

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F311307

CLIFTON L. CHILDERS (DECEASED), EMPLOYEE	CLAIMANT
STAFFMARK, LLC MIDWEST, EMPLOYER ALTANTIC MUTUAL INSURANCE, CARRIER	RESPONDENT #1
MAYTAG CORPORATION, EMPLOYER SENTRY INSURANCE COMPANY, CARRIER	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED MARCH 3, 2005

A hearing in this case was conducted on December 10, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Batesville, Independence County, Arkansas.

Claimant was represented by Bill H. Walmsley, Attorney at Law, Batesville, Arkansas.

Respondent #1 was represented by John D. Davis, Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by Joseph H. Purvis, Attorney at Law, Little Rock, Arkansas.

Respondent #3 was represented by Terry Pence, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on September 14, 2004; a Prehearing Order was filed in this matter on September 15, 2004. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to the following five stipulations, which are hereby accepted.

1. Respondent #1 and Respondent #2 controvert this claim.
2. On October 14, 2003, Claimant sustained an injury in the parking lot of Maytag

(Respondent #2); on October 23, 2003, Claimant died from this injury.

3. Claimant was survived by a minor child, Dale Taylor Huss.
4. Claimant's average weekly wage was \$426.92.
5. Claimant was a general employee of Respondent #1, and a special employee of Respondent #2.

At the December 10, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. After eliminating those issues resolved by the stipulations, the parties agreed that the remaining issues to be litigated and resolved are limited to the following:

1. Whether Claimant was engaged in horseplay, so that his injury was not compensable pursuant to Ark. Code Ann. § 11-9-102(4)(B)(i).
2. Whether Claimant was not performing employment services, so that his injury was not compensable pursuant to Ark. Code Ann. § 11-9-102(4)(B)(iii).
3. Whether Claimant can demonstrate the elements required to prove a specific incident compensable injury.
4. Whether Claimant's minor child was a dependent of Claimant.
5. Whether Claimant's dependent is entitled to benefits under Ark. Code Ann. § 11-9-527.
6. Whether Claimant is entitled to an award of attorney's fees.

All other issues are reserved.

It is argued that Claimant sustained a compensable injury on October 14, 2003, when he fell from the back of a pickup truck onto Respondent #2's parking lot; Claimant was in the parking lot at the direction of Respondent #2. It is further argued that Dale Taylor Huss is Claimant's dependent, as that term is understood under the Arkansas

Workers' Compensation Law, and that she is therefore entitled to benefits under Ark. Code Ann. § 11-9-527. An award of attorney's fees is also sought for the presentation of this claim. Respondents contend that Claimant was engaged in horseplay at the time he sustained his injury on October 14, 2003. In the alternative, they argue that Claimant was not performing employment services at the time of his injury.

DISCUSSION

A. Horseplay

The record establishes that on October 14, 2003, Claimant arrived at Respondent #2's facility, clocked in at 5:17 p.m., and began working the 5:30 p.m. to 4:00 a.m. shift. Some time after 7:20 p.m., a bomb threat caused the evacuation of this facility's employees. The employees were directed to remain on the facility's parking lot; they did not clock out, and were paid for their time on the parking lot. They were subject to being recalled to work at any time.

While waiting on the parking lot, some employees decided to order pizza for delivery to the facility's gates. An employee drove his truck to another vehicle to obtain the telephone number of the pizza restaurant. Another employee sat in the front of the truck; five employees, including Claimant, sat in the back of the truck. Candace Sutter, one of the employees in the back of the truck, described Claimant's position:

Q. Okay. Were you sitting towards the end of the bed or sitting on the end where the tailgate is?

A. Yes.

Q. Okay. On the passenger's side. Where was Clifton Childers?

A. Cliff was on the left side of the driver's side above where I was sitting on

the rail.

Q. Okay. Sitting on the rail, you're talking about on the side of the truck, the truck bed sides?

A. Yes.

Anton Walters, the employee occupying the truck's passenger seat, recalled that "there were a lot of people in the back of the truck back there carrying on, talking, yelling at each other." Tenaya Moffett, another employee in the back of the truck, confirmed that everybody in the back of the truck was laughing and joking while the truck was going to get the telephone number.

After retrieving the telephone number, the truck started back to its original location by the same route. Walters actually got the phone number; he and the driver exited the truck, "and we told everybody to sit down inside the bed of the truck...." Nonetheless, Claimant remained on the side of the bed for the return trip. The truck driver stopped and started the truck three separate times; Claimant held onto the side of the truck as he remained in place. Claimant declined two more requests to sit down in the truck's bed. As the truck began to make a right turn, Claimant released his hold on the side of the truck and began to cross his arms. He fell backwards out of the truck and onto the parking lot, thereby sustaining his injury.

Claimant's Certificate of Death, introduced into evidence as a part of Claimant's Exhibit #1, indicates that Claimant injured himself at 8:55 p.m. on August 14, 2003. He died on October 23, 2003, after receiving medical treatment. The cause of death is given as craniocerebral trauma.

