

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 07-087624

Employee: Rhonda J. Long
Employer: Monroe Manor Nursing Home
Insurer: Missouri Nursing Home Insurance Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: July 6, 2007
Place and County of Accident: Paris, Monroe County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated May 23, 2008.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Ronald F. Harris, issued May 23, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 31st day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Rhonda J. Long

Injury No. 07-087624

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Monroe Manor Nursing Home

Additional Party: Second Injury Fund (left open)

Insurer: Missouri Nursing Home Insurance Trust

Hearing Date: April 28, 2008

Checked by: RFH/tmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? See award.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: July 6, 2007.
5. State location where accident occurred or occupational disease contracted: Paris, Monroe 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? Yes.
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 happened or occupational disease contracted: Going to get a lift when tripped and fell.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Parts of body injured by accident or occupational disease: Left shoulder.

- 14. Compensation paid to-date for temporary disability: None.
- 15. Value necessary medical aid paid to date by employer/insurer? \$728.91.
- 16. Value necessary medical aid not furnished by employer/insurer: To be determined later.

Employee: Rhonda J. Long

Injury No. 07-087624

- 17. Employee's average weekly wages: \$393.75.
- 18. Weekly compensation rate: \$262.50/\$262.50.
- 19. Method wages computation: By agreement.

COMPENSATION PAYABLE

Amount of compensation payable: To be determined later.

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rhonda J. Long

Injury No: 07-087624

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Monroe Manor Nursing Home

Additional Party: Second Injury Fund (left open)

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge for a temporary hearing on April 28, 2008. The Division had jurisdiction to hear this case pursuant to §287.110 RSMo. Attorney Casey Welch represented Rhonda Long (“Claimant”). Attorney Patrick Reidy represented Monroe Manor Nursing Home (“Employer”) and Missouri Nursing Home Insurance Trust (“Insurer”). The Second Injury Fund did not appear and is left open as the issues presented were limited to those raised in a temporary award and did not directly involve the Second Injury Fund. Both parties submitted post hearing memoranda.

STIPULATIONS

1. The Employee and the Employer were operating under the provisions of the Workers’ Compensation Law on or about July 6, 2007;
2. The Employer’s liability was insured through Missouri Nursing Home Insurance Trust;
3. The Employee’s average weekly wage was \$393.75;
4. The rate of compensation for temporary total disability is \$262.50;
- The Employer has paid no TTD benefits to date; and
6. The Employer has provided medical aid in the amount of \$728.91.

ISSUES

The parties requested the Division to determine:

1. Whether Employee sustained a compensable injury by way of an accident arising out of and in the course of her employment on July 6, 2007.
2. Whether Employee is entitled to temporary total disability benefits.

The following exhibits were admitted into evidence without objection:

CLAIMANT’S EXHIBITS

- Exhibit A: Report of Injured Employee
Exhibit B: Deposition of Rhonda Long

The Employer offered no exhibits.

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

FINDINGS OF FACT

Claimant testified that on July 6, 2007, she was employed for the employer as a certified nurse's aid working the 2:00 p.m. to 10:30 p.m. shift. Her duties consisted of such things as assisting residents in getting into and out of bed; getting them ready for and taking them to the evening meal; taking them to the restroom and assisting them with bathing.

On July 6, 2007, Claimant and a co-worker were responsible for assisting some 20 to 22 residents. Claimant testified that the busiest time of the shift was getting people ready for the evening meal, as they were to have everyone in the dining room at 5:00 p.m., so their dinner trays could be delivered. In order to try to get everyone in the dining room by 5:00, the CNA's would begin taking residents to the dining room around 4:00 p.m.

At approximately 4:45 p.m. on July 6, Claimant had just finished taking a resident to the dining room and was in the process of going to get another when she came upon one of her resident's sitting in a wheel chair at the nurses' station. That resident told the Claimant she needed to go to the restroom. Claimant informed the resident she would have to go get a lift to assist getting the person out of the wheelchair and to the restroom. Claimant testified it would take 15 to 20 minutes to get the lift and get the resident to the restroom before she could then resume taking people to the dining room for the evening meal. She was walking down the hall at a rapid pace, faster than her normal pace, to get the lift when she tripped over her shoe and fell forward on her face and left shoulder. She did not know if her shoe stuck or caught on the floor, just that she tripped over her shoe. The incident was reported and Claimant was taken by ambulance to the emergency room at the Audrain Medical Center, where x-rays were taken suggesting a possible rotator cuff tear.

Employer then sent Claimant to see Dr. Mary Jo Crawford, who also suspected a rotator cuff tear, placed claimant in a sling, and sent her for an MRI. Dr. Crawford then referred claimant to Dr. Quinn at Columbia Orthopaedic Group. Upon arriving at Dr. Quinn's office on July 16, claimant was informed the employer was denying treatment and if she wanted to see Dr. Quinn, she would have to pay for it herself. Claimant agreed to pay for the visit. After reviewing the MRI, Dr. Quinn diagnosed a large rotator cuff tear and recommended surgery and physical therapy. Claimant testified that she did not get either the surgery or the therapy, as she did not have health insurance and could not afford to pay for it herself.

Dr. Quinn informed Claimant she could perform light duty work and Claimant so advised the employer. Claimant testified the employer declined to offer her light duty work. Claimant returned to Dr. Quinn on July 31, at which time the doctor told her she needed to have surgery and there was no need for her to return unless it was to have the surgery performed.

Claimant testified she then called the employer to ask them to reconsider light duty, which the employer again declined to offer. Employer terminated Claimant's employment approximately a week later. Claimant did not work following the incident on July 6, 2007, until October 11, 2007, at which time she went to work caring for a lady in the lady's home.

I find the Claimant to be a credible witness.

RULINGS OF LAW

Did Claimant sustain a compensable injury by way of an accident arising out of and in the course of her employment on July 6, 2007?

The injury occurred July 6, 2007; consequently, the Workers' Compensation Law as amended in 2005 governs the instant case.

As of the date of this accident § 286.120.1 RSMo, as amended in 2005, provided, in pertinent part, as follows:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment . . .

The definitions of both accident and injury were significantly changed in the 2005 legislation. The definitions are set forth in § 287.020.2 RSMo and § 287.020.3 RSMo, and are, in pertinent part, as follows:

2. The word **“accident”** as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter the term **“injury”** is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the 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...(emphasis added).

Construction of the phrase “arising out of and in the course of employment” historically has been broken in half, resulting in a two-prong test, with the “arising out of” portion construed to refer to causal origin, and the “course of employment” portion to the time, place, and circumstances of the accident in relation to the employment.

Proof of a compensable injury requires not only establishing that it occurred at a particular place, and a particular time (the “in the course of” component), the injury must also be causally connected to some risk or hazard of the job (the “arising out of employment” component).

The second prong, whether the injury arose “in the course of” employment, is easily resolved in the instant case. The injury occurred within the period of employment at a place where the employee could reasonably be expected to be and while engaged in the furtherance of the employer's business.

The first prong, the “arising out of”, test primarily concerned with causal connection, is the dispositive issue in this case.

Historically, our courts have required a showing that the employee's injury was caused or due to a risk of employment. Missouri cases have uniformly held that an accident and resultant injury “arise out of” the employment when there is a causal connection between the conditions under which the work was required to be performed and the resulting injury. The injury “arises out of” the employment so long as the injury was a rational consequence of a hazard connected with the employment.

During the 2005 legislative session, the legislature expressed its displeasure with what it perceived to be the expansion of the Act to such an extent that the focus on determining whether a case was compensable seemed to be whether the act was “incidental” to the employment, a doctrine that some refer to as “positional risk”, rather than whether the employee was actually engaged in performing the duties of employment.

The legislature expressed its displeasure with the enactment of §287.020.10, which is as follows:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of **“accident”**, **“occupational disease”**, **arising out of**, and **in the course of the employment**” to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W. 3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

(emphasis added).

All three of the cases abrogated in the above referenced statute have one thing in common, i.e., it was difficult or impossible to determine whether the employment subjected the employee to some risk or hazard greater than the employee would have been subjected to in normal everyday life.

Employer argues that recent decisions from the Labor and Industrial Relations Commission (“Commission”) require a conclusion Claimant has failed to prove she suffered a compensable injury within the meaning of the relevant statutes.

Specifically, employer cites the Commission decisions in *Randy Johnson v. Town & Country Supermarkets, Inc.*, Injury No.: 06-078999 and *Joyce Bivins v. St. John’s Regional Health Center*, Injury No.: 06-095060. Employer correctly notes the Commission denied both claims on the grounds they involved “unexplained” or “inexplicable” incidents that were not causally related to the employment. However, both *Johnson* and *Bivins* are distinguishable from the instant case.

The *Johnson* case involved a grocery store employee who was walking down an aisle at a rapid pace to retrieve some grocery carts from a nearby retirement community when he “stepped wrong” and his ankle rolled. He admitted that he was not sure what caused the accident and that he did not slip, trip, or stumble. Although he was walking at a rapid pace, there was no evidence the rapid pace was remotely connected to the “misstep” causing the injury. The Commission noted that employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. In denying the case, the Commission noted that it could not establish a causal connection between the conditions under which the employee was performing his work and the resulting injury.

In *Bivins*, the employee was walking across the floor when she “just fell”, meaning she fell without explanation. The Commission concluded since the injury was the result of an “unexplained” fall, it was unable to determine or conclude there was any unique condition of employment which contributed to the injury.

In both decisions the Commission noted an award of compensation may be issued if the injury were a rational consequence of some hazard connected with the employment. The instant case is distinguishable from both *Johnson* and *Bivins*, in that the injury is a rational consequence of a hazard connected with the employment.

Rather than being an “unexplained” or “inexplicable” incident, Claimant testified credibly as to the specific event that occurred on July 6, 2007, resulting in her injury. Claimant’s testimony was that she “tripped” over her shoe as she was walking rapidly down the hall to retrieve a lift to assist a resident. That testimony is consistent with the injury report completed within an hour of the incident (Claimant’s Exhibit A). Additionally, Claimant’s walking at a rapid pace was necessary, due to a sense of urgency, in that she wanted to get the resident to the restroom as quickly as possible to avoid an embarrassing “accident,” as well as trying to get all her residents to the dining room at the appointed time for the evening meal so their food would not be cold. Time was of the essence and Claimant knew it. The record leads to the conclusion the injury was a rational consequence of a hazard/risk associated with the employment.

The uncontradicted testimony indicates as a result of the fall, Claimant was diagnosed with a large tear of her rotator cuff which would require surgery to repair. Additionally, employee testified and there was no evidence to the contrary that she had no problems with her left shoulder prior to July 6, 2007.

Employer correctly points out Claimant has the burden of proving all the essential elements of her claim. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo. App. 1996). A thorough review of the evidence, as well as the relevant statutory provisions, leads to the conclusion Claimant has met her burden of proving she sustained a compensable injury by way of an accident arising out of and in the course of her employment on July 6, 2007.

Liability for temporary total disability

As noted earlier, there was some confusion as to whether TTD benefits were to be addressed in this award. During a conference call with the parties on May 19, 2008, the parties confirmed they are not requesting TTD be addressed in this award. Consequently, TTD benefits will not be addressed in this award.

CONCLUSION

Claimant has met her burden of proving that she suffered a compensable injury as the result of a work related accident arising out of and in the course of her employment.

Claimant's attorney requests a fee of 25% of all benefits awarded for necessary legal services. Since the only issue determined at this time is a purely legal issue, no attorney's fee is granted at this time and will be addressed at a later date.

This award is temporary or partial in nature, is subject to further order, and the proceedings are hereby continued and left open until a final award can be made.

Date: _____

Made by: _____

RONALD F. HARRIS

*Chief Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Jeffrey Buker

*Director
Division of Workers' Compensation*

Prior to going on the record at the hearing, the parties indicated in the event this case is determined to be compensable, they felt they would be able to resolve medical treatment and TTD benefits; therefore, there was no need to raise either as a disputed issue at hearing. However, once on the record, TTD was raised as a disputed issue. In order to clarify this, a conference call was held on May 19, 2008, at which time both parties agreed that neither medical treatment nor TTD benefits needed to be addressed in this award and that the sole issue to be addressed was the compensability of the injury.