

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F211353

JASON D. OXNER, EMPLOYEE

CLAIMANT

**ARK COTTON GROWERS
ORGANIZATION, EMPLOYER**

RESPONDENT

AGRI-GROUP-COMP SIF, CARRIER

RESPONDENT

OPINION FILED JULY 25, 2003

The hearing was conducted on May 15, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Helena, Phillips County, Arkansas.

The claimant was represented by Donald S. Ryan, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by Guy A. Wade, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 15, 2003, in Helena, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant's average weekly wage was \$316.43, giving rise to a temporary total disability rate of \$211.00.

The issues to be litigated at the hearing were as follows:

1. Did claimant sustain a compensable right lower extremity injury on September 26, 2002? (Respondent says that claimant was not performing employment

services and/or was engaged in horseplay when the injury occurred.)

2. Other issues are reserved.

The claimant testified that he is a general mechanic who worked for Arkansas Cotton Growers in September, 2002. He worked on trucks and four-wheelers in the respondent/employer's shop. The large work area had a separate small break room in it, with a small door leading into it. The claimant testified that he worked with Jason Scorsby, Jeramie Valdez, who performed the same work as the claimant, and Chuck Cagle (the supervisor). In the break room there was a coke and candy machine where employees could get a soft drink if they were thirsty during the day. According to the claimant, the employees could go to the break room, get a drink or candy and bring it back to the work station. The claimant testified that there was a regular one hour lunch period per day, but the time taken to go get a soft drink or candy was not considered lunch period. He testified that he would have been paid during the time that he would go to break room, get a coke and bring it back to his work station. There was no time clock used at the facility.

The claimant testified that on September 26, 2002, his supervisor was not there. Regardless, about that time, the supervisor telephoned one of the other employees and asked that everyone stay until he got back to the shop, because he wanted to talk to them about something. According the claimant, from 30 to 45 minutes elapsed after that phone call. The claimant went to get a bag of Skittles candy out of the machine in the break room. On the way out of the break room, he slipped on a wet spot by the door, fell on his right foot and ankle and injured himself. He testified that no horseplay caused a fall. The supervisor arrived approximately 10 minutes later. The

claimant was taken to the hospital.

Approximately one week after the accident, the claimant heard that he had been accused of horseplay during the time he was injured. Later, he signed a statement saying he was engaged in horseplay that day. He received a warning notice, which he signed stating that he did violate the safety rules. He received a verbal warning.

The claimant testified the first day that he missed work was on September 29, 2002, and he was off work until November 21, 2002. The claimant filed a claim for workers' compensation benefits on October 16, 2002. He admitted he was terminated in March, 2003, for tardiness.

Jason Scorsby testified that regardless of what the claimant testified, he did not take a telephone call from the boss about staying late on September 21. He testified that the claimant's fall occurred in the afternoon. He admitted signing some papers that there was some sort of horseplay involved. He said that he, the claimant and Mr. Valdez were "stick fighting with broom handles." He described the horseplay:

"MR. SCORSBY: Just messing around trying to hit each other.

JUDGE CURDIE: And what happened after the little fight?

MR. SCORSBY: I said we need to get back to work and put them down and Jason said well I'm hungry so he went and got some Skittles. On the way back he went down.

JUDGE CURDIE: So you're saying that there was horseplay, but he didn't fall as a result of horseplay? Is that what you're saying?

MR. SCORSBY: Yes, sir."
(T-36)

Jeramie Valdez testified that he also is a mechanic who worked for the

respondent/employer. He testified that he was 10 to 12 feet away from the claimant when he saw him fall coming back from the snack machine:

“A. He fell in the shop. But we have a wall that divides the administrative from the shop and the vending machine is on the administrative side, so you have to walk through the, they got a swinging door there where you walk through and he was coming back from the snack machine and when he opened the swinging door coming into the shop, he slipped and fell.”
(T-40)

Scorsby testified that he was not aware (like the claimant testified) of anybody receiving a telephone call from the boss saying the three workers should stay because the boss wanted to have a meeting. He admitted signing a warning notice about horseplay. However, he testified as follows:

“Q. Okay. Were you asked to sign a warning notice about horseplay?

A. Was I asked to sign a -

Q. Warning notice.

A. Yes sir.

Q. Had there been some kind of horseplay that day?

A. No sir.

Q. You didn't see any horseplay?

A. No sir.

Q. You weren't personally involved in any?

A. No sir.”

(T-42)

However, Mr. Valdez later stated that there was stick fighting between Mr. Scorsby and the claimant, lasting approximately 5 to 10 minutes. He testified that there were no plans to wait for the boss to return to the mechanic shop. Mr. Valdez testified

that after he picked up his tools and stored them, he was going to leave.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.

2. The claimant's average weekly wage was \$316.43, giving rise to a temporary total disability rate of \$211.00.

3. The preponderance of the evidence reflects that the claimant did not sustain a compensable injury which arose out of and in the course of his employment. Specifically, the preponderance of the evidence reflects that the claimant did not injure himself while he was performing "employment services."

DISCUSSION

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the

compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Arkansas Code Ann. § 11-9-102(5)(B)(iii) (Repl. 2002) states:

An injury is not compensable if it was inflicted upon the employee at a time when employment services were not be performed, or before the employee was hired or after the employment relationship was terminated.

Employment services are performed when the employee does something that is generally required by his or her employer. Collins v. Excel Spec. Prods., 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." Collins, supra; Pifer, supra. The test is whether the injury occurred "within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interests directly or indirectly." Collins, supra; Pifer, supra. This test has also been previously stated as whether the employee was engaged in the primary activity that he was hired to perform or in incidental activities which are inherently necessary for the performance of the primary activity. Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997).

In White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999), the claimant's duties included loading some veneer dryers with lumber. Although he was supposed to have three scheduled work breaks per shift, he frequently was unable to take breaks because the employer failed to provide relief staff. Accordingly, the

claimant would take a break in a cigarette-smoking area where he still could view his work station and immediately return if necessary. While returning from a smoke break, he slipped and fell on some slick algae on the floor.

The Arkansas Supreme Court held that the claimant had sustained a compensable injury. The court stated the following rules for deciding when an employee is performing "employment services":

We have held that the test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interest directly or indirectly.

Related to the issue of whether an injury arose in the course of employment is the requirement that the employee be performing "employment services" at the time of the injury. The court of appeals has held that when an employee is doing something that is generally required by his or her employer, the claimant is providing employment services.

Id. at 478, 6 S.W.3d at 100 (emphasis added).

In concluding that the claimant suffered a compensable injury, the court twice emphasized that the employer compelled the claimant to be in the circumstances in which he found himself at the time of the accident:

Because there was no relief worker provided, White was forced to remain near his immediate work area in order to monitor those machines. If one of those dryers needed to be loaded or his supervisor needed him for some reason, White would have been forced to return to his forklift immediately.

In Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (March

7, 2002), the claimant left the production line in a meat processing plant to go to the bathroom. On her way to the bathroom, she fell and broke her arm. The court relied on the same statutory principles and case law definitions set out above, citing White.

Significantly, the court reasoned:

We note that the activity of seeking toilet activities, although personal in nature, has been generally recognized as a necessity such that accidents occurring while an employee is on the way to or from toilet facilities, or while he or she is engaged in relieving himself or herself, arise within the course of employment.

347 Ark. At 818 (emphasis added). The Court concluded that the claimant's taking a restroom break "was a necessary function and directly or indirectly advanced the interests of his employer." Id. at 819 (emphasis added).

Likewise, in Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2001), the employee was injured after leaving a bathroom at his employer's facility. The Court's discussion in Pifer closely tracks that of the Collins opinion. This included the conclusion that claimant Pifer's restroom break "was a necessary function and directly or indirectly advanced the interests of his employer."

In Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997), a nurse's assistant whose job required her to care for patients in their homes was injured in an automobile accident while on route from her employer's offices to a patient's home. The claim was deemed to be compensable because "travel was a necessary part of her employment." 328 Ark. At 387, 944 S.W.2d at 527 (emphasis

added).

Conversely, a claimant was denied compensation when she tripped over a rolled-up carpet while walking to a designated smoking area. Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998). Although the claimant argued that allowing her to take a smoke break indirectly advanced the employer's interest by allowing her to be more relaxed and, therefore, to work more efficiently, the court rejected this contention. The court reasoned that "although appellant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do." *Id.* at 139, 970 S.W.2d at 304 (emphasis added).

The review of the evidence demonstrates that Mr. Oxner was not engaging in horseplay when he was injured. However, the preponderance of the evidence reflects that the claimant was not performing employment services at the time he sustained his injury. There was no testimony, and the preponderance of the evidence does not show, that the claimant's task that he was performing at the moment he was injured (returning from getting a bag of candy) was even indirectly benefitting the respondent. It was only benefitting the claimant. Likewise, it is not inherently necessary for the claimant's job performance to get a bag of candy and walk back to his work site. Since the claimant was not indirectly advancing his employers' interest, he cannot prevail in his claim. There was no testimony concerning why getting a bag of candy was a "necessary part" or was "inherently necessary for the performance of the job." Therefore, the preponderance of the evidence reflects that the claimant did not sustain a compensable injury pursuant to the Arkansas Workers' Compensation law.

The claimant's claim is denied and dismissed.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

DC