

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412585

DIANE PATTESON

CLAIMANT

OZARK WAFFLES, LLC

RESPONDENT EMPLOYER

WAUSAU

RESPONDENT CARRIER

ORDER AND OPINION FILED AUGUST 8, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on June 22, 2005. A prehearing conference was held and a prehearing order was filed on June 1, 2005. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on November 11, 2004.
2. The temporary total disability/permanent impairment rate is \$127.

The claimant contends that she sustained a specific incident injury on November 11, 2004 and is entitled to medical benefits and temporary total disability benefits from November 12, 2004 to April 14, 2005, and attorney's fees.

Respondents contend the claimant's injury is the result of horseplay and did not arise out of and within the course and scope of her employment or while performing employment services. The claim has been controverted in its entirety.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was an employer-employee relationship on November 11, 2004.
2. The temporary total disability/permanent partial disability rate is \$127.
3. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment.

DISCUSSION

The claimant, 28 years old, worked as a waitress at the respondent employer about five months before the November 11, 2004, incident. According to the claimant, it was slow at work and she sat down in a booth to work her tickets for the day. She asked Dale Tabor to help her calculate the tickets and he sat down beside her. When the telephone rang, the claimant asked another employee, Dwayne Kelley, who was not on duty as yet, to answer the telephone and since he was not on duty, the claimant got up to answer the telephone. She stepped over the back of the booth and fell, breaking her hand.

The claimant testified that she spoke with the manager, Mary Dick, on the telephone after she injured her hand and told Ms. Dick she had fallen and broken her hand. The claimant was questioned about attending a meeting on October 25, 2004, where sitting in booths was discussed as not permitted while on duty. The claimant attended that meeting. The claimant did not return to work for the respondent employer but had been working for another employer at the time of the hearing for approximately one month.

Dale Tabor, an employee of the respondent employer in November 2004, testified that he was sitting in the booth with the claimant on November 11, 2004, helping calculate her tickets when the telephone rang. According to Mr. Tabor, the claimant got up to answer the telephone and stepped over the back of the booth and fell, injuring her hand. Mr. Tabor confirmed that he was fired from the employer for horseplay and for being untruthful in a written statement about the claimant's fall.

Daniel Kelley, a cook at the respondent employer, testified that he was working the third shift on November 11, 2004, which started at 9:00 p.m. He arrived early to eat and visit and witnessed the claimant's incident of climbing over the booth to answer the telephone. Mr. Kelley testified that he attended a safety meeting where the employees were instructed not to sit in the booths while on duty.

Mary Dick, unit manager for the respondent employer, testified that she has employee meetings regularly and had one on October 25, 2004. Various business items were discussed but again a reminder was given that sitting in the booths while on duty was prohibited. Ms. Dick testified about a conversation she had with Dale Tabor on November 11, 2004, about the claimant.

Yes. Dale called me and he said, 'I am going to have to take Diane to the hospital. She fell and broke her hand.' And I asked him what happened. He told me he had taken the mat out of our walkway to take it out back and clean it, and that she ran around the counter to answer the phone and slipped and fell. (Tr. p. 30, lines 5-10.)

Ms. Dick learned the next morning that the circumstances of the claimant's fall were different and Mr. Tabor later changed his story and no longer works for the respondent. Ms. Dick reminded Mr. Tabor that the claimant would be required to take a drug test at the hospital following her fall incident at work. Ms. Dick testified that Mr. Tabor called her back and stated, in part:

Dale called me back, and he said don't file it under workers' comp because she is going to file it under her husband's insurance because she doesn't smoke pot herself but she was around someone who did and was afraid that it might be in her system. (Tr. p. 30, lines 11-15.)

Ms. Dick testified that she spoke with Dale Tabor on the evening of the incident but she could hear the claimant in the background supplying information to Mr. Tabor. Ms. Dick stated that all employees knew that a drug test was required when there was a work injury.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (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 harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant's own testimony was that she was sitting in a booth while on duty working on her daily tickets when the telephone rang. The claimant knew that sitting in the booths while on duty was prohibited. The claimant went over the back of the booth to answer the telephone and fell, injuring her hand. There is no dispute that the claimant sustained a fracture in her left hand arising out of a fall at work. The dispute stems from whether the claimant was performing employment services arising out of and in the course of her employment or whether she was

involved in horseplay. Respondents contend first that the claimant was involved in a prohibited activity by sitting in a booth while on duty. More importantly, the claimant stepped over the top of a booth to get to the phone rather than waiting for Mr. