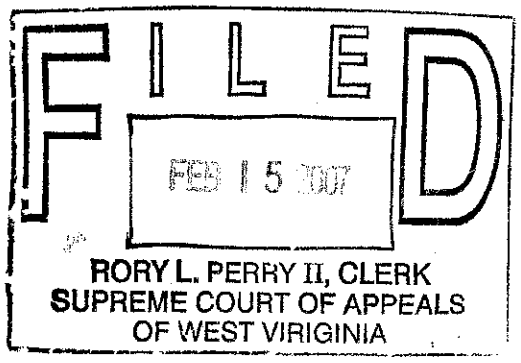
IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA



CHARLESTON

JENNY S. WILLIBY,
Claimant-Petitioner,

vs.

WVOIC,
and FIRST CENTURY BANK,
Respondents.

Appeal No. _____
Claim No. 2005-015558
D. O. I. 09/03/2004
BOR Appeal No. 74504

PETITION FOR APPEAL

TO THE HONORABLE JUDGES OF THE SUPREME COURT

OF APPEALS OF WEST VIRGINIA

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THE KIND OF PROCEEDING AND NATURE OF THE

RULING IN THE LOWER TRIBUNAL

This is an appeal from an Order of the Workers' Compensation Board of Review dated January 17, 2007 which reversed the Office of Judges order dated October 19, 2005, which had affirmed the Commission's order dated November 11, 2004 ruling the claim compensable. The Board of Review reversed the prior orders and held the claim not compensable. It is from the Board of Review's order dated January 17, 2007 which the Petitioner seeks this appeal.

II

STATEMENT OF FACTS

The petitioner, Jenny S. Williby, is an employee at First Century Bank, working as a loan clerk. On September 3, 2004, a holiday weekend, Ms. Williby was injured in the course of and as a result of her employment. Because it was a holiday weekend, the bank had less staff than usual, resulting in a very busy day for Ms. Williby. Because of the busy day, Ms. Williby missed her normal break. Later, she called in her lunch to a market across the street. She then left the bank on what the bank describes as a paid 15 minute break (during which she is not off the clock) she went across the street to a local market, picked up her lunch and returned to the bank. Unfortunately, on her return across the street, she fell hard, injuring her shoulder. She returned to the bank, and subsequently was taken to Bluefield Regional Medical Center.

At Bluefield Regional Medical Center she was evaluated and it was determined that she had sustained a right shoulder fracture (specifically a right proximal humerus fracture comminuted with mild angulation), facial abrasions and cephalgia. The treatment plan was to use a shoulder immobilizer, and she was released to follow with Dr. Stephen O'Saile.

As Dr. O'Saile followed Ms. Williby, he became suspicious of a rotator cuff tear and had her evaluated by MRI to determine if he was correct. An MRI of November 9, 2004 revealed a supraspinatus tear at the insertion point with the intact biceps tendon. She was then scheduled for a rotator cuff surgery which was performed by Dr. O'Saile on November 17, 2004.

Fortunately for Ms. Williby, she has recovered, although with limitations, and has successfully returned to work. Her last evaluation by the Commission was performed by Dr. Robert Kropac on March 10, 2005, at which time he opined she was not ready for an impairment

evaluation, as she needed continued treatment. (She has since been granted a 9% permanent partial disability award.)

After the Commission's initial ruling of compensability on November 11, 2004, the employer, by counsel, took the deposition testimony of Ms. Williby. In response to questioning she testified that she was injured returning from picking up her lunch during her 15 minute morning break. She further noted that she had to pick it up when she did because she did not have her morning break that day. (Tr. January 10, 2005, pp. 5).

Subsequently, Ms. Williby retained counsel and her deposition was retaken. At that time, she testified that she was a salaried employee, working 39 ½ per week. She noted that the employer provided for two breaks during the day and a lunch break from 12:00 to 12:30. She also noted that she could not always take her lunch on time, due to dealing with customers. Her testimony also noted that the bank provided a place to eat. On the date of her injury, September 3, 2004 (a Saturday), Ms. Williby noted that it was a holiday weekend. She stated that because it was a holiday, that the bank had less staff working. She reported that she was very busy, and because they were understaffed, she called out for her lunch (a location across the street). She then proceeded to get her lunch during her break, and she fell returning to the bank. She went on to note that it was a common practice for employees to go to the store, get pop, dinner, a muffin, but that they typically did not clock out. Further, she noted that this occurred during regular work hours, and it occurred with the knowledge and acquiescence of the employer. She also noted it occurred anytime, even at times outside regular breaks. Finally, she indicated that she could not eat at the location that she purchased the lunch, because they did not provide a place to eat. (Tr., July 25, 2005, pp. 16-18, 22-24, 26-27).

Finally, Lisa Huff appeared and testified by deposition on July 25, 2005. During her testimony, she indicated she was the Director of Human Resources. She noted Ms. Williby was salaried. She agreed with Ms. Williby that the day of her injury was a holiday weekend and was a very busy time, yet the bank did not staff as heavy (due to those with seniority taking off). She further agreed with Ms. Williby that the bank did permit and tolerate employees going across the street during regular working hours. While noting that they should clock out to do so, she then admitted that the 15 minute breaks are paid, and therefore, they would not clock out during those times. She further conceded that employees may not take the break as scheduled due to working with clients. (Tr., July 25, 2005, pp. 1-8).

Thereafter, the claim was submitted for a decision.

ASSIGNMENT OF ERROR

The Workers' Compensation Board of Review erred and was clearly wrong in that the order it entered is clearly based upon error of law and there is insufficient evidence to sustain the decision, since the Petitioner has clearly shown that she injured her shoulder in the course of and as a result of her employment.

IV

POINTS AND AUTHORITIES AND ARGUMENT

The petitioner, Jenny S. Williby, seeks this appeal to reinstate the Commission and Office of Judge's orders ruling the claim compensable.

In its order, the Board of Review explicitly finds that this claim cannot be compensable because Ms. Williby was injured off the premises of the employer, during a break, and therefore, the claim does not meet the legal requirement that the injury be in the course of and as a result of employment. The Board further found that the place of injury was not brought

into the scope of employment by express or implied requirement of the employment contract, as the bank had no control over her during her break. The Board of Review fundamentally errs in such s finding.

Both the Commission and the Office of Judges have been aware of these facts and law, yet both ruled the claim compensable. They did so because the evidence in the record does support the conclusion that Ms. Williby was acting in the course of and as a result of her employment. Her actions were an accommodation to her employer in this instance, and thus, did occur as a result of, and in the course of employment. Whether a particular act is in the course of and as a result of employment depends on the particular facts in each case. *Barnett v. State Workmen's Compensation Comm'r*, 153 W.Va. 796, 172 S.E.2d 698 (1970). The particular facts in this case make it clear that Ms. Williby was acting in the course of and as a result of employment. There can be no other conclusion.

Ms. Williby works in customer service. It is expected of an employee in her position to put off taking breaks or lunch if she is working with a customer at the time those breaks or lunch are to begin. The customer comes first! The bank's representative affirmed this to be true. As a consequence, in order to accommodate the bank, employees oftentimes are not taking breaks (as Ms. Williby testified to) or are rushing to get lunch.

In any event, the Saturday of her injury was a holiday weekend, which by the Banks own admission, is a busy time. Yet, they also choose to under-staff the bank (apparently so those with seniority can take off time to enjoy the holiday). That is certainly within the purview of the banks authority. It may operate as it chooses. However, in understaffing, they left Ms. Williby (and other employees) in the position of having to skip breaks and work in order to accommodate the employer's decision to under staff the bank on a busy day. These breaks are a

part of the employer-employee contract, and are paid breaks. Additionally, it left her in the position of calling in her lunch, and rushing to get it in order to return to work to attend to the tasks required of her by the employer. By skipping breaks, and taking lunch in the employee lunchroom, she was acting in a fashion to accommodate the employers operations. By doing so, she furthered the business practices of the bank. On this specific day, Mrs. Williby was not free to use her break as she saw fit, as stated by the Board of Review, because she was expected to work in customer service and accommodate the Bank's choice to under-staff on a busy day. She had two choices: to not eat at all, or call out and pick up a meal quickly, at the only place where she could do so quickly.

It is also clear from this record that the employer is aware of and permits employees to leave the bank, to go to the very store Ms. Williby went to, in order to get food, drinks and the like, even during regular working hours. The employer acknowledges this is a regular occurrence. Additionally, employees go to the store even outside of scheduled breaks. The employer has created the environment whereby employees can, and do, leave the premises while on the clock. They do so to get food and drink, in order to work around customers. It is now a part of the accepted work environment at the bank, and, it is being done to accommodate the business practices of the bank. It should also be noted that the two 15 minute breaks are paid breaks and employees are still on the clock during those breaks. Thus, even the pay policy of the bank indicates that those breaks are considered part of the regular work hours of the employees.

It must also be noted that the Board of Review found that the bank had no control over Mrs. Williby's activities during her break. That is patently untrue. The bank required Mrs. Williby to work through scheduled breaks, and to go on breaks only when she was free from customers. On this particular day, the bank exerted even further control, in that they had

understaffed and required her to work even more. She was "free" to have lunch, so long as it did not interfere with her job duties. Thus, she called in lunch across the street (the only place she could get lunch quickly in town) and was returning directly to work. She fell on her return. The employer clearly was controlling her actions when she fell – the employer's actions caused her to be in that very spot she fell, at the very time she fell, as a direct consequence of her job duties. Or in the vernacular of Workers Compensation – in the course of and as a result of her employment.

Ms. Williby fell during a paid break, while she was on the clock, returning quickly to work on a busy holiday weekend at the bank. She had put off her break to do her job then called out for lunch at the only location where she could pick it up quickly and return to her duties. She went to pick it up, returning to the bank. Obviously, she was working around the busy day she was encountering, in order to complete her duties of employment. The bank was admittedly understaffed, by its own decision. Ms. Williby was accommodating the employer by working through breaks, then going out quickly to get lunch, in order to return to her duties quickly. Her actions were very clearly in the course of her employment (the employer acknowledges this is permitted behavior, it was during a paid break and it functions to accommodate customer service) and as a result of her employment (she was trying to work her lunch in around a busy day, when the bank was understaffed.) The Commission and Office of Judges recognize that even though she was not on the premises that her actions were in the furtherance of the employers business, were an accommodation to that business, and were causally connected to her employment. Thus, it is improper to conclude as the employer has briefed that simply because Ms. Williby was on the street, and "on break" that therefore, she was not working in the course of and as a result of her employment. The actions of the bank, and their

expectations of their employees in working through breaks and lunch to serve customers make it clear that in this particular instance, her injury occurred as a result of both express and implied requirements of her employment, bringing the place of injury into the scope of employment. Her actions were causally connected to her employment under the particular facts of this injury, and thus, her claim was rightly ruled compensable.

V

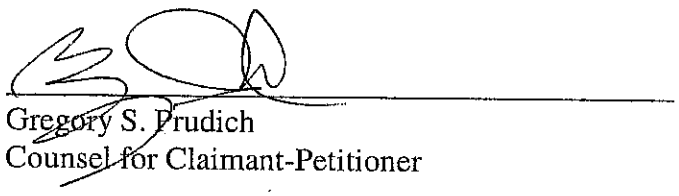
PRAYER FOR RELIEF

For these reasons and all other reasons apparent from the record, the petitioner, Jenny S. Williby, respectfully prays that the Order of the Workers' Compensation Board of Review entered on January 17, 2007 be reversed and set aside and that the Commission and Office of Judges orders ruling the claim compensable be reinstated.

Respectfully submitted this the 14th day of February, 2007.

JENNY S. WILLIBY

SANDERS, AUSTIN,
FLANIGAN & ABOULHOSN



Gregory S. Prudich
Counsel for Claimant-Petitioner

W. Va. State Bar No. 4362

CERTIFICATE OF SERVICE

I, Gregory S. Prudich, counsel for petitioner, do hereby certify that I have served a copy of the foregoing **PETITION FOR APPEAL**, upon Workers' Compensation Defense Division and Janet C. Williamson, counsel for the employer, by mailing a true copy thereof by United States mail, postpaid to their addresses, Workers' Compensation Defense Division, P. O. Box 4318, Charleston, West Virginia 25364-4318 and Janet C. Williamson, WILLIAMSON, MAGANN & GURGANUS, 600 Roger Street, Princeton, WV 24740 on this the 14th day of February, 2007.

Gregory S. Prudich
Counsel for Petitioner