

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F313638

JAVIER MONDRAGON	CLAIMANT
SARIO MONDRAGON	DECEASED EMPLOYEE
MELVIN & NONNIE CARPENTER D/B/A NONNIE'S ANTIQUES, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 3, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on August 5, 2005 at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE PAUL KEITH, Attorney at Law, Monticello, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical and funeral expenses, and attorney's fees as a result of his brother's death. All other issues are reserved.

At issue is whether or not the deceased was performing employment services at the time of the compensable injury pursuant to Ark. Code Ann. §11-9-102. Also in dispute is the compensation rate, as defined by Ark. Code Ann. §11-9-518.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant and benefits are hereby awarded.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on December 18, 2003, and that the accident at work was the cause of death. The respondents paid \$924.42 in medical expenses before controverting this claim.

On December 18, 2003 the claimant was struck in the eye by an arrow fired from a compound bow by co-worker, Chris Carpenter who is also the grandson of Melvin Carpenter, the

owner of the business. The claimant died as a result of his injuries on December 24, 2003.

The Mondragon family is seeking payment of medical expenses (ambulance, emergency room, helicopter, hospitalization) and funeral expenses subject to a limit of \$6,000.00 pursuant to Ark. Code Ann. §11-9-527. The claimant contends the deceased was performing his job duties on the employer's premises at the time of the accident.

The respondents contend the claimant was not performing employment services at the time of the accident and the injury does not arise out of and in the course of his employment. Therefore, Travelers is not liable.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript. Claimant's objection to the recorded statement of co-worker, Juan Barrajas Martinez was overruled and has been considered in this decision. His statement was taken March 9, 2004 by the adjuster as part of the investigation of the claim. Since then Mr. Martinez returned to Mexico and cannot be located. Although the Commission is not bound by the rules of evidence, Ark. Code Ann. §11-9-705(a)(1), it should be noted in the interest of fair play, that the statement was not made under oath; claimant's counsel has not had an opportunity to cross-examine Mr. Martinez; and there were some communication problems between the witness and the interpreter, whose credentials are unknown. These factors limit the evidentiary weight that can be given to this statement.

The following witnesses testified at the hearing: Melvin Carpenter, a partner in Nonnie's Antiques and his grandson, Chris Carpenter.

The antique store is composed of three main buildings and a shed. The parking lot is in the middle with two showrooms on either side and the workshop/residence in the middle. The shed is behind the workshop. Sario Mondragon lived inside the workshop.

The showrooms had definite business hours but the workshop had no set timetable. Furniture being refinished was moved outside during the day. The refinisher's work was completed whenever they finished their tasks and moved the furniture back inside for the night.

The workshop employees were Sario Mondragon, Juan Barajas Martinez and Chris Carpenter. The employees were expected to move, repair and refinish furniture to be sold in the showroom.

The accident happened late in the day when it was beginning to get dark, however, the work was not finished and the workshop remained open. Chris Carpenter was preparing for the hunting season using the space behind the workshop for target practice with a cross bow. Sario Mondragon rounded the corner of the workshop near the target area and was struck in the eye by an arrow. An ambulance took him to Chicot County Hospital where he was airlifted to a hospital in Memphis and died a few days later.

Chris Carpenter does not know why Mr. Mondragon walked behind the workshop. To the best of his knowledge, the deceased was unaware that he had started target practice.

Melvin Carpenter, the owner, was present when Juan Martinez gave a recorded statement to the adjuster through an interpreter. Mr. Martinez indicated the employees finished their work at 5:00 p.m. and the accident happened around 6:00 p.m. This statement is inconsistent with the testimony of both Melvin and Chris Carpenter. Mr. Martinez also indicated that Sario Mondragon was aware Chris was behind the building practicing. Again, this statement is inconsistent with Chris Carpenter's testimony.

COMPENSATION RATE

Melvin Carpenter testified that the deceased lived on the premises in an area inside the workshop. He was provided water, gas, electricity, lodging, and \$7.00 per hour for moving, repairing, and refinishing furniture. The work hours varied and payments were made in cash. There are no employment records. The parties stipulated that his lodging was valued at \$25.00 per week. Since the deceased lived on the business premises, he was available for work for a full work week. Therefore, I find his average weekly wage to be \$305.00. ($\$7.00 \text{ per hr.} \times 40 \text{ hrs.} = \$280.00 + \$25.00 \text{ wkly. lodging}$).

A “compensable injury” is defined as an accidental injury... arising out of and in the course of employment....” Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2003).

“Arising out of the employment” refers to the origin or cause of the accident and the phrase “in the course of employment” refers to the time, place and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985).

The test for arising out of the employment requires that a causal connection exist between the injury and the employment. The injury must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

A compensable injury does not include an “injury which was inflicted upon the employee at a time when employment services were not being performed....”Ark. Code Ann. §11-9-102(4)(B)(iii)(Supp. 2003). An employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer.” White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999). The test for determining whether the employee was performing employment services at the time of the injury is “whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly.” Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002).

Furthermore, injuries caused by non-work related hostility leading to assault are not compensable but the Act provides an exception for innocent victims of horseplay, Ark. Code Ann. §11-9-102(4)(B), Ringier America v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993), Larson’s Workmen’s Compensation, Desk Edition, Vol. 1, §23 “Horseplay”.

The evidence of record shows the deceased was killed by his employer’s grandson when he was struck in the eye by a arrow from a crossbow. This employer chose to run a business with no employment records (wage records, attendance sheets, time cards, etc.) or supervision of the

employees. The owner's grandson was allowed to use the business premises for target practice and an employee was allowed to live on site, see Larson's Workmen's Compensation, Desk Edition, Vol. §24 "Resident Employees." Chris Carpenter had practiced target shooting behind the workshop for several days in a row and this was condoned by the employer.

As I interpret the conflicting lay testimony, the workshop was still open at the time of the accident, therefore, the deceased was still "on-the-clock". Although no one knows exactly why the deceased walked around the back of the workshop, it was getting dark, near closing time and the furniture still needed to be moved inside the workshop. Obviously, employment services remained and the deceased's two co-workers, Chris and Juan, were behind the workshop. Tragically, when Mr. Mondragon rounded the corner of the workshop, he was mortally wounded. Therefore, I find the deceased was the innocent victim of horseplay.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employment relationship existed among the parties on December 18, 2003 at which time the claimant's average weekly wage was \$305.00 weekly, including wages and lodging.
2. The claimant has proven by a preponderance of the evidence of record that his brother was the innocent victim of horseplay pursuant to Ark. Code Ann. §11-9-102.
3. Respondents are directed to pay all medical expenses pursuant to Rule 30.
4. Respondents are directed to pay funeral expenses.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge