

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F614010**

**LOIS JUNE CHRISTIAN, EMPLOYEE**

**CLAIMANT**

**GOODY'S FAMILY CLOTHING, INC., EMPLOYER**

**RESPONDENT**

**SAFETY NATIONAL CASUALTY CORP., CARRIER**

**RESPONDENT**

**AMENDED OPINION FILED JANUARY 7, 2008**

Hearing before Administrative Law Judge O. Milton Fine II on October 16, 2007, in Harrison, Boone County, Arkansas.

Claimant represented by Ms. Adrienne K. Murphy, Attorney at Law, Fayetteville, Arkansas.

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

**STATEMENT OF THE CASE**

On October 16, 2007, the above-captioned claim was heard in Harrison, Arkansas. A prehearing conference took place on July 16, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

**Stipulations**

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. They are the following five, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed at all times relevant to this claim.

3. On December 17, 2006, Claimant was attacked while working and suffered physical injuries, including multiple contusions.
4. Some temporary total disability and medical treatment has been paid by the Respondent carrier.
5. Claimant's compensation rate is \$239/\$179.

### Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1.

The following were litigated:

1. Whether Claimant sustained compensable mental injuries pursuant to Ark. Code Ann. § 11-9-113.
2. Whether Claimant is entitled to reasonable and necessary medical treatment for a mental injury.
3. Whether Claimant is entitled to additional temporary total disability benefits from approximately January 8, 2007 to June 16, 2007.
4. Whether Claimant is entitled to a controverted attorney's fee.

### Contentions

#### Claimant:

1. Claimant contends that her mental injuries are compensable. Claimant was working at the Goody's Department Store in Harrison, Arkansas on December 17, 2006 when she was attacked by an autistic teenage male. Claimant was the manager on duty, and the store had been open for approximately one hour at the time of the accident. Specifically, the Claimant had her back to the entrance of the store and was reading over

product information with an employee at a sales register after a customer had inquired about the product.

2. The Claimant was choked from behind, had her hair pulled, and sustained numerous lacerations when she was attacked. She reported to the North Arkansas Regional Medical Center the day of the accident, received treatment, and was referred to her primary care physician. Her primary care physician treated the Claimant's physical injuries and then referred her to a counselor at Vista Health for post-traumatic stress disorder. In February, the Claimant suffered a mental breakdown with suicidal thoughts and was admitted to an inpatient psychiatric facility.
3. The severity of Claimant's medical condition is evidenced by her treatment and diagnosis during her twenty days at an inpatient psychiatric facility, where upon discharge she was diagnosed with post-traumatic stress disorder. She has been unable to work since. Therefore, the Claimant contends that she is entitled to maximum compensation for the medical treatment she has received and will receive in the future as well as temporary total disability for her mental injury as set forth in Ark. Code Ann. § 11-9-113. Claimant contends she is entitled to a controverted attorney's fee.

Respondents: At the end of the hearing, Respondents withdrew their second contention, which read that Claimant has not met the requirements of Ark. Code Ann. § 11-9-113. This left the following contention:

1. Respondents contend that Claimant was working as a checker in a store when an autistic teenager entered the store and attacked her. The attack

had nothing to do with the employment. The Claimant was not injured in the course and scope of her employment. Her alleged injury was not due to a risk of her employment. The Claimant is alleging a mental injury that is not corroborated by evidence as required by Ark. Code Ann. § 11-9-113.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that she sustained a psychological injury arising out of and in the course of her employment. For that reason, her injury is not compensable under Ark. Code Ann. § 11-9-113.
4. Due to the above determination regarding compensability, Claimant has not proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment, temporary total disability benefits, or a controverted attorney's fee.

**CASE IN CHIEF**

Summary of Evidence

\_\_\_\_\_ Claimant was the sole witness at the hearing.

In addition to the pre-hearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit No. 1, Claimant's medical records, consisting of one index page and 35 numbered pages thereafter; and Respondents' Exhibit 1, a DVD containing six minutes, 17 seconds of surveillance footage of Claimant taken February 6, 2007.

Testimony

Lois June Christian. Claimant testified that she had worked for Respondent Goody's for six years. On December 17, 2006, she was working as a "Code 1 manager on duty." Her job was to manage the store while she was there—to open it and the registers and to run the store. On that date, she had opened Goody's and was the only manager on the premises. A customer had asked a cashier about a computerized toy for sale at the front of the store. Because the cashier was not familiar with the toy, Claimant was consulted.

Claimant stated:

So I stopped and picked up one of the computers and was looking at it with, or was standing in front of the register looking. And then, this person came in and grabbed me from behind and just started choking me. And I tried to get loose, and I thought had gotten loose from him, and I was able to make a step or two and he grabbed me by the back of the hair and jerked me back and went to beating me in the head, and grabbed my throat again. And there was a lady, I don't know if it was a parent or care giver or whatever, she got him off of me. And, anyhow, I just, I don't know, the police came and stuff.

The main manager, Molly, was called and came to relieve Claimant. As soon as Molly arrived, Claimant went to the emergency room. Thereafter, Claimant went to see Dr.

Corey Jackson, her primary care physician. Dr. Jackson gave her medications to deal with her pain and muscle strain.

Claimant testified that she attempted to return to work the following Tuesday, but “broke down” because “it was like I could feel the presence of that guy still in the store.” She went to Dr. Jackson, who prescribed medication, including Paxil, for her nerves.

From there, Claimant began treatment at Vista Health with a counselor, Vicki Henley. However, Dr. Jackson still prescribed her medications. Later, Claimant began to experience repeated nightmares, and began to have suicidal thoughts—“I’ll just take all of my medication and go to bed and no one will find me until, you know, the weekend.” She began treating at The BridgeWay. This treatment included shock treatments, which left Claimant with a diminished memory of the attack and required her to learn to write and drive all over again.

Claimant has not returned to work. She has not applied for Social Security disability benefits or unemployment benefits, and would like to be able to return to work. However, at this time she stated that she was not in a condition to work. She tries to go only to places where there is not much activity. Prior to the attack, she was not on any medications for depression or anxiety. The only counseling she had received previously was for six months 1982, following the untimely death of her father.

When questioned by Respondents, Claimant testified that Goody’s in Harrison is located in a shopping center, and has glass doors that open to the front. Her assailant, who was in his teens or maybe early twenties, came into the store from the parking lot. Claimant did not know if he was a customer, because his first action inside the store was to grab her. When he assaulted her, he never said anything, but simply grunted. The lady

that pulled the attacker off of Claimant came from the parking lot as well. She was able to stop the assailant simply by grabbing him by the back of the neck. The lady said nothing other than that the attacker was autistic, and the of them left the store immediately. Nobody in Goody's talked to them before they left. Claimant had never seen them before. When the police interviewed Claimant, she was able to described her attacker and what had taken place. Four or five other employees were in the store when the attack took place, and they were interviewed as well. But they did not come to her aid. And no arrest or legal action has taken place in connection with the attack, to Claimant's knowledge, because the assailant has not been located.

As a result of the assault, Claimant's neck was bruised and strained. She got over her physical injuries fairly quickly. But two days after the attack, when she tried to return to work, she was only able to stay in the store for 15 minutes. She became afraid to go out in public. While she was not working, she was able to drive herself to the doctor and to take her ill aunt for treatment also. In explaining the surveillance footage in Respondents' Exhibit 1 that shows Claimant in a truck with two women, Claimant testified that was when she was taking her aunt to the eye doctor. She has only been to the grocery store once since the attack, and no longer goes out to eat. Claimant's husband is a truck driver, and is gone all week. Prior to seeking treatment at The BridgeWay, Claimant simply stayed at home. Since receiving treatment and learning to drive again, she stays with her mother and son.

Claimant stated that her physicians have told her that she cannot work because of her fear of going out. But she admitted that she probably could perform a job where the public could not come in the door. However, she has not sought such a position.

With respect to her medical history and treatment, Claimant testified that she had previously taken Wellbutrin, but only to aid in her attempt to quit smoking. She saw Dr. Winston Wilson, a psychologist. But he did not tell her anything. Vicki Henley, a therapist from Vista Health, is treating her. And she is seeing Dr. Jackson, her personal physician, as well. She testified that while she still has memory problems, her condition is improving. Her group insurance paid for some of her treatment at The BridgeWay, and workers' compensation has paid for her doctor's bills and medication.

Claimant has not applied for unemployment benefits, and she does not have disability insurance.

Respondents called no witnesses.

### Records

Claimant's Exhibit 1. The medical records of Claimant that were introduced at the October 16, 2007 hearing and are part of Claimant's Exhibit 1 reflect that on December 17, 2006, she presented to North Arkansas Regional Medical Center at 1:57 p.m. with anterior neck stiffness that she stated occurred "when she was attacked at work by [an] autistic customer." Her arms and neck were scratched also. The brain and cervical CT scans and the cervical x-rays she underwent were normal, and there was no evidence of a skull fracture or acute cervical fracture. She was given Robaxin and Percocet, and given a tetanus shot. She was diagnosed with tenderness (per palpation) of the anterior neck, posterior right shoulder and scapula, and the ulnar aspect of the left and right forearms, and was discharged the same day at 7:50 p.m.

The next day, December 18, 2006, she sought treatment by Dr. Corey Jackson. She complained of neck pain, and had abrasions and scrapes to her neck and forearms,

which Dr. Jackson stated appeared to be due to fingernail scratches. She was placed on Percocet, Robaxin and Naproxen. Claimant returned the following day and stated that she became upset at work when told that she would be working alone that afternoon. She stated that she was upset because the assailant could have had a knife and because her co-workers did not come to her aid. She was "suffering some severe anxiety" and was "very tearful" during the doctor's visit. While he stated that her neck pain was stable, Dr. Jackson wrote that Claimant "definitely needs some counseling." He referred her to see a counselor that Friday, three days later.

When she came for a follow-up appointment with Dr. Jackson on December 21, 2006, she was still distraught, fearful that she would see the red car that the assailant was last seen in. Her neck pain was improving. On December 28, her paranoia/anxiety was improving, along with her neck. She was staying at home instead of at her mother's house. She was continued on Valium, with the plan to change her to Klonopin. Claimant next went to Dr. Jackson on January 4, 2007. At the time, she was still experiencing anxiety but had been getting out some. She still presented with anxiety, which aggravated her blood pressure, when she returned on January 19, 2007. On January 8, 2007, Dr. Jackson wrote the following:

Ms. Christian presented to clinic on 12/18/06 after being assaulted at work by a customer. On her first day of returning to [sic] she began to experience an anxiety attack from the emotional trauma the incident had caused.

Ms. Christian has been referred to a counselor to help with the emotional issue and is making little progress at this time. This was made worse by the lack of intervention/assistance from fellow employees during the attack and having to stay and work after the attack.

Ms. Christian does not have any physical limitations to return to work, however the psychological restrictions that she has is the bigger issue at

hand. I will need to follow Ms. Christian until this matter is resolved or until she is assigned to a Psychiatrist.

Claimant presented to Vista Health Outpatient Services on December 27 2007, and was seen by Vicki Henley, a licensed clinical social worker. Claimant stated that she wanted to "get my life back to normal." While cooperative with the intake process, she was tearful at times. She reported difficulty sleeping and with dwelling on the attack. Henley assigned Axis I diagnoses of 308.3 Acute Stress Disorder and 311 Depressive DO NOS, and an Axis II diagnosis of 799.9 Deferred. Claimant was seen by Henley again on January 9, 2007, and given the same diagnoses. When Claimant returned on January 18, 2007, she was given the 308.3 Acute Stress Disorder diagnosis again, with plans made for Claimant to be accompanied by a therapist on a drive by Goody's. She also practiced deep breathing exercises. Henley noted that Claimant had been referred to Dr. Nichols for psychological testing per the request of Debra Wilson. On January 25, Claimant accompanied a therapist to several locations near Goody's and was able to do so without experiencing a panic attack. Claimant stated that she felt good about her progress. When she returned on February 8, she was referred to The BridgeWay Hospital for inpatient treatment due to having suicidal thoughts "precipitated by financial problems, feeling hopeless, helpless" since the attack.

On February 4, 2007, Claimant reported to Dr. Jackson that she was having suicidal thoughts. She went in to see him two days later and was diagnosed as having, *inter alia*, anxiety.

Claimant was admitted to and evaluated at The BridgeWay on February 8, 2007. The notes for that state in pertinent part:

The patient is a 52-year-old white female referred by her outpatient provider secondary to suicidal ideation and "PTSD." The patient reports she was physically assaulted at her place of employment by someone that was "autistic" and since then she has been unable to function in public places. She sustained some mild trauma to her neck, but nothing long-standing or severe and has been cleared physically per her report. She reports inability to go out in public and even going to a local bank causes her severe anxiety. She reports each time telling her story, she relives the horror "all over again." She has had isolation, mood lability, crying spells, and lack of enjoyment of pleasurable things. She has good social support. She has reported suicidal ideation with plan to overdose on all of her pills and had actually started to write her husband a note. She has psych history. She denies hallucinations and no evidence of psychosis noted.

Her diagnoses, which were reviewed and approved by Dr. Leigh Anne Bennett, were:

Axis 1: MDD, Rec, Severe. PTSD  
Axis 2: Deferred.

Per notes by Dr. Duong Nguyen, Claimant was discharged from The BridgeWay on February 28, 2007 with the following diagnoses:

Axis 1: Major Depression, recurrent, severe, without psychotic features.  
Posttraumatic Stress Disorder.  
Axis 2: None.

As the notes from Vista Health reflect, Claimant continued to see counselor Vicki Henley. On March 2, 2007, she stated that her stay in The BridgeWay saved her from committing suicide. She continued to stay at home. Henley noted that Claimant had decreased anxiety. On March 26, she reported being treated rudely at her evaluation by Dr. Wilson. While she reported continuing anxiety, she was able to provide a history from before the attack. She was able to decrease her focus on the attack. On April 19, 2007, Claimant went over her evaluation by Dr. Wilson with Henley. She stated that she still had nightmares, fear, and poor memory, but had attempted on two occasions to go out in public. On her final visit, on May 17, 2007, she reported going to the grocery store with her

husband. She still reported nightmares and anxiety, along with a poor memory. Her husband was to teach her how to drive again. She was able to venture to the grocery store and presented with decreased anxiety.

Dr. Jackson on March 6, 2007 reported that Claimant had undergone electroshock therapy at The BridgeWay six times and was doing better. She was on Paxil, Klonopin and Protonix.

Respondents' Exhibit 1. This is a DVD that was purportedly filmed on February 6, 2007. It is 6 minutes, 17 seconds in length and begins with footage of Claimant approaching and getting into a black pickup truck and driving away. The DVD then cuts to the camera operator following a black automobile north on Highway 65 through Harrison until it arrives at Kilgore Vision Center. Claimant is seen riding in the front passenger seat of the car with another lady. They exit the car, meet a third lady, and the three go into the Center. Later, all three exit the Center and get into the same black automobile, with Claimant now riding in the rear seat. The camera operator follows the car south on Highway 65 and then down another road, when the footage abruptly ends.

## **ADJUDICATION**

### A. Compensability

Claimant has contended that she suffered a compensable psychological injury under Ark. Code Ann. § 11-9-113 on December 17, 2006 when she was attacked by an individual while she was working as a manager for Respondent Goody's. Respondents have countered that her claim is not compensable because the attack had nothing to do with her employment, she was not injured in the course and scope of her employment, and her alleged injury was not due to a risk of her employment.

Arkansas Code Annotated § 11-9-113, which I find applies to this issue, provides:

(a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of crime of violence.

As the evidence before me unquestionably shows, Claimant was a victim of a crime of violence: battery. Hence, she is not required to prove that her physical injuries, which are well-documented, caused her psychological injury.

To show that the injury arose out of her employment, a claimant must show that a causal connection existed between it and her employment. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "in the course of employment" when it occurs "within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly." *Olsen Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997); *Pilgrims Pride Corp. v. Calderera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

In support of her position during her closing argument, Claimant at the hearing cited *Ritchie Grocery v. Glass*, 70 Ark. App. 222, 16 S.W.3d (2000). But this case dealt with whether the claimant's post-traumatic stress disorder diagnosis met the criteria of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV ("DSM-IV"). It does not shed light on whether Claimant's injury arose out of and in the course of her employment, which is the crux of this case.

During Respondents' closing argument, they argued that the more applicable decision to the instant case is *Kendrick v. Peel*, 32 Ark. App. 29, 795 S.W.2d 365 (1990).

There, the Arkansas Court of Appeals held that the minor son of Kathy Kendrick, who was shot and killed at her employer's office by mass murderer Ronald Gene Simmons, was not entitled to workers' compensation benefits under the positional-risk doctrine. The court stated that previous cases showed that this doctrine "would be applied in a proper case," and quoted the following passage from 1 A. Larson, *THE LAW OF WORKMEN'S COMPENSATION* 6.50 (1990):

An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. . . . This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by some neutral force, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment. [Emphasis in LARSON]

The *Kendrick* Court sustained the Commission's finding that the doctrine should not apply because it had been stipulated that Kendrick and Simmons had previously worked together and that all of his victims had either been his co-workers or members of his family. He was not "like a 'roving lunatic,' referred to by Larson, who would be expected to kill without the selectivity demonstrated by the evidence in [Kendrick's] case." *Kendrick, supra*.

For that reason, *Kendrick* is clearly distinguishable from the case at bar. Nothing in the evidence shows that Claimant had any previous connection with her assailant. To the contrary, the scenario of a department store manager being the target of an assault by an individual afflicted by autism or another condition is a very close analogy to Larson's "roving lunatic" hypothetical situation.

In *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), the Arkansas Court of Appeals elected to adopt the positional-risk doctrine. In so doing, the court added that it saw “no need to draw fine distinctions between types of ‘neutral risks.’ A tornado or windstorm is no less ‘neutral’ than a roving lunatic or a stray bullet.” *Id.*

However, on appeal, the Arkansas Supreme Court did not adopt the positional-risk doctrine but instead applied the “increased-risk doctrine” as it did in *Parrish Esso Serv. Ctr. v. Adams*, 237 Ark. 560, 374 S.W.2d 468 (1964). See *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). Under this doctrine, the injury is compensable only “if the employment exposed the employee to a greater degree of risk than other members of the public in the general vicinity.” *Jivan v. Economy Inn*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. June 28, 2007). The Arkansas Supreme Court in *Jivan* noted that it has never expressly adopted the positional-risk doctrine. *Id.* n.1.

When applying the increased-risk test, I find that Claimant has not proven by a preponderance of the evidence that her injuries arose out of and in the course of her employment at *Goody's*. Her job on December 17, 2006 as manager of the store did not expose her to a higher level of risk to an assault by a disturbed individual than other members of the public in the general vicinity. The assailant entered the store just prior to the attack, and nothing in the evidence would label him a customer. The only conclusion to be drawn from the evidence was that the attack on Claimant was purely random. For instance, a customer checking out of *Goody's* at the time the disturbed individual entered the store could just as easily have been his victim. From the evidence before me, I cannot find that Claimant's position at the time of the attack, at the front of the store with her back to the door, led her assailant to attack her. Nor can I find that anything related to

Claimant's employment made her the target of the assault as opposed to one of the bystanders. Such determinations could be based only on speculation and conjecture, in which I am not permitted to engage. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979).

In reaching this conclusion, I am not unmindful of Claimant's testimony that she was the only manager in the store at the time of the attack and that she was not free to leave the premises in such an instance. After the assault she had to wait until Molly, the primary manager of the store, came to relieve her before she could go to the emergency room.

While this would strengthen Claimant's case for compensability under the positional-risk doctrine, it does not do so under the increased-risk doctrine. In *Parrish* and *Deffenbaugh*, which dealt with storm-related injuries, the Arkansas Supreme Court focused on whether the claimant's duty at the time of injury kept the employee from seeking shelter or a safe haven. In *Parrish, supra*, the claimant was picked up by a gust of wind and dropped onto concrete while securing his employer's property. The court held that his employment

placed him at that moment in a more dangerous situation insofar as the 'Act of God' was concerned than that to which the general public in that vicinity was subjected; for the general public was not required to go outside at such a time but could remain in places of safety.

Similarly, in *Deffenbaugh* the claimant was injured by a tornado while waiting in a mobile home for a truck to arrive that he was required to assist with unloading. The court focused on the fact that, unlike the general public, the claimant was not free to leave to seek shelter. However, while the evidence in the case at hand shows that Claimant's duties would have kept her from leaving the store to seek refuge from the assailant, it certainly

would not have prevented her from seeking safety inside the store. In any case, it was the absolutely unpredictable nature of this assault, rather than Claimant's employment situation, which made her (as it would a member of the general public) vulnerable to such an attack.

In sum, Claimant has not met her burden of proving that she sustained a compensable psychological injury.

B. Balance of Issues

Because Claimant's injury is not compensable, Claimant has not proven her entitlement to reasonable and necessary medical treatment, temporary total disability benefits, or a controverted attorney's fee.

**CONCLUSION**

Claimant bears the burden of proving by a preponderance of the evidence that her psychological injury is compensable. She has been unable to do this. Therefore, her claim must be, and hereby is, denied and dismissed.

**IT IS SO ORDERED.**

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Hon. O. Milton Fine II  
Administrative Law Judge