Sutter testified that the employees were directed to go outside because of a bomb

threat. They were directed to stay in the parking lot, were paid for the three or four hours that they remained in the parking lot, and were subject to discipline if they left. She testified that an ordinary lunch break occurred at 11:00 p.m. On cross-examination, Sutter conceded that the employees were not told to order a pizza, nor were they told to ride in a pickup truck while in the parking lot.

To Sutter's recollection, no one else sat on the bed rail except for Claimant; he had been asked to sit down in the bed of the truck but did not. She recalled that there was sufficient room for him to sit in the bed of the truck had he chosen to do so. She did not ever see Claimant try to sit down in the bed of the truck.

Sutter testified extensively concerning the circumstances of Claimant's fall.

Q. Now, was it after the driver starting doing this stop and starting that you asked Clifton to sit down in the bed of the truck?

A. Yes. Well, we asked him.

Q. Did you ask him to sit down in the bed of the truck?

A. Yes.

Q. But instead of sitting down in the bed of the truck, he stayed up on the bed rail laughing and joking, is that right?

A. Yes.

Q. As you testified, the truck turned and he fell off, is that right?

A. Well, no, at that time he crossed his arms and said, oh, I won't fall.

Q. So the fact of the matter is he wasn't holding on.

A. Yes.

Q. When he fell off, was he?

A. Right.

Q. And he wasn't holding on just before he fell off, was he?

A. No.

...

Q. Right before he fell off, what happened? Just.[..]

A. He was up and he went and curled his arms and told me and Nikia or me and Tenaya that he wasn't going to fall.

Q. All right. Y'all told him, hey, sit down and hang on and then he did, is that when he brought his arms up and crossed his arms?

A. Right. Me and Tenaya told him hang on and stuff and that's when he crossed his arms.

Q. Right before he fell off, did he actually cross his arms?

A. He had his arms up at his elbows.

...

Q. I'm not sure whether you answered my question or not, but he was in the back of this moving truck sitting on the top of the bed rail, you had told him to hold on; instead he folded his arms and said what?

A. Oh, I won't fall.

Q. Oh, I won't fall. And then at that time?

A. He started going back because as he was going to cross his arms he had leaned just enough and that threw him backwards.

Q. He went backwards.

A. Right.

...

Q. Based on what you perceived and looking at Mr. Childers at that time, did you feel like he was trying to act macho?

A. Yes.

Q. Do you think he was trying to show off?

A. Yes.

Sutter confirmed that she did not believe Claimant was in any particular danger, and that she was speculating or guessing as to the motive for his behavior.

Walters testified that he worked the same shift as Claimant. He verified Sutter's testimony concerning the location of the various employees in and about the truck, including Claimant. Walters did not think Claimant was in any particular danger where he sat. As to the employees in the back, Walters reiterated that "they were sitting in the back of the truck, yelling, talking, just making plain, talking back and forth." Walters testified:

Q. What was that truck doing when [Claimant] fell out of it?

A. We were turning to the right.

Q. Okay. And that would be a 90 degree turn to the right, wouldn't it?

A. Yes, sir.

Q. But you're going out of one aisle getting ready to turn down another aisle, isn't that right?

A. Yes, sir.

Q. And you were making a 90 degree turn?

A. Yes, sir.

Q. And that turn was just right so the force would have been away from or toward the right end of the truck, right?

A. The way we were turning.

Q. Whatever centrifugal or whatever kind of force when you're turning and spinning around it would have been away from the truck, wouldn't it?

A. Yes.

Q. Is that what you think caused him to fall?

A. Yes.

Although Walters did not see Claimant fall, he did look at the back of the truck prior to the fall, and he recalled that Claimant already had his arms crossed.

Moffett worked the same shift as Claimant; as previously noted, she was in the back of the truck with Claimant, Sutter, and two other employees. She recalled that the truck was driving about five to eight miles per hour. She described the trip out to the vehicle containing the phone number, the driver's stopping and starting three times on the way back, and she continued:

Q. Even after this stopping and starting took place, did you ever see Mr. Childers attempt to sit down in the bed of the truck?

A. No.

Q. So he just continued to laugh and joke around like everybody else?

A. Yes.

Q. Now, what happened just before Mr. Childers fell out of the back of the truck?

A. He was holding on.

Q. You probably need to speak up so these other individuals can hear you.

A. He was holding onto what he was actually sitting on and I asked him, Cliff, you might want to sit down and he said, oh, that's okay. And Candace Sutter, she also said, Cliff, why don't you just go ahead and sit down. And he said, he started crossing his arms and he said, oh, I won't fall. And as soon as he finished saying that, he fell out of the truck.

Q. So the truck was moving when he said, oh, I won't fall?

A. Yes.

Q. Did he cross his arms?

A. We were turning as he was.

Ark. Code Ann. § 11-9-102(4)(B)(i) provides that injuries caused by horseplay shall

not be considered to be compensable injuries.

“Horseplay” has not been defined by statute or case law in Arkansas, except to note that its meaning is synonymous with the term “skylarking,” which is chiefly employed in English case law. This is instructive, as the verb “to skylark” describes a practice in which a sailor would run up and down the rigging of a ship in sport, graphically exemplifying the dictionary definition of “horseplay” as “rough or boisterous play.” Webster’s Third New International Dictionary (1961).

Morales v. Martinez, ___ Ark. App. ___, ___ S.W.3d ___ (November 10, 2004) (citation omitted); compare Ballentine’s Law Dictionary 568 (3d ed. 1969) (defining “horseplay” as “[h]aving fun in a rough and boisterous manner, often at hazard of personal injury to participant or spectator”). The definition of “boisterous” includes “marked by or expressive of exuberance and high spirits.” Webster’s Ninth New Collegiate Dictionary 165 (1988).

It is Claimant’s burden to prove by a preponderance of the evidence that he sustained an injury while engaged in the performance of employment services rather than while engaged in horseplay. See Ark. Code Ann. § 11-9-102(4)(E)(i); Morales, ___ Ark. App. at ___, ___ S.W.3d at ___. “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I respectfully find that it has not been proven by a preponderance of the evidence that Claimant sustained his fatal injury while engaged in the performance of employment services rather than while engaged in horseplay. To the contrary, the evidence of greater convincing force establishes that Claimant was engaged in horseplay as he fell from the truck and sustained his injury on October 14, 2003. Claimant was not engaged in any work-related activities; his employment did not require him to order pizza or to sit on the

edge of the side of the truck. There was “carrying on, talking, yelling” going on in the back of the truck; two witnesses agreed that Claimant was laughing and joking, as well. Whatever his motive, despite being asked to sit in the bed of the truck and having every opportunity to do so, Claimant declared “Oh, I won’t fall” as he released his hold on the side of the truck, folded his arms, and entered the fatal turn.

Two Arkansas cases and a treatise are cited by Claimant’s counsel: Southern Cotton Oil Div. v. Childress, 237 Ark. 909, 377 S.W.2d 167 (1964); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993); and 2 Arthur Larson & Lex K. Larson, Larson’s Workers’ Compensation Law § 23.01 (2004). The Arkansas Supreme Court decision treats horseplay as an “arising-out-of-employment” problem; the Arkansas Court of Appeals decision and the treatise treat horseplay as a “course-of-employment” problem. Compare Southern Cotton, 237 Ark. at 919, 377 S.W.2d at ___, with Ringier Am., 41 Ark. App. at 50, 849 S.W.2d at ___, and Larson & Larson, supra, § 23.01. In its Morales decision, the Arkansas Court of Appeals made reference to Southern Cotton, but did not apply the analysis suggested by that case or the other two authorities cited by Claimant’s counsel.

This opinion follows the method of analysis employed in the Arkansas Court of Appeal’s Morales decision. It should be noted that the two cases cited by Claimant’s counsel precede the effective date of Act 796 of 1993. Act 796 enacted the provision regarding horseplay that is now found at Ark. Code Ann. § 11-9-102(4)(B)(i). Under Morales, it is appropriate to ask whether an injury has been caused by conduct that may be defined as horseplay; if so, that injury is not compensable. See Morales, ___ Ark. App. at ___, ___ S.W.3d at ___.

To summarize, I find that Claimant sustained his injury while engaged in horseplay. This incident is very unfortunate and regrettable. Nonetheless, Claimant's injury is not compensable, pursuant to Ark. Code Ann. § 11-9-102(4)(B)(i) and the Morales decision.

B. Remaining Claims

Given the determination that Claimant's conduct resulting in his injury constitutes horseplay, it is not necessary to discuss the remaining issues: Claimant's injury shall not be considered a compensable injury. See Ark. Code Ann. § 11-9-102(4)(B)(i). Since compensability of the claim has not been established, compensation must be denied. See Reed v. Conagra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744).

_____ **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. Respondent #1 and Respondent #2 controvert this claim.
3. On October 14, 2003, Claimant sustained an injury in the parking lot of Maytag (Respondent #2); on October 23, 2003, Claimant died from this injury.
4. Claimant was survived by a minor child, Dale Taylor Huss.
5. Claimant's average weekly wage was \$426.92.
6. Claimant was a general employee of Respondent #1, and a special employee of Respondent #2.
7. I find that Claimant's October 14, 2003 injury was caused by horseplay, so that it is not compensable. Claimant's employment did not require him to sit on the side of a truck bed. Claimant and his fellow employees were "carrying on, talking, yelling" in the

back of the truck; Claimant was laughing and joking as well. Despite being asked more than once to sit in the bed of the truck and having every opportunity to do so, Claimant released his hold on the side of the truck, folded his arms, and fell from the truck as it made a right turn. Under the law, this conduct constitutes horseplay.

8. Because Claimant's injury is not compensable under the statute, it is not necessary to discuss the remaining issues in this claim, including the requests for benefits and an attorney's fee.

ORDER

Based upon the foregoing, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml