was showing her where things were. She's new in our office and I had another associate with me. And we were on our way back. We had gone and picked up the wrappers and were on our way back. And I absolutely do not know. . . I just, I just fell.

(Employer's Exhibit B, pp. 3-4)

- Employer's Exhibit C is a deposition of Claimant taken on January 19, 2017. The Claimant testified under oath, as follows:

Q: So you fell in route back to the office. What area of the store was this where you fell.

A: I was in fishing.

Q: In the fishing department area? Now is there anything on the ground that caused you to fall?

A: I do not remember. I remember falling. I do remember not being able to get up because I couldn't raise my arm, but I don't remember the floor.

Q: Do you remember telling Lisa Patterson in your recorded statement that you didn't see anything visible?

A: I didn't.

Q: That caused you to fall?

A: I didn't.

Q: So it's fair to say that you just fell?

A: Yes sir.

Q: And you didn't trip over anything?

A: Not that I know of.

Q: Did your shoes have good grip on them?

A: Yes sir.

Q: Was the lighting good in the area?

A: Yes sir.

(Exhibit C, p. 29 line 16 – P. 30 line 12)

Importantly, Claimant testified that the concrete floor in the aisle of Bass Pro where she fell, was just like the other paved surfaces where Claimant regularly walks as a normal part of her non-employment life. Claimant testified that she goes to Wal-Mart, to the grocery store, to other stores, and to flea markets to shop on a regular basis. Claimant also testified that she walks on paved surfaces in the parking lots and sidewalks of the various stores and flea markets where she regularly goes in her non-work time, and those surfaces are just like the concrete floor in the fishing department at Bass Pro. In all of these locations, she walks on paved surfaces, just like those in the fishing department at Bass Pro.

On redirect, Claimant attempted to explain why she had attributed her fall on direct examination to her foot catching on an uneven area of the floor, when this was never raised in her three previous statements. Claimant testified that she had only recently come to this conclusion, shortly before the hearing, when she examined the photographs of the accident scene (Exhibit D) and the video of the fall (Exhibit E). Claimant's testimony was not credible and it was entirely speculation on her part. It is not credible for Claimant to make a series of three different statements, all near in time to the accident, in which she identifies no defect in the floor and claims that there was nothing about the floor that caused her to fall. Claimant clearly fabricated this story about an alleged uneven surface of the floor, in an attempt to bolster her claim at the hearing.

The employer's representative, Cheryl Nall, also testified at the hearing. She identified the photographs of the floor where the fall occurred. She testified that the floor in this area is a completely flat and even surface. There is an expansion joint in the floor, but that expansion joint is completely filled with a solid material, such that it makes the floor a completely level and even surface. Ms. Nall also testified that the floor as shown in the photographs was in the same condition as of the time of Ms. Wall's fall. Ms. Nall's testimony on this point was un rebutted and undisputed. Additionally, both Ms. Nall and Ms. Wall testified that thousands of people every week and millions every year walk on this main aisleway of the fishing department.

Moreover, Pa Moua, a coworker of Ms. Wall, testified in her deposition that she was positioned directly behind Ms. Wall at the time of the accident and did not see anything that Ms. Wall could have tripped over. (Exhibit 15, p. 15). She testified there was no foreign substance, liquid, or merchandise on the ground, and there were no cracks in the floor. (Exhibit 15, p. 16). There was an expansion joint in the tile, which she described as "flat" when walking on. (Exhibit 15, p. 17). She acknowledged this was the main area of the fishing department, where hundreds if not thousands of people walk every week. (Exhibit 15, p. 16-17). In response to Mr. Pitts' question regarding the condition of the floor, Ms. Moua responded:

A. The area was pretty flat. I was walking right behind her, so I didn't trip on anything or slip on anything, so I don't know how she fell. I even asked her if she tripped or fell or anything. She said she doesn't remember. (Exhibit 15, p. 8).

It is important that there are a number of other reasons why Ms. Wall would have fallen while she was walking through the Bass Pro fishing department, that had nothing to do with her

employment. First, Claimant admitted that she had polio as a child that weakened her left leg, she had a left ankle fusion from a prior fall which requires her to wear a brace to deal with the weakness in her left ankle. Furthermore, Claimant admitted that she has fallen a number of times, and several of those occurred shortly before the incident which is the subject of this case. While camping at State Park Marina in Branson, Claimant was walking up the hill from a boat dock, and slipped and fell jarring her knees and shoulders. (Exhibit C, p. 9). The following day, Claimant was walking through their camp, when she tripped and fell toward a camping table, and caught herself from falling to the ground on the camping table. (Exhibit C, p. 15). Claimant also admitted that she slipped and fell on a rug at Bass Pro in 2006 or 2007 and that she had fallen previously when she caught her foot on a pallet. Thus, Claimant was prone to falling due to reasons that had nothing to do with her work at Bass Pro, which may include the ankle fusion that occurred in 1993.

Claimant was pushing a cart shortly before her fall, as shown in the video. However, it is important that Claimant does not attribute her fall to the cart, and there is no evidence that the cart caused or contributed to the fall. Instead, the video shows that the presence of the cart actually slowed Claimant's fall, because she caught or braced herself on the side of the cart as she began to fall. Claimant does not contend that the cart was the cause of her fall, and there is no evidence to suggest any role of the cart in the fall.

In conclusion, the credible evidence showed that Claimant fell while walking on a flat concrete surface. This was a condition Claimant regularly encountered in her regular, non-employment life. In fact, Claimant even admitted that she had previously shopped in the Bass Pro fishing department during off work hours, and the day before the hearing she had met a friend at Bass Pro during her non-working time. Under Section 287.020, RSMo., *Miller, Johme*, and subsequent cases, the flat concrete surface where Claimant fell was a risk or hazard to which she was equally exposed in her non-employment life. The fact that Claimant happened to fall while on duty and inside the Bass Pro Shops store, does not make the fall compensable. There must be something particular about the location of the fall that is unique to her work and it created a unique exposure to that risk. Here, there is no unique or specific risk attributable to Ms. Wall's employment. She simply fell on a flat concrete surface. In these circumstances, the fall is not compensable and the claim must be denied.

Left Hand Injury

Claimant has asserted a claim for a left carpal tunnel condition and left long trigger finger condition. Ms. Wall's left hand complaints are not compensable because her work activities were not the prevailing factor in causing her alleged incident of occupational disease.

It is important that Claimant is morbidly obese. She is 5'3" tall, weighed 256 pounds on the date of her IME with Dr. Lennard, and has a body mass index of over 45. She was diagnosed with type II diabetes by treating physician, Dr. Heath Morgan (Employer's Exhibit I). Claimant's date of birth is 5/29/1949, and she was 66 on the date of her fall at Bass Pro and 68 on the date of trial.

Dr. Lennard provided a report in which he concluded that Claimant's carpal tunnel condition is not caused by her work, stating: "She has numerous other non-work-related risk factors for development of CTS including age, gender and elevated BMI." (Exhibit F, p. 870). Dr. Lennard identified the CTS risk factors on the third page of his report. He identified the

factors listed above, but had not been provided with information about the Type II diabetes diagnosis, which is clearly listed in his report as a CTS risk factor. (Exhibit F, p. 870). In addition, Claimant admitted to Dr. Lennard and at the hearing that she has a history of crocheting and that she typically crochets for at least a couple of hours a night during the wintertime when she makes afghans. (Exhibit F, p. 864).

Claimant attempted to identify her duties as a cash office clerk as the cause of her CTS condition. However, Claimant's testimony defeated that conclusion. Claimant admitted that her primary duties are to take till bags that are generated by the checkout registers and count and bundle the cash, put the coins through a coin counter and close the wrappers, and put the money in the safe. She then enters information on a computer using a mouse. She is also required to fill bags with paper money to prepare cash registers to begin the work day. Importantly, Claimant admitted that she is continually moving from task to task as part of her regular work day. Furthermore, Claimant has held the cash office position for eight years, (since 2008) without ever developing the CTS condition. She does not engage in a single, continual repetitive hand movement as part of her job. Instead, she engages in diverse and different activities with her hands, throughout her working day. The evidence simply does not support the conclusion that Claimant's job duties caused her CTS condition.

In conclusion, Claimant's CTS complaints are not compensable. In this case I find the opinions presented by Dr. Lennard to be more credible than those presented by Dr. Schafly. Dr. Lennard determined that the carpal tunnel injury was not related to Ms. Wall's work activities. Dr. Lennard identified specific risk factors including Claimant's gender, age and obesity, as well as her diabetes diagnoses, as risk factors for causing carpal tunnel. Furthermore, Claimant engages in a variety of diverse activities with her hands throughout her workday, and the evidence showed that her work activities were not of such a repetitive nature to cause carpal tunnel. Instead, the evidence shows that it is the other risk factors that Claimant possess, that are the cause of her CTS condition. Thus, in accordance with Dr. Lennard's report, Claimant's work activities at Bass Pro Shops were not shown to be the prevailing factor in the cause of her CTS condition, the injury is not compensable, and compensation should not be awarded.

2. Whether the alleged accident or incident of occupational disease caused the injuries and disabilities for which benefits are now being claimed.

No. As fully discussed above in Issue 1, Ms. Wall's shoulder injury did not arise out of the course and scope of her employment at Bass Pro World, LLC. Therefore, the injury and disability from the shoulder injury are not compensable under the Missouri Workers' Compensation Law. As to her carpal tunnel complaints, Dr. Lennard determined that her left hand carpal tunnel complaints were not caused by work, but rather her non-work-related risk factors. (Exhibit F, p. 870). Thus, neither injury is compensable under the Missouri Workers' Compensation Law.

3. Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$50,024.00.

No past medical expenses are awarded. As fully discussed above in Issue 1, Ms. Wall's shoulder injury did not arise out of the course and scope of her employment at Bass Pro World, LLC. Therefore, the injury and disability from the shoulder injury are not covered under the

Missouri Workers' Compensation Law. As to her carpal tunnel complaints, Dr. Lennard determined that her CTS complaints were not caused by work, but rather her non-work-related risk factors. Thus, neither injury is compensable under the Missouri Workers' Compensation Law and the employer and insurer are not liable for past medical expenses.

4. Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of her injuries.

No future medical care is awarded. As fully discussed in Issue 1, neither injury is compensable under Missouri Workers' Compensation Law; therefore, Ms. Wall is not entitled to future medical benefits.

5. Whether the employee is entitled to temporary total disability compensation. (The employee seeks payment for twelve (12) weeks of temporary total disability compensation in the amount of \$4,301.64, plus future temporary total disability per Greer v. Sysco Food Service, 475 S.W.3d 655 (Mo. Banc 2015)).

No temporary total disability is awarded. As fully discussed in Issue 1, neither injury is compensable under Missouri Workers' Compensation Law; therefore, Ms. Wall is not entitled to any temporary total disability benefits.

6. Whether the employee sustained any permanent disability as a consequence of the alleged accident on July 1, 2015; and, if so, what is the nature and extent of the disability.

No permanent partial disability is awarded. As more fully discussed above in Issues 1 and 2, Ms. Wall has not sustained an injury from an accident or incident of occupational disease that arose out of and in the scope of her employment at Bass Pro Outdoor World, LLC; therefore, the injuries and disabilities Ms. Wall are now claiming are not covered under the Missouri Workers' Compensation Law.

7. Whether employee sustained any disfigurement? (There was a conditional stipulation of two weeks as the award for Claimant's injury to her left hand, if it is determined to be compensable).

Claimant is not entitled to compensation for her left hand complaints, and therefore not entitled to disfigurement for the injury. As fully discussed in issue 1 and 2, Claimant's work activity at Bass Pro was not the prevailing factor in the cause of her CTS condition. Thus, the injury is not compensable, and disfigurement should not be awarded.

I certify that on 1-26-18,
I delivered a copy of the foregoing award
to the parties to the case. A complete
record of the method of delivery and date
of service upon each party is retained with
the executed award in the Division's case file.

By MPJ

Made by: B. A. Elmer
Kevin A. Elmer
Administrative Law Judge
Division of Workers' Compensation

