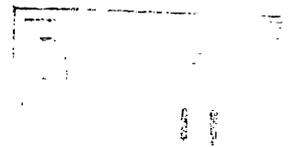


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IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

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CHARLESTON

---

GEORGETTE MORTON,

Petitioner,

vs.

APPEAL NO. 2045565

SENECA HEALTH SERVICES, INC.

CLAIM NO. ~~2010015856~~  
2011 008468

Respondent.

---

FROM THE WEST VIRGINIA WORKERS' COMPENSATION BOARD OF REVIEW

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**PETITION FOR AN APPEAL FILED ON BEHALF OF THE CLAIMANT**  
**FROM A FINAL DECISION OF THE WEST VIRGINIA**  
**WORKERS' COMPENSATION BOARD OF REVIEW**  
**AND**  
**PETITIONER'S BRIEF**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:**

This matter comes on before this Honorable Court pursuant to the Petition for Appeal filed on behalf of the claimant, Georgette Morton, petitioner, to a decision of the Workers' Compensation Board of Review certified on September 14, 2011, Petitioner Exhibit "A", which affirmed a final ruling of the Office of Judges dated February 4, 2011,

Petitioner Exhibit "B". The ruling of the Office of Judges issued on February 4, 2011 affirmed a prior ruling of the claims administrator dated September 15, 2010, rejecting the claim. The claimant, Georgette Morgan, petitioner, respectfully requests that this Honorable Court accept her Petition for Appeal, to hear her upon the same, and, ultimately, reverse the decision of the Board of Review certified on September 14, 2011 and enter a final decision which holds this claim compensable and grants temporary total disability benefits from September 2, 2010 through September 20, 2010.

### **STATEMENT OF FACTS**

The claimant, Georgette Morton, petitioner, sustained an injury to her right upper extremity on September 1, 2010 in the course of and resulting from her employment as an employee at Seneca Health Services, Inc.

The essential functions of the claimant's job included:

- providing information by typing formatting, editing, retrieving and copying data;
- contributing to the daily efficient operations by collecting information;
- scheduling and monitoring client appointments;
- collecting prior balances;
- facilitating information while adhering to HIPAA regulations; and
- maintaining professional knowledge by participating in training opportunities and performing other duties assigned by the supervisor.

The purpose of the claimant's job was to provide secretarial, reception and data entry functions necessary for accurate processing of clinical and administrative data. Of equal importance, the claimant was to provide support staff functions, which resulted in a positive and professional representation of Seneca.

On September 1, 2010, Elisa Robinette stopped by the claimant's office to pick up a box of maternity clothes that had been left for her by another coworker. The box had been left in the front office across from plaintiff's desk for quite some time. Elisa Robinette asked the claimant to help her lift the box because it was rather large and flimsy, and over packed. The claimant agreed to assist her. The claimant lost her balance as she tried to pick up the box and she fell backwards. She tried to catch herself with her right arm, which caused her injury. Despite the injury, the claimant managed to help her co-worker remove the box from her office and then she continued with the rest of her work day.

Her symptoms began to worsen as the day progressed. She began to experience excruciating pain and was unable to hold a pencil, answer the phone, or type on the computer. She informed her supervisor, Charity Register, of the injury and decided to seek medical treatment.

On September 1, 2010, the claimant was seen at the Robert C. Byrd Clinic by Dr. Patrick Ryan, a medical doctor, who ordered x-rays. The unofficial report showed irregularity along the inferior medial portion of the scapula. She was excused from work for the next three days and was referred to an orthopaedic.

On September 7, 2010, the claimant was seen by Chip Woodyard, a physician's assistant, at Jackson River Orthopaedics. On that date, an MRI was ordered which later revealed a probable small bone bruise in the lateral humeral head and some mild soft tissue edema. She was placed in a sling and authorized to return to work the following day.

On September 8, 2010, the claimant returned to work as ordered, but she was unable to do perform her job functions because of continued discomfort. She was placed on leave until her next appointment at Jackson River Orthopaedic Center.

On September 14, 2010, the claimant returned to the Jackson River Orthopaedic Center for her follow-up appointment. At the time of the physical examination her wrist and hand were still swollen. She was placed on leave from September 14, 2010 to September 19, 2010 to give her injury time to heal. She was ordered to return to work on September 20, 2010. She was also referred to Alleghany Regional Hospital for physical therapy.

On September 15, 2010, the claims administrator issued an order which rejected the claim, and a protest was filed on behalf of the claimant.

The claimant submitted the January 3, 2010 (2011) report of Dr. Joe M. Pack, the claimant's treating orthopedic surgeon, Petitioner Exhibit "C".

The claimant, Georgette Morton, testified at a hearing held on January 11, 2011, Petitioner Exhibit "D". Ms. Morton testified that she perceived no limits and on what responsibilities are in terms of helping individual with their personal functions. Ms. Morton testified that she was a secretary but in their office they were classified as support staff; they were not called secretaries. Ms. Morton testified that the majority of the day, she was supporting other staff in the office. Ms. Morton testified that the box of clothing had been in her office probable two weeks. Ms. Morton testified that other staff members would have such items on the premises. Ms. Morton testified that she would assist these individuals in moving not only the property of the entity but also personal

items. Ms. Morton testified that there had been instances where her supervisor had observed her engaging or participating in such activity. Ms. Morton testified that she was never advised that engaging in such activity, specifically the involvement of personal items of a co-worker, was something she should not do.

By order dated September 14, 2011, the Board of Review affirmed the Office of Judges' February 4, 2011 ruling.

### **ISSUES PRESENTED**

THE ISSUES PRESENTED IN THIS CLAIM IS WHETHER THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGE AND BOARD OF REVIEW DATED FEBRUARY 4, 2011 AND SEPTEMBER 14, 2011, RESPECTIVELY, ARE CLEARLY WRONG AND SUBJECT TO REVERSAL.

### **ARGUMENT**

The Administrative Law Judge and Board of Review were clearly wrong to conclude that the disability, Georgette Morton, petitioner, complained of was not due to an injury received in the course of and resulting from employment.

The Workers' Compensation Appeal Board shall reverse, vacate or modify the order or decision of the Administrative Law Judge if the substantial rights of the petitioner or petitioners have been prejudiced because the Administrative Law Judge's findings are:

1. In violation of statutory provisions; or
2. In excess of the statutory authority or jurisdiction of the Administrative Law Judge; or
3. Made upon unlawful procedures; or
4. Affected by other error of law; or
5. Clearly wrong in view of the reliable, probative and substantial evidence on the

- whole record; or
6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Three elements must coexist in compensability cases: 1) a person injury, 2) received in the course of employment, and 3) resulting from employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E. 2d 698 (1970). Jordan v. State Workmen's Compensation Comm'r., 156 W.Va. 159, 191 S.E. 2d 497(1972).

A compensable accident is an injury incurred by an employee attributable to a definite, isolated fortuitous occurrence. Jordan v. State Workmen's Compensation Comm'r., 112 W.Va. 555, 166 S.E.5 (1932). An accident may be an unusual or unexpected result attending the operation or performance of a usual or necessary act or event. Pennington v. State Workmen's Compensation Comm'r., 159 W.Va. 370, 222 S.E.2d 579 (1976). An injury to be compensable, must be received in the course of and resulting from the employment. West Virginia Code §23-4-1.

The Administrative Law Judge was clearly wrong to decide this case based upon a discussion of the going and coming rule set forth in Williby v. W.V. Office of the Insurance Commissioner, 224 W.Va. 358, 686 S.E.2d W.Va. Lexis 99 (2009). In Williby, a bank employee sustained an injury in a fall which occurred while she was crossing the street to return to her place of employment after picking up her lunch during a break. Id. The Court went on to explain that a place of injury may be brought within the scope of employment by an "express or implied requirement of the contract of employment, of its use by the servant in going to and returning from work." Id.

However, the case at bar does not involve an off-premise injury. Unlike the issue in Williby, where the injury occurred outside the zone of employment, it is clear that Ms. Morton's injury occurred in her office while she was on duty.

"The two phrases, in the 'course of' and 'resulting from' are not synonymous and both elements must concur in order to make a claim compensable." Emmel, 150 W.Va. 277,281) (citing Damron v. State Compensation Comm'r, 109 W.Va. 343, 15 S.E. 119; 21A M.J., Workmen's Compensation, § 210). It is clear that the claimant received an injury and that the injury occurred in the course of her employment. Therefore, the Administrative Law Judge was clearly wrong to borrow the philosophy of the Williby case and allow it to be determinative of the case at bar.

In determining whether an injury resulted from the claimant's employment, a causal connection between the injury and the employment must be shown to have existed. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965). It must appear that the injury resulted from something he was doing in the course of his work. Archibald v. Workmen's Compensation Comm'r., 77 W.Va. 448, 87 S.E.2d 791 (1966). Whether an injury occurs in the course or resulting from the employment so as to be compensable under the Workers' Compensation act will depend upon the particular facts in each case. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965).

In Emmel, the West Virginia Supreme Court of Appeals considered whether the claimant was engaged in a purely personal activity. In that case, the employee completed his work day and officially checked out on the time clock. Id. at 279. However, rather than leaving his employer's premises, he chose to go to the taproom and drink beer with other

employees. Id. The claimant remained in the taproom for approximately two hours. Id. When he excused himself to go to the bathroom, he fell and struck his head on the concrete floor which caused his injury. Id. The Compensation Appeal Board found the claim compensable. Id. at 284. However, the West Virginia Supreme Court of Appeals reversed the decision because it found that the claimant was engaged in a purely personal activity. Id.

In Sizemore v. State Workmen's Compensation Comm'r., 160 W.Va. 407, 235 S.E.2d 473 (1977), the Court analyzed the role of the individual participants. Id. at 408. In that case, the claimant was hit on the head on his hard hat by a fellow employee. Id. The Compensation Appeal Board labeled the incident as an assault and denied benefits. Id. After carefully analyzing the role of the participants, the West Virginia Supreme Court of Appeals reversed the decision, holding that the innocent victim of horseplay was entitled to compensation. Id. at 411.

Unlike the Emmel case where the Court held that the claimant was engaged in a purely personal matter, here we have a case which does not involve a purely personal activity. If we consider the role of the two employees involved, like the Court did in the Sizemore case, this injury surely did not result from a purely personal matter between two employees. It is fair to say that it was a purely personal matter for Elisa Robinette, the employee who picked up the maternity clothes. It was never a purely personal matter to the claimant. Ms. Morton testified that she was a secretary, although in their office she referred to as support staff. Ms Morton testified that she perceived no limits in regard to her responsibilities in assisting co-workers with their personal functions.

The employer benefited, at least indirectly from the cooperation exhibited by employees in assisting one another in performing tasks which were personal in nature, The employer benefited from the removal of the box of clothing which had been placed in Ms. Morton's area without her consent or direction.

### CONCLUSION

**WHEREFORE,** Based upon the foregoing, the claimant, Georgette Morton, petitioner, respectfully requests that this Honorable Court accept her Petition for Appeal, to hear her upon the same, and, ultimately, to reverse the decision of the Board of Review certified on September 14, 2011 and enter a final decision which hold this claim compensable and grants TTD benefits from September 2, 2010 through September 20, 2010.

Respectfully submitted,

GEORGETTE MORTON  
By Counsel



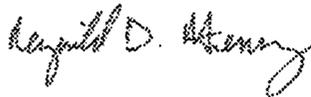
REGINALD D. HENRY  
WV State Bar I. D. #: 4933

**CERTIFICATE OF SERVICE**

I, Reginald D. Henry, counsel for the claimant herein, do hereby certify that I served the foregoing Petitioner Brief by forwarding a true copy thereof by United States mail, postage prepaid, to the following:

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October 7, 2011



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