

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F301455**

<b>CYNTHIA G. CALDWELL, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>STAFFMARK, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>ATLANTIC MUTUAL INSURANCE CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 7, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on June 16, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE STEVEN R. MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant and benefits are hereby awarded.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on January 21, 2003 at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$233.00/\$175.00, in the event this claim is found to be compensable.

The claimant contends she injured her back when she slipped on a rug. Dr. Anthony Russell performed surgery on March 6, 2003 for an herniated nucleus pulposus at L4-L5. The claimant seeks payment of medical expenses, temporary total disability from January 23, 2003 to July 7, 2003 and attorney's fees.

The respondents contend the claimant was not performing employment services at the time of the accident.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits along with a diagram of the workplace contained in the hearing transcript.

The claimant, who appeared to be credible, was the only witness to testify at the hearing.

The claimant, age 45, (D.O.B. January 17, 1959) was assigned by the employment agency to work at Remington Arms beginning in July, 2002. She had worked there on two previous occasions. The claimant worked the day shift, four days per week with a thirty minute unpaid lunch break. Her health history includes a previous back injury.

On Tuesday, January 21, 2003, the claimant went to lunch at 11:00 a.m. in the breakroom at the plant. She then went outside to smoke before returning to the breakroom at 11:30 a.m. to put her beverage in the refrigerator. She left the breakroom to go to the restroom before returning to her work station.

The diagram of the plant shows the restrooms to the right of the breakroom while the claimant's work station is on the left. The claimant had to walk past the men's restroom in full view of several co-workers sitting in the breakroom. She slipped on a rug and fell. When she returned from the restroom, her supervisor had moved the rug to dry out while a co-worker

mopped up the water with toweling.

The claimant returned to work the next day, Wednesday, but she was stiff and sore. When she left work on Thursday, she was hoping her condition would improve with rest over the weekend. But on Monday she filled out an accident report and sought medical treatment which was denied.

The claimant received treatment from Dr. Anthony Russell, neurosurgeon, at her own expense. Surgery was performed on March 6, 2003 and she was released on July 7, 2003.

### **MEDICAL EVIDENCE**

The claimant was treated by Dr. Anthony Russell for a non-work related back injury. Surgery was performed for an herniated nucleus pulposus at L4-5 on September 19, 2000. She was released with no restrictions on November 29, 2000.

After the slip and fall at work, the claimant returned to Dr. Russell.

#### **Dr. Russell's Report of January 31, 2000:**

Cynthia Caldwell returns today after a lengthy absence. I last saw her in May of 2001 in follow up for her initial lumbar discectomy. She had done well in the interim but indicates that on the 21<sup>st</sup> of this month she slipped at work and 48 hours later noted the onset of pain in the hip and leg.

An MRI scan revealed a recurrent disk herniation at L4/5 on the left. Surgery was performed on March 6, 2003 and the claimant reported improvement. She was released with instructions to pursue light to moderate duty (see Dr. Russell's reports of April 7, 2003 and July 7, 2003).

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the

burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,”

Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

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or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

The phrase, “Arising out of and in the course of employment” excludes injuries suffered when the employee is not performing employment services.

The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly. White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999), Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 504 (1997).

Injuries occurring on restroom breaks are generally held to arise out of the course of employment and are therefore compensable, Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002), and Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002).

The claimant explained that she worked with four other people on the line and it would be difficult to shut down production for individual restroom breaks. Employees were expected to use the restroom at designated break times.

The evidence of record shows the claimant was engaged in conduct permitted by the employer at the time of her injury. The restrooms on the company's premises and the scheduled break times for the employees were a necessary function that indirectly advanced the interests of the employer. Accordingly, I find the claimant sustained a compensable injury when she tripped and fell on her way to the restroom while performing employment services.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employment relationship of employer-employee-carrier existed between the parties on January 21, 2003 at which time the claimant was earning sufficient wages to be entitled to a compensation rate of \$233.00/\$175.00.
2. The claimant has proven by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The claimant was injured on a restroom break while performing employment services.
4. Respondents are directed to pay all reasonable and necessary medical expenses within thirty days of receipt pursuant to Rule 30.
5. Respondents are directed to pay temporary total disability benefits from January 23, 2003 to July 7, 2003 as the claimant remained in her healing period totally incapacitated from working.

6. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

7. If they have not all ready done so, the respondents are directed to pay the court reporter's fees and expenses within thirty days of receipt of this opinion.

#### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge