APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1108693

GAIL BRUCE,

EMPLOYEE,
CLAIMANT/APPELLANT,

V.

COLUMBIA HEART CLINIC,

EMPLOYER,

AND

HARTFORD INSURANCE COMPANY OF
THE MIDWEST c/o THE HARTFORD,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in
Columbia, South Carolina on May 21, 2013.

Appellate Panel Decision and Order
filed 9-3, 2013.

APPEARANCES:

Claimant/Appellant represented by
Tommy Bellinger, Esquire, McWhirter, Bellinger & Associates
of Columbia, South Carolina.

Defendants/Appellants represented by
Kelly F. Morrow, Esquire of McAngus Goudelock & Courie, L.L.C.
of Columbia, South Carolina.

STATEMENT OF THE CASE

A hearing before the Single Commissioner was held on November 8, 2012. At the hearing, Claimant alleged that she was injured in the course and scope of her employment on July 15, 2011 while on a smoke break. In particular, she alleged that she injured her right shoulder and both knees. Claimant sought an award of compensability, temporary total disability benefits, a finding that she has reached maximum medical improvement, and also a finding pursuant to S.C. Code Ann. §42-9-10 that she is permanently and totally disabled as a result of her injuries. Further, Claimant sought an award for lifetime causally-related medical treatment.

Defendants denied that this claim is compensable and indicated that Claimant failed to provide sufficient evidence to show that she suffered from a compensable injury by accident that arose out of and in the course in scope of her employment. In particular, Defendants argued that Claimant was on a non-paid lunch break when she was injured, and that the injury did not occur on the Employer's premises. Defendants relied upon Matute v. Palmetto Health Baptist, 391 S.C. 291, 296-97, 705 S.E.2d 472, 475 (Ct. App. 2011). In the alternative, should the Commission find that her claim is compensable, the Defendants took the position that the injuries resulting from the accident should be limited to the right shoulder, based upon her reporting of the injury to her physicians, and also on the short-term disability paperwork and subsequent amendment of the Form 50 filed after her termination by the Employer. In addition, Defendants denied that Claimant is entitled to temporary total disability benefits as work was available to her at the time of her termination, which was performance based. Further, Defendants asserted that Claimant's alleged injuries to her bilateral knees are not compensable as she failed to report them at the time of the accident, or in the medical evidence, as a whole. The medical evidence supports that she

had pre-existing conditions that were end-stage osteoarthritis in both knees and knee replacements were previously recommended for both knees that pre-date to the date of the accident.

The Single Commissioner issued a Decision and Order on January 10, 2013 finding that Claimant's injuries suffered while on her break and off Employer's premises was as a personal act without any connection to her duties with Employer. The Commissioner went on to find that the personal comfort doctrine did not apply and that Claimant did not sustain her burden of proving a compensable injury by accident within the course and scope of her employment.

Claimant filed a Request for Commission Review on January 17, 2013 asserting the Single Commissioner erred in numerous findings of fact and conclusions of law. The Full Commission held a hearing on May 21, 2013 to determine issues raised by Claimant.

SINGLE COMMISSIONER FINDINGS OF FACT

Based upon the testimony and evidence submitted by both parties, the undersigned Commissioner makes the following Findings of Fact:

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Commission Act.
2. The Claimant's average weekly wage is $1,289.36, with a corresponding compensation rate of $704.92. I base this finding upon stipulation of the parties.
3. Based on the evidence as a whole, I find that the Claimant's injury while on her personal smoke break (and off the Employer's premises), was a personal act, without any connection to her employment duties. While the personal comfort doctrine was argued by the Claimant, the case law dealing with that doctrine relates to acts that occurred on the employer premises, for the most part. Claimant was on a sidewalk and in an area not

maintained by or controlled by the Employer. Her injury was clearly in no way connected to the Employer, her job duties, or the Employer premises.

4. Claimant has not proven that she sustained an injury by accident in the course and scope of her job duties. Specifically, "The South Carolina Workers' Compensation Act requires that, to be compensable, an injury by accident must be one 'arising out of and in the course of employment'." S.C.Code Ann. §42-1-160 (1985). The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Both parts must exist simultaneously before any Court will allow recovery. Hicks v. Piedmont Cold Storage Inc., 324 S.C. 628, 479 S.E.2d 831, 834 (Ct. App. 1996). "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. Howell v. Pacific Columbia Mills, 291 S.C. 469, 472, 354 S.E.2d 384, 385 (1987). For an injury to "arise out of" employment, the injury must be proximately caused by the employment. Douglas v. Spartan Mills, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965). The injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. Id. Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49-50, 508 S.E.2d 21, 24-25 (1998). Claimant has not sustained her burden of proving a compensable injury by accident arising out of and in the course and scope of her employment.

5. South Carolina courts have adopted the personal comfort doctrine. In Mack v. Branch No. 12 Post Exchange, Fort Jackson, 207 S.C. 258, 35 S.E.2d 838 (1945), an employee who arrived before the start of work was smoking a cigarette on the employer's premises. His leg was burned when a spark from his cigarette ignited his pants where he had spilled

lighter fluid. The Supreme Court found the injury compensable. In reaching this conclusion, the Court recognized the personal comfort doctrine and held: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment." Id. at 264-65, 35 S.E.2d at 840 (quoting Whiting-Mead Co. v. Indus. Accident Comm'n, [178 Cal. 505] 173 P. 1105, 1106 (1918). Osteen v. Greenville County Sch. Dist., 323 S.C. 432, 438-39, 475 S.E.2d 775, 779 (Ct. App. 1996)(rev'd, 333 S.C. 43, 508 S.E.2d 21 (1998). Similarly, if the Claimant's injury, while on a lunch break, had occurred while at work or on the Employer's premises, this claim would have been found compensable.

6. I also find that the case of Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (S.C. 1987) to be directly on point with this case. In this case, as in Howell, the Claimant was injured on a public street, not on the Employer's premises. Had the accident occurred in an area which was maintained and controlled by the Employer, then the result would have been different.

7. The case of Matute v. Palmetto Health Baptist, 391 S.C. 291, 296-97, 705 S.E.2d 472, 475 (Ct. App. 2011), is also directly on point with this case. Matute holds the following,

in pertinent part: "As a general rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment." Gray v. Club Group, Ltd., 339 S.C. 173, 188, 528 S.E.2d 435, 443 (Ct. App. 2000). However, South Carolina has recognized a number of exceptions to this rule, including the following: (1) in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; (2) the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment; (3) the way used is inherently dangerous and is either the exclusive way of ingress and egress to and from his work or constructed and maintained by the employer; (4) the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the employee in going to and coming from work; or (5) an employee sustains an injury while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work. Id. at 188–89, 528 S.E.2d at 443. None of the exceptions to the "going and coming" rule apply under these circumstances. The following evidence supports this conclusion: (1) Palmetto Baptist did not provide Matute with transportation to and from work, nor did it pay for her transportation; (2) Matute was not fulfilling any duty or task in connection with her employment at Palmetto Baptist when she fell; (3) Matute's route into and out of the hospital was neither the exclusive nor the required means of entry or exit, nor was it inherently dangerous; (4) the Sumter Street crosswalk was open to

pedestrian traffic on the date of Matute's fall, but she chose not to use the crosswalk when exiting the hospital; (5) Matute was on a public sidewalk when she fell; and (6) Palmetto Baptist does not own, maintain, or control the sidewalk on which Matute fell. Thus, we hold the appellate panel properly reversed the single commissioner." Matute v. Palmetto Health Baptist, 391 S.C. 291, 296-97, 705 S.E.2d 472, 475 (Ct. App. 2011), reh'g denied (Feb. 28, 2011).

8. I have reviewed all the medical evidence and the depositions of Drs. Van Dam and Fulton. While they are supportive of the Claimant on causation, had this claim been found compensable, the only body part injured was her right shoulder. Claimant had substantial and severely injured bilateral knee problems well before this accident, which already needed to be replaced. Moreover, the earliest medical reports detail only the right shoulder being injured. It was clear from the evidence that only her right shoulder was injured in this case. However, as I do not find the claim compensable under the case law as cited, there are no benefits to be awarded under any theory.
9. All benefits under the S.C. Workers' Compensation Act are hereby denied.

SINGLE COMMISSIONER CONCLUSIONS OF LAW

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
2. Pursuant to S.C. Code Ann. §§ 42-1-130 and 42-1-140, the Claimant was an employee of the Employer.
3. Pursuant to S.C. Code Ann. §§ 42-1-40 and 42-1-50, the Claimant's average weekly wage is $1,289.36, with a corresponding compensation rate of $704.92.

4. Pursuant to S.C. Code Ann. §42-1-160, the Claimant did not suffer from a compensable injury by accident to her right shoulder and bilateral knees on July 15, 2011, as she did not sustain her burden of proof which requires a showing of a compensable injury arising out of and in the course and scope of her employment.
5. Pursuant to Mack v. Branch No. 12 Post Exchange, Fort Jackson, 207 S.C. 258, 35 S.E.2d 838 (1945), South Carolina recognizes the personal comfort doctrine, however the Claimant was not on a smoke break that occurred while at work or on the Employer's premises, thus her injury is not compensable.
6. Pursuant to Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (S.C. 1987), the Claimant was not injured in an area that was maintained and controlled by the Employer, thus her injury is not compensable.
7. Pursuant to Matute v. Palmetto Health Baptist, 391 S.C. 291, 296-97, 705 S.E.2d 472, 475 (Ct. App. 2011), though South Carolina recognizes exceptions to the going and coming rule, none of the exceptions apply under these circumstances.
8. Pursuant to S.C. Code Ann. §42-15-20, notice of the accident was given to the Employer for her right shoulder, however notice was not given for her bilateral knees.
9. Pursuant to S.C. Code Ann. §42-1-10, et al., Claimant is denied all benefits under the S.C. Workers' Compensation Act.

EVIDENCE OF THE CASE

Testimony of Julie Hunt:

Ms. Hunt testified that she worked with Claimant at Columbia Hearth for the past twelve years. Ms. Hunt recalls that, on July 15, 2011, Claimant asked her for a cigarette before going on her lunch break. (H. Tr. p. 8, ll. 20-25). Ms. Hunt testified that there's an area outside the

Columbia Heart building where people smoke. She said it is off of the property and it must belong to the City. (H. Tr. p. 9, ll. 5-11).

Ms. Hunt was asked questions about Claimant's condition before and after her alleged incident. Ms. Hunt stated, that prior to her fall, she didn't notice any problems with Claimant's right arm or right shoulder. (H. Tr. p. 10, ll. 1-3). After the injury, she noticed that Claimant favored the right shoulder, (H. Tr. p. 10, l. 7), and Claimant asked her to get charts. (H. Tr. p. 10, ll. 8-10). As for her knees and legs, before the date of the injury, Ms. Hunt knew Claimant had arthritis and took steroid shots. (H. Tr., p. 10, ll. 16-19). After the date of the injury, Ms. Hunt said that Claimant's ability to get around declined. (H. Tr. p. 10, l. 25).

Ms. Hunt also testified that she heard Claimant crying in the bathroom on a few occasions and occurring near the end of the day. She said that Claimant was upset due to the pain of walking down the halls and working with patients all day. (H. Tr. p. 11, ll. 13-16). Further, Ms. Hunt testified that Claimant had a limp after her date of injury. (H. Tr. p. 11, ll. 8-9).

On cross-examination, Ms. Hunt testified that she's been friends with Claimant for twelve years. (H. Tr. p. 13, l. 7). Ms. Hunt said that she was not Ms. Bruce's supervisor, so she didn't know what Claimant's job duties were. (H. Tr. p. 14, ll. 1-13). She stated Claimant was her direct supervisor at Columbia Heart. Further, she said that she only knew what Claimant was crying about one time. (H. Tr. p. 15, ll. 1-3). She also said that Claimant walked with a shuffle and a limp prior to her injury. (H. Tr. p. 15, ll. 4-7).

Testimony of Claimant:

Claimant testified on her own behalf. She testified that she was born on February 20, 1954. (H. Tr. p. 18, l. 5). She is single and lives in Elgin. (H. Tr. p. 18, ll. 6-9). Claimant was

hired by Columbia Heart in August 1995 and was last employed there as a Support Manager. (H. Tr. p. 18, ll. 19-24). Claimant said that as a Support Manager, she managed twenty-one people. This includes all secretaries and medical assistants, and involved disciplinary action, disputes, and patient flow. (H. Tr. p. 19, ll. 18-25). She also took x-rays and helped with patient care. (H. Tr. p. 20, ll. 1-5).

Claimant testified that before the accident, she was allowed to manage her own schedule and she did not check charts because there was no time in her schedule. After the accident, she was not allowed to decide whether she worked the floor or not. (H. Tr. p. 20, ll. 12-25). Claimant said she was told to work the floor every day, which she did. (H. Tr. p. 21, ll. 3-4).

In particular, as to the injury, Ms. Bruce testified that on July 15, 2011 she went downstairs to speak with Angela Jenkins regarding some concerns about her being put on probation in late June. (H. Tr. p. 22, ll. 13-17). After she finished talking with Ms. Jenkins, Claimant said she went back upstairs and told her team leader that she was going to have a cigarette and she'd be right back. (H. Tr. p. 23, ll. 1-8). Claimant said it was extremely hot, she took a few puffs and then started back towards the building. She said that the area where everyone smokes is about twenty feet from the entrance to Columbia Heart. There is a parking area around the smoking area and a sidewalk for ingress and egress. (H. Tr. p. 24, ll. 1-15). Claimant said she was moving fast, headed down the sidewalk and her foot hit the sidewalk where it settled. She said she fell forward, came down hard on her knees and then the top part of her body came down. She turned her face away from the sidewalk and her shoulder was the last part that hit the ground. (H. Tr. p. 25, ll. 1-9). Claimant testified that she didn't do anything other than go to the smoking area and then back to Columbia Heart. (H. Tr. p. 25, ll. 16-20).

Claimant said that someone from the hospital asked if she was okay and then an administrative person from Columbia Heart walked out and saw her. (H. Tr. p. 27, ll. 17-25). She was taken to the hospital and Ms. Jenkins came to speak with her there. (H. Tr. p. 29, ll. 2-4).

Claimant testified that she had previous right rotator cuff surgery. (H. Tr. p. 27, ll. 21-25). Prior to the injury, Claimant said that her right shoulder was doing fine. She didn't lift real heavy stuff, but it didn't bother her. She could do anything she wanted to. (H. Tr. p. 30, ll. 7-20). As for her knees, Claimant said she had prior surgery to both knees when she was twelve. In particular, she testified that she had patella realignment because of congenital anomalies. Claimant did say she had osteoarthritis in both knees. (H. Tr. p. 31, ll. 1-17). Prior to the fall, at times, if she was on her feet a lot, her knees would hurt and she had steroid injections about every two-to-three months. She was able to do whatever she wanted to do and she didn't have any problems unless she overdid it. (H. Tr. p. 32, ll. 1-9). Since the injury, she states that she is hardly able to walk. She needs a total knee replacement which she was avoiding if she could help it. (H. Tr. p. 32, ll. 16-18). Claimant admitted that Dr. Constable recommended total knee surgeries prior to her fall, and she subsequently left her care and began treating with Dr. Van Dam. (H. Tr. p. 33, ll. 3-9).

Claimant said that her main complaint on the date of the accident was her right shoulder. (H. Tr. p. 34, l. 1). The following day, she saw that both knees were skinned, both ankles were skinned, and bruising on her chest. (H. Tr. p. 34, ll. 14-21). She then went on to testify about her right shoulder dislocating five times (H. Tr. p. 37, ll. 1-2) and ultimately undergoing surgery on July 22nd. (H. Tr. p. 37, ll. 5-8). Then, she started having problems with her knees. She was in a lot of pain and she asked Dr. Fulton to give her an injection in her knees. (H. Tr. p. 37, ll.

16-22). She has continued to see Dr. Van Dam since August and is currently on Lortab, Ultram and Meloxicam. (H. Tr. p. 38, l. 3). Since her injury she has been using a rolling walker (H. Tr. p. 39, l. 13) and if she didn't use it she's afraid she would fall. (H. Tr. p. 39, ll. 17-19). Her pain level is worse since the fall and the shots for her knees don't work anymore. (H. Tr. p. 39, ll. 24-25). She's noticed that her knees have steadily gone downhill since the accident. She was on a lot of medications due to her shoulder surgery, so she claims it was hard to tell what was going on with her knees. (H. Tr. p. 40, ll. 15-23).

Claimant testified that she is unable to clean her house, grocery shop, or cook. She needs help all of the time. (H. Tr. p. 41, ll. 21-25). She requires help getting in and out of the shower, getting dressed, going up and down stairs, and she has given up on any extra activities. (H. Tr. p. 42, ll. 1-6). Claimant said that Dr. Van Dam has recommended a shower chair and a rolling walker, neither of which were recommended prior to her fall. (H. Tr. p. 43, ll. 4-11).

Claimant said that as for her right shoulder, she has almost no range of motion. (H. Tr. p. 43, l. 14). She can't comb her hair with her right hand. (H. Tr. p. 43, ll. 21-23). She can't reach with her right shoulder and has continuous pain. (H. Tr. p. 44, ll. 7-13). Claimant said she begged Dr. Fulton to release her to return to work without restrictions because she was afraid she would lose her job. (H. Tr. p. 44, ll. 18-25). Claimant said that she is in agreement with Adger Brown, the vocational expert, that she is permanently and totally disabled. (H. Tr. p. 45, ll. 18-22).

On cross-examination, Claimant testified that she was outside of Columbia Heart's facility on a sidewalk that is used by anyone choosing to enter the building at that entrance. (H. Tr. p. 47, ll. 9-25). There are multiple ways in and out of the facility. (H. Tr. p. 48, ll. 22-24). Columbia Heart doesn't dictate which door she comes in and out of. (H. Tr. p. 49, ll. 3-7).

Claimant further testified that Columbia Heart doesn't provide her with her means of transportation to and from work. (H. Tr. p. 49, ll. 17-20). Claimant said that on the day of the accident, she wasn't going out to run an errand for Columbia Heart, but she was on a smoke break. (H. Tr. p. 50, ll. 6-10). Claimant also testified that the sidewalk where she fell was not under construction (H. Tr. p. 50, ll. 11-14) and she was leaving the building because she wanted to of her own accord and not a the direction of her Employer. (H. Tr. p. 50, ll. 19-23).

Claimant said that she has had two prior workers' compensation claims with Columbia Heart. (H. Tr. p. 51, ll. 14-16). The most recent claim before this one involved both shoulders (H. Tr. p. 51, ll. 20-23) and it was also a trip and fall accident. (H. Tr. p. 52, ll. 2-3).

Claimant testified earlier that, when she fell, her knees were the first thing to hit the sidewalk. When asked why she testified that she fell on both shoulders in her deposition, Claimant said she didn't understand the question. (H. Tr. p. 53, ll. 4-8). When she arrived at the hospital, she doesn't recall if she told the doctors she was on a smoke break or lunch break when the accident occurred. She claims she was screaming when they took down her history. (H. Tr. p. 53, ll. 17-23). The record submitted into evidence by her attorney from the initial hospital visit indicates that she presented with pain to her right shoulder from a fall during her lunch break at work. Claimant said when she was initially in the hospital, the only thing she could think about was her shoulder and she did not tell them about her knees. (H. Tr. p. 54, ll. 16-24). Claimant further said that when she went to see Dr. Fulton days later she didn't mention her knees because she was on a heavy dose of morphine. (H. Tr. p. 55, ll. 1-11). Claimant said that she told Dr. Fulton and Dr. Van Dam that she injured both knees in this accident (H. Tr. p. 55, l. 23), yet it is not contained in any of their reports.

Before she went to see Dr. Fulton, Claimant testified that she filled out short-term disability paperwork with Columbia Heart. (H. Tr. p. 57, ll. 17-19). Claimant testified that she indicated in the paperwork that she was injured off the job when she tripped on uneven concrete and fell on her right shoulder. She said that she didn't realize at the time that her knees were worse than they were before the accident because she was medicated. (H. Tr. p. 58, ll. 11-18).

Claimant said she treated with Dr. Constable for her knees for a period of time before the accident. She has been treating there since 2005. (H. Tr. p. 61, ll. 14-17). Dr. Constable was providing bilateral knee injections and medications before her accident and also affirmatively told her that she would need bilateral knee replacements before the accident occurred. (H. Tr. p. 62, ll. 4-17).

Claimant testified that she was told, prior to the accident, that she was not meeting her administrative responsibilities and an administrative plan of action was put into place as to how she was supposed to rectify those shortcomings in her job. (H. Tr. p. 64, ll. 1-10). Claimant was not meeting the qualifications of her job, so a portion of her job was removed which in turn reduced her pay which upset her. (H. Tr. p. 64, ll. 11-22). Claimant went on to testify regarding the particulars of her employment and how Columbia Heart took away some of her job responsibilities. She then said she went out for surgery with Dr. Fulton and came back to work without any work restrictions. (H. Tr. p. 70, ll. 6-11). Claimant testified that she did the best she could to save her job. She was in pain and needed to go to therapy, but she had a difficult time scheduling it. (H. Tr. p. 70, ll. 14-19; p. 71, l. 1).

Claimant disputed the claim that she told Adger Brown she'd gained sixty pounds due to the use of steroids. (H. Tr. p. 73, ll. 21-25). Further, Claimant testified that in January 2012 she was able to get up and get dressed without assistance. (H. Tr. p. 75, ll. 13-19).

Testimony of Gloria B. Martin:

Ms. Martin testified on behalf of Claimant. She has known Claimant for thirty years. (H. Tr. p. 82, l. 8). Ms. Martin said that she and Claimant were friends who would get together on holidays, went shopping, and went swimming together. (H. Tr. p. 82, ll. 21-23). Ms. Martin said that, during the times they were together before her accident, she did not have any problems with her right shoulder. (H. Tr. p. 83, ll. 7-10). Before her accident, she knew that Claimant's knees were scarred. (H. Tr. p. 83, ll. 19-22). Ms. Martin also testified that, in the past, Claimant would host a July 4th gathering at her house and cook all of the food. This year, they ordered pizza because Claimant could not do the cooking. (H. Tr. p. 85, ll. 1-21). Ms. Martin tries to help Claimant do things, like clean up and fix her hair, get in and out of chairs, and take her shopping. (H. Tr. p. 86, ll. 1-9).

Testimony of Angela Jenkins:

Ms. Jenkins testified on behalf of Columbia Heart. Ms. Jenkins said that she has been employed there for almost seven years. She is the Human Resources Manager. (H. Tr. p. 88, ll. 12-18). Ms. Jenkins handles the workers' compensation claims for Columbia Heart and also does administrative work. Ms. Jenkins handled Claimant's workers' compensation claim. (H. Tr. p. 89, ll. 2-12).

Ms. Jenkins testified to the break policy of Columbia Heart. She explained that everyone is to take a minimum of a 30-minute lunch break every day. This is for both salaried and non-salaried employees. If you are non-exempt, it is without pay. During those breaks, employees are free to do what they want and are not under the direction or control of Columbia Heart. (H. Tr. p. 90, ll. 5-14). Further, Ms. Jenkins testified that they do not control the manner in which employees come in and out of work. (H. Tr. p. 90, ll. 15-19). With regards to the sidewalk that

Claimant was injured on, it is not the main sidewalk, but one of the sidewalks that leads from the parking area back into the building. Ms. Jenkins said that Columbia Heart did not pay for Claimant's transportation to and from work, nor did they provide her with a company vehicle. Ms. Jenkins also indicated that there is more than one company located in the building occupied by Columbia Heart. (H. Tr. p. 91, ll. 1-18).

Ms. Jenkins testified that Claimant's performance had declined prior to her date of accident. Due to a high turnover rate, Claimant's job was analyzed and a plan of action was formulated. (H. Tr. p. 92, ll. 1-4). Ms. Jenkins said that evaluations are based on the hire anniversary date, which, in Claimant's case, is in August. So, the evaluation that was handed up at the hearing and entered into evidence, pre-dated the performance problems Claimant was having. (H. Tr. p. 92, ll. 16-22). Ms. Jenkins said that, as a result of Claimant's deficiencies, some of Claimant's job duties and responsibilities were removed which in turn reduced her pay. (H. Tr. p. 94, ll. 6-9). She also had a discussion with Claimant right before the accident on July 15th about the reduction in pay. Ms. Jenkins said that Claimant was upset and after the discussion left for her lunch break. (H. Tr. p. 94, ll. 21-23).

Ms. Jenkins said she spoke with Claimant right after the accident and she was specifically complaining about her shoulder. Thereafter, the administrative assistant stayed with Claimant in the hospital and kept updating her. Claimant and never made any mention about her knees. (H. Tr. p. 95, ll. 17-25). Ms. Jenkins said that Claimant never told her she suffered an injury to her knees. Up until her termination in January 2012 and even after returning to work, Claimant never reported that she had a problem with her knees as a result of the fall. (H. Tr. p. 96, ll. 1-22).

On the date of the accident, the Claimant's change in duties and responsibilities had already occurred. The change was to take place July 1st, though they gave her some leeway because of payroll timing. (H. Tr. p. 97, ll. 1-7). The plan of action set forth what was specifically expected of her and what her responsibilities were. (H. Tr. p. 99, ll. 1-4). When Claimant came back to her job after being released from Dr. Fulton, she did not have any work restrictions. If she had had work restrictions, they would have accommodated her. (H. Tr. p. 99, ll. 21-23). Ms. Jenkins said that Claimant would still be there working if she had done her job. (H. Tr. p. 100, ll. 3-4).

On cross-examination, Ms. Jenkins testified that Columbia Heart sees, on average, 300 patients per day. (H. Tr. p. 101, l. 21). Further, she said that they use students, however these students are there to learn and not to come in and do a job. (H. Tr. p. 102, ll. 7-9). Ms. Jenkins said that Claimant complained about pain in her shoulders after physical therapy. (H. Tr. p. 103, ll. 1-3). Ms. Jenkins also testified that Claimant told her she was having pain in her knees, but she never said it was caused by the accident. (H. Tr. p. 103, ll. 14-15).

Ms. Jenkins did not tell Claimant that she reported her injury as workers' compensation when she brought her purse to her directly after her fall. (H. Tr. p. 106, ll. 19-25 and p. 107, l. 1).

Medical Evidence:

1. In June 2010, Dr. Constable indicated Claimant should consider bilateral total knee replacements. (Van Dam Depo Tr. 8:6-10).
2. Claimant had pre-existing severe arthritis in both knees. (Van Dam Depo Tr.7:12-14).
3. Dr. Van Dam stated that for there to be a recommendation of a total knee replacement there would need to be a near or total loss of cartilage between the bone. (Van Dam Depo

Tr. 9:8-10).

4. On July 15, 2011 Claimant reported to the Emergency Department at Richland Memorial Hospital with complaints that she tripped and fell, landing heavily on her right arm. She denied any other injuries during this fall. (Cl. APA p. 1).

5. On July 17, 2011 Claimant reported to the Emergency Department at Richland Memorial Hospital with complaints of right shoulder pain that originally occurred during her lunch break at work when she fell and dislocated her right shoulder. (Cl. APA p. 9).

6. On July 20, 2011, Claimant was seen by Dr. David B. Fulton at Moore Orthopaedics. She was examined for an evaluation of pain and instability in her right shoulder. (Cl. APA p. 36).

7. On July 22, 2011 Claimant underwent surgery for right arthroscopic Bankart repair, right arthroscopic biceps tenotomy and right arthroscopic rotator cuff repair. (Cl. APA p. 66).

8. On August 3, 2011 Claimant was seen in follow-up by Dr. Fulton following her surgery and notes that she is doing well. He also notes that she is having knee pain that she recurrently gets cortisone injections in and is past due. (Cl. APA p. 38).

9. On September 15, 2011 Claimant is evaluated by Dr. W. Alaric Van Dam regarding her bilateral knees. He notes she has severe osteoarthritis and tricompartmental involvement. She has been doing poorly with her knees overall. (Cl. APA p. 41).

10. On November 16, 2011 Claimant returns to Dr. Fulton regarding increased pain and symptoms in her right shoulder and problems with her left shoulder. She underwent an MRI arthrogram on both shoulders. The right reveals moderate arthritic changes, likely post traumatic in nature, with loss of cartilage from the glenoid, as well as moderate loss of joint space narrowing to the humeral head. Claimant was told to discontinue therapy,

use anti-inflammatories, ice, and heat as needed. Given the fact that there are no acute findings, she is able to return to work full-duty, without restrictions, as tolerated. (Cl. APA p. 46).

11. Claimant returns on November 18, 2011 regarding her bilateral knees. Dr. Van Dam notes that she has severe osteoarthritis of the bilateral knees. He gave her an injection. (Cl. APA p. 48).

12. On December 16, 2011 Claimant returns with a report of pain that has been ongoing for some time, especially in the knees. She has a history of end-stage osteoarthritis of both knees. (Cl. APA p. 50).

13. Dr. Van Dam testified that nothing related to the July 2011 accident necessitated any treatment other than what she was already receiving prior to the accident. (Van Dam Depo Tr. 15:15-23).

14. Claimant's surgical options and her diagnosis as a surgical candidate were the same before her accident as after he accident. (Van Dam Depo Tr. 18:3-10).

15. Dr. Van Dam stated the he could not state that the accident accelerated the timeline under which Claimant would require a knee replacement. (Van Dam Depo Tr. 29:19-22).

16. On June 29, 2012 Claimant underwent an FCE with Columbia Rehabilitation Clinic. (Cl. APA p. 69).

FULL COMMISSION FINDINGS OF FACT

Based upon the testimony and evidence submitted by both parties, We make the following Findings of Fact:

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Commission Act.

2. The Claimant's average weekly wage is $1,289.36, with a corresponding compensation rate of $704.92. We base this finding upon stipulation of the parties.

3. Based on the evidence as a whole, we find that the Claimant's injury while on her personal smoke break (and off the Employer's premises), was a personal act, without any connection to her employment duties. While the personal comfort doctrine was argued by the Claimant, the case law dealing with that doctrine relates to acts that occurred on the employer premises, for the most part. Claimant was on a sidewalk and in an area not maintained by or controlled by the Employer. Her injury was clearly in no way connected to the Employer, her job duties, or the Employer premises.

4. Claimant has not proven that she sustained an injury by accident in the course and scope of her job duties. Specifically, "The South Carolina Workers' Compensation Act requires that, to be compensable, an injury by accident must be one 'arising out of and in the course of employment'." S.C.Code Ann. §42-1-160 (1985). The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Both parts must exist simultaneously before any Court will allow recovery. Hicks v. Piedmont Cold Storage Inc., 324 S.C. 628, 479 S.E.2d 831, 834 (Ct. App. 1996). "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. Howell v. Pacific Columbia Mills, 291 S.C. 469, 472, 354 S.E.2d 384, 385 (1987). For an injury to "arise out of" employment, the injury must be proximately caused by the employment. Douglas v. Spartan Mills, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965). The injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. Id. Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49-50, 508

S.E.2d 21, 24-25 (1998). Claimant has not sustained her burden of proving a compensable injury by accident arising out of and in the course and scope of her employment.

5. South Carolina courts have adopted the personal comfort doctrine. In Mack v. Branch No. 12 Post Exchange, Fort Jackson, 207 S.C. 258, 35 S.E.2d 838 (1945), an employee who arrived before the start of work was smoking a cigarette on the employer's premises. His leg was burned when a spark from his cigarette ignited his pants where he had spilled lighter fluid. The Supreme Court found the injury compensable. In reaching this conclusion, the Court recognized the personal comfort doctrine and held: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment." Id. at 264-65, 35 S.E.2d at 840 (quoting Whiting-Mead Co. v. Indus. Accident Comm'n, [178 Cal. 505] 173 P. 1105, 1106 (1918). Osteen v. Greenville County Sch. Dist., 323 S.C. 432, 438-39, 475 S.E.2d 775, 779 (Ct. App. 1996)(rev'd, 333 S.C. 43, 508 S.E.2d 21 (1998). Similarly, if the Claimant's injury, while on a lunch break, had occurred while at work or on the Employer's premises, this claim would have been found compensable.

6. We also find that the case of Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (S.C. 1987) to be directly on point with this case. In this case, as in Howell, the Claimant was injured on a public street, not on the Employer's premises. Had the accident occurred in an area which was maintained and controlled by the Employer, then the result would have been different.

7. The case of Matute v. Palmetto Health Baptist, 391 S.C. 291, 296-97, 705 S.E.2d 472, 475 (Ct. App. 2011), is also directly on point with this case. Matute holds the following, in pertinent part: "As a general rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment." Gray v. Club Group, Ltd., 339 S.C. 173, 188, 528 S.E.2d 435, 443 (Ct. App. 2000). However, South Carolina has recognized a number of exceptions to this rule, including the following: (1) in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; (2) the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment; (3) the way used is inherently dangerous and is either the exclusive way of ingress and egress to and from his work or constructed and maintained by the employer; (4) the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the employee in going to and coming from work; or (5) an employee sustains an injury while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily

work. Id. at 188–89, 528 S.E.2d at 443. None of the exceptions to the "going and coming" rule apply under these circumstances. The following evidence supports this conclusion: (1) Palmetto Baptist did not provide Matute with transportation to and from work, nor did it pay for her transportation; (2) Matute was not fulfilling any duty or task in connection with her employment at Palmetto Baptist when she fell; (3) Matute's route into and out of the hospital was neither the exclusive nor the required means of entry or exit, nor was it inherently dangerous; (4) the Sumter Street crosswalk was open to pedestrian traffic on the date of Matute's fall, but she chose not to use the crosswalk when exiting the hospital; (5) Matute was on a public sidewalk when she fell; and (6) Palmetto Baptist does not own, maintain, or control the sidewalk on which Matute fell. Thus, we hold the appellate panel properly reversed the single commissioner." Matute v. Palmetto Health Baptist, 391 S.C. 291, 296-97, 705 S.E.2d 472, 475 (Ct. App. 2011), reh'g denied (Feb. 28, 2011).

8. We have reviewed all the medical evidence and the depositions of Drs. Van Dam and Fulton. While they are supportive of the Claimant on causation, had this claim been found compensable, the only body part injured was her right shoulder. Claimant had substantial and severely injured bilateral knee problems well before this accident, which already needed to be replaced. Moreover, the earliest medical reports detail only the right shoulder being injured. It was clear from the evidence that only her right shoulder was injured in this case. However, as we do not find the claim compensable under the case law as cited, there are no benefits to be awarded under any theory.

9. All benefits under the S.C. Workers' Compensation Act are hereby denied.

FULL COMMISSION CONCLUSIONS OF LAW

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
2. Pursuant to S.C. Code Ann. §§ 42-1-130 and 42-1-140, the Claimant was an employee of the Employer.
3. Pursuant to S.C. Code Ann. §§ 42-1-40 and 42-1-50, the Claimant's average weekly wage is $1,289.36, with a corresponding compensation rate of $704.92.
4. Pursuant to S.C. Code Ann. §42-1-160, the Claimant did not suffer from a compensable injury by accident to her right shoulder and bilateral knees on July 15, 2011, as she did not sustain her burden of proof which requires a showing of a compensable injury arising out of and in the course and scope of her employment.
5. Pursuant to Mack v. Branch No. 12 Post Exchange, Fort Jackson, 207 S.C. 258, 35 S.E.2d 838 (1945), South Carolina recognizes the personal comfort doctrine, however the Claimant was not on a smoke break that occurred while at work or on the Employer's premises, thus her injury is not compensable.
6. Pursuant to Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (S.C. 1987), the Claimant was not injured in an area that was maintained and controlled by the Employer, thus her injury is not compensable.
7. Pursuant to Matute v. Palmetto Health Baptist, 391 S.C. 291, 296-97, 705 S.E.2d 472, 475 (Ct. App. 2011), though South Carolina recognizes exceptions to the going and coming rule, none of the exceptions apply under these circumstances.
8. Pursuant to S.C. Code Ann. §42-15-20, notice of the accident was given to the Employer for her right shoulder, however notice was not given for her bilateral knees.

9. Pursuant to S.C. Code Ann. §42-1-10, et al., Claimant is denied all benefits under the S.C. Workers' Compensation Act.

ORDER

IT IS THEREFORE ORDERED that Claimant did not suffer a compensable injury by accident arising out of or in the course and scope of her employment on July 15, 2011. Therefore, the claim for injuries to her right shoulder and bilateral knees is **DENIED.**

IT IS FURTHER ORDERED the Claimant is denied all benefits under the Act.

IT IS FINALLY ORDERED the Single Commissioner's Decision and Order is **AFFIRMED IN FULL.**

AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION

Avery Wilkerson, Commissioner (Chair)

Andrea Roche, Commissioner

Melody James, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on September 3, 2013