

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308708

TINA ENGLE

CLAIMANT

THOMPSON MURRAY, INC.

RESPONDENT

CONTINENTAL CASUALTY COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 3, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in
Springdale, Washington County, Arkansas.

Claimant represented by DAVID WALL, Attorney, Fayetteville, Arkansas.

Respondents represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 13, 2004, in Springdale, Arkansas. A pre-hearing order was entered in this case on September 14, 2004. The pre-hearing order set out various stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, certain elaborations and expansions were made in regard to the stipulations and issues and the parties agreed on the appropriate weekly compensation rates (should such benefits be appropriate). A copy of the pre-hearing order with these various amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On August 7, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
3. The claim is controverted in its entirety.

4. On August 7, 2003, the claimant sustained an accidental fall that caused physical injuries to at least her back, ribs, left foot, left leg, left arm, and both hands. These injuries are established by medical evidence, are supported by "objective findings", required medical services, and resulted in disability.

By agreement of the parties the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained compensable injuries to her back, ribs, left foot, left leg, left arm, left hand and right hand in the accidental fall of August 7, 2003.
2. Whether the claimant was performing employment services at the time of the accidental fall.
3. Whether the claimant was "engaged" in social or recreational activities for her own personal pleasure at the time of the fall.
4. Whether the claimant's fall and injuries constitute horseplay.
5. Whether the claimant's fall and injuries were due to her intoxication.
6. The claimant's entitlement to the payment of medical expenses.

In regard to these issues, the claimant contends:

"Claimant contends that she sustained a compensable injury on August 7, 2003, when she fell from a cliff in Lake View, Arkansas, on a company retreat with required attendance. The claimant contends that she was within the course and scope of her employment at the time of the accident. Finally, the claimant contends that the respondents have denied this claim in its entirety and it shall be considered totally controverted."

In regard to these issues, the respondents contend:

1. Claimant's injuries did not occur while she was engaged in employment services;
2. Claimant's injuries occurred while she was performing social or recreational activities for her own person, pleasure;

3. Claimant did not sustain injuries arising out or in the course of her employment;
4. Respondents ask leave to attend their contentions after discovery has been completed.

DISCUSSION

_____ There is little or no factual dispute surrounding the claimant's accident of August 7, 2003 and the resulting physical injuries to various portions of her body. The claimant's injuries occurred when she either jumped or fell in the process of jumping from a bluff on the shore of Bull Shoals Lake.

The Appellate Courts have recognized that the "employment services" requirement of Ark. Code Ann. §11-9-102(4)(B)(iii) is merely a legislative clarification of the longstanding requirement that "compensable" injuries must "arise out of and occur in the course of the employment," Matlock v. Arkansas Blue Cross Blue Shield, 74 Ark. App. 322, 49 S.W. 3rd 126 (2001). In regard to the requirement that compensable injuries must "arise out of and occur in the course of the employment," the Appellate Courts have previously held:

"The phrase arising out of the employment refers to the origin or cause of the accident and the phrase in the course of the employment refers to the time, place, and circumstances under which the injury occurred; in order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its (the employment) risks." J&G Cabinets v. Hennington, 269 Ark. 789, 600 S.W. 2nd 916 (Ct. App. 1980).

The evidence shows at the time of her fall that the claimant, her supervisor (Charlie Anderson), and various other individuals the Account Service Department were participating in an "offsite" or retreat at Bull Shoals Lake. It was the regular practice of the respondent employer for each department to periodically hold such "offsites" or retreats. These were two day affairs with the first day was to consist of rest, relaxation, and "team building" or group bonding and the second day was to

consist of group meetings to go over past performances, to discuss current problems, and to discuss future projections. All department personnel were expected to attend these events and were paid for their time. The claimant as the Administrative Assistant to the head of the department, had been expressly assigned the duty to arrange, coordinate, and generally be responsible for seeing that the retreat ran smoothly. These duties included making payment for the expenses incurred, renting the facilities, renting the required necessary boats and equipment, paying for the gas, obtaining and paying for the food, obtaining and paying for appropriate beverages (including alcoholic beverages), etc.

Thus, it appears that prior to the claimant's accidental fall, on August 7, 2003, she was within the general confines of time and space, established by her assigned employment duties. However, it is the specific activities that the claimant was performing at the actual time of her accidental fall that is controlling.

The claimant's testimony and Claimant's Exhibit No. 1, show that the period of 12:30 p.m. to 6:30 p.m. had been reserved for certain water sports and activities. These included a ride around the lake on a party pontoon boat, an opportunity to ride a wave runner, and a stop at a "hangout" spot on the lake with a beach area and a cliff or rocks to jump from the water. However, it appears that with the possible exception of the boat ride on the pontoon boat, all of the other activities were optional. It is apparent from the claimant's testimony that she was not directed or required to jump off any rocks or cliffs into the water. The claimant testified that she elected to attempt this activity because she thought it would be fun or exciting. Although the claimant testified "that's what everybody does is go jump off the cliffs," (when they go to Bull Shoals Lake), this testimony is clearly exaggerated. Obviously, this is not an activity that "everybody," who goes to Bull Shoals, engages in. In fact, the majority of the claimant's own party did not make any attempt to

engage in such activity.

In explaining how her fall occurred, the claimant testified that she was attempting to leap from the cliff, changed her mind at the last second, and was unable to stop before she went over the edge of the precipice. As a result, her trajectory did not extend far enough to prevent her from striking the rocks protruding the cliff face below.

Under the then required rule of liberation construction and the Court's holding in J&G Cabinets v. Hennington (supra), the respondent's foreknowledge and permission for employees to engage in "cliff jumping" while "at work" may have caused this fall to "arise out of and in the course of" the claimant's employment. However, after the legislature's enactment of Ark. Code Ann. §11-9-102(4)(B)(iii) and its mandate of strict construction of the Act in 1993, a different conclusion must be reached.

Applicable case law provides that "employment services" are those activities or services actually inherently necessary for the performance of the job for which the employee was hired. These activities must also either directly or indirectly advance the interest of the employer.

The claimant's testimony clearly shows that the claimant was not expressly directed by her employer to attempt to jump from the cliff on Bull Shoals Lake. It is obvious that this activity was neither directly nor indirectly necessary for her to perform her job duties as an Administrative Assistant to the head of the respondent's Account Service Department. It is further apparent that the specific activity in which the claimant was engaged at the time of her accident, i.e. jumping from the cliff, neither directly nor indirectly benefitted the respondent employer or in any way advanced its interests.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence shows that the claimant was not performing

"employment services" when she experienced her accidental fall on August 7, 2003. Thus, any injuries that she sustained in this fall would be expressly excluded from the category of "compensable" injuries by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iii). No benefits can be awarded under the Act for these injuries.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 7, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On August 7, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$440.00 for total disability and \$330.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that any injury she sustained in the accidental fall, on August 7, 2003, constitute "compensable injuries" within the meaning of the Act. Specifically, these injuries are expressly excluded from the category of "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iii), in that the claimant was not performing "employment services" at the time of her accident.
5. The respondents have denied the occurrence of any "compensable injuries" and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge