

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F304985**

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| <b>NIMISHA JIVAN (DEC'D), EMPLOYEE</b>    | <b>CLAIMANT</b>   |
| <b>ECONOMY INN &amp; SUITES, EMPLOYER</b> | <b>RESPONDENT</b> |
| <b>CYPRESS INSURANCE CO., CARRIER</b>     | <b>RESPONDENT</b> |

**OPINION FILED AUGUST 1, 2005**

This matter comes before Administrative Law Judge J. Mark White on the record.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

Pursuant to the Prehearing Order filed May 16, 2005, the parties agreed to submit consideration of this claim on a stipulated record. The record is comprised of the Prehearing Order filed May 16, 2005; the letter brief and exhibits submitted by the claimant on June 15, 2005; and the brief submitted by the respondents on July 27, 2005.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier relationship existed at all relevant times, including February 17, 2003; that the claimant was employed as the assistant manager for the respondent-employer, and in that capacity she and her husband, the hotel manager, were provided with a

room in the hotel in which to live on the premises to carry out their responsibilities as employees of the hotel; that on February 17, 2003, a fire occurred at the hotel, causing the claimant's death; that the claimant is survived by her widower, Jack Jivan, and two minor children, Tejash and Kushbu; and that the respondents have controverted this claim in its entirety. Subsequent to the filing of the Prehearing Order, the parties further stipulated that on February 17, 2003, the claimant was off duty and was in the bathroom of the hotel room provided by the respondent, changing her clothes to go to a gym to exercise when a fire occurred at the hotel; that she was not able to escape the fire and died as a result of smoke inhalation; that although the claimant was off duty at the time her death occurred, she and her husband were always considered to be on call to address any hotel-related issues, which is at least one of the reasons she and her husband were provided a room in the hotel there on the premises; and that the claimant earned an average weekly wage of \$230.77, entitling her estate to a compensation rate of \$154.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable fatal injury; the surviving widower and minor children's entitlement to death benefits pursuant to Ark. Code Ann. § 11-9-527; and controversion and attorney's fees.

The claimant's estate contends that the claimant's death is compensable; that

the claimant's surviving widower and two minor children are entitled to compensation death benefits, pursuant to Ark. Code Ann. § 11-9-527; and that the respondents should be ordered to pay attorney's fee as permitted by law.

The respondents contend that the claimant's death was not due to an incident arising out of her employment; that the claimant was an assistant manager of a hotel and lived on the premises; and that the claimant was not performing employment services at the time of the accident.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents, briefs submitted by the parties, and other matters properly before the Commission, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant's estate has proven by a preponderance of the evidence that the claimant was engaged in employment services at the time of her fatal injury,

and that her injury arose out of and in the course of her employment.

4. The claimant's estate has proven by a preponderance of the evidence that the claimant sustained an injury caused by a specific incident identifiable by time and place of occurrence; that the existence and extent of her injury is established by medical evidence supported by objective findings; and that her injury caused internal or external physical harm to the body resulting in her death.
5. The claimant's estate has therefore proven by a preponderance of the evidence that the claimant sustained a compensable injury.
6. The claimant's estate has proven by a preponderance of the evidence that her surviving family members, Jack, Tejash, and Kushbu Jivan, were wholly and actually dependent upon the claimant at the time of her fatal injury.
7. The claimant's estate has therefore proven by a preponderance of the evidence that Jack Jivan, as widower, and the two minor children Tejash and Kushbu, are entitled to death benefits per Ark. Code Ann. § 11-9-527.
8. The respondents have controverted this claim in its entirety.

## DISCUSSION

The relevant facts herein are largely set forth in the stipulations outlined above. The claimant lived with her husband in a hotel room on the premises of the respondent-employer, where they were employed as assistant manager and manager, respectively. On February 17, 2003, a fire broke out in their living area, trapping the claimant in a bathroom. She died of smoke inhalation. At the time, the claimant had been changing her clothes to go exercise.

To prove her fatal injury compensable, the claimant by her estate bears the burden of proving that her injury occurred while she was engaged in employment services. *Morales v. Hector Martinez, et al*, No. CA 04-92 (Ark. App. filed Nov. 10, 2004); ARK. CODE ANN. § 11-9-102 (4)(B)(iii). An employee is performing “employment services” when she is doing something that is generally required by her employer. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002). In making their case, both the claimant’s estate and the respondents discuss the six-factor employment-services test set forth by the Court of Appeals in *Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001), but I note that the Supreme Court has expressly rejected the *Matlock* test. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W.3d 14 (2002).

The claimant’s estate argues that the claimant was performing employment

services at the time of her fatal injury, in that she was “on call” 24 hours per day and required to be continuously available to perform work activities as needed. The respondents, in turn, cite *Cook v. ABF Freight Systems*, \_\_ Ark. \_\_, \_\_ S.W.3d \_\_ (Oct. 6, 2004). The claimant therein was injured in a private motel neither owned by nor affiliated with the employer. There is no indication that the *Cook* claimant was required to stay at this hotel; rather, the room was provided solely for his convenience, and the claimant evidently could have come and gone as he pleased. There is no indication that the presence of the *Cook* claimant at that motel advanced his employer’s interests.

The instant claimant, in contrast, was on the employer’s premises at the time of her injury and was expected to reside on the premises for the employer’s convenience. The respondent-employer clearly derived a significant benefit from the claimant’s regular and continual presence on the premises of the hotel.

The concept of employment services encompasses the performance of incidental activities that are inherently necessary for the performance of the primary activity. *Privett v. Excel Specialty Prod.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002). Given the claimant’s responsibilities to her employer, her residing on the premises and spending as much time as possible on the premises was inherently necessary for the performance of her primary activity, managing the hotel. An employee is

performing employment services when her injury is sustained 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. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002). It is plain from the record that the employer's purpose and interest was advanced by the claimant's frequent and regular presence on the premises. She was within the space boundaries of her employment, and given that she was "on-call" 24 hours per day, she was within the time boundaries as well.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Given the facts stipulated to by the parties, and the case law discussed above,

I find that the claimant's estate has proven by a preponderance of the evidence that the claimant was engaged in employment services at the time of her fatal injury, and that her injury arose out of and in the course of her employment. Given the stipulations and exhibits submitted herein, I find that the claimant's estate has proven by a preponderance of the evidence that the claimant sustained an injury caused by a specific incident identifiable by time and place of occurrence; that the existence and extent of her injury is established by medical evidence supported by objective findings; and that her injury caused internal or external physical harm to the body resulting in her death. The claimant's estate has proven every element of a compensable injury; I therefore conclude that the claimant's estate has proven by a preponderance of the evidence that the claimant sustained a compensable injury leading to her death.

### **Death Benefits**

Death benefits are payable to certain family members "wholly and actually dependent upon the deceased employee." ARK. CODE ANN. § 11-9-527 (c). Proof of actual dependency does not require a showing of total dependency, but rather that the decedent's contributions were relied upon by the surviving claimants. *Pinecrest Memorial Park, Inc., v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983). Actual

dependency must be proven if the surviving claimants did not reside with the decedent. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979).

Given the stipulations of the parties, and the exhibits submitted herein, it is apparent that the deceased claimant resided with her husband, Jack Jivan, and their two minor children, Tejash and Kushbu, on the premises of the respondent-employer, and that the surviving family members relied upon the claimant's contributions. I find that the claimant's estate has proven by a preponderance of the evidence that her surviving family members, Jack, Tejash, and Kushbu Jivan, were wholly and actually dependent upon the claimant at the time of her fatal injury. I therefore conclude that Jack Jivan, as widower, and his two minor children Tejash and Kushbu, are entitled to death benefits per Ark. Code Ann. § 11-9-527.

#### **AWARD**

The claimant's estate has proven by a preponderance of the evidence that the claimant sustained a compensable injury, and that Jack Jivan, as widower, and their two minor children Tejash and Kushbu, are entitled to death benefits per Ark. Code Ann. § 11-9-527. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum

statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

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 Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge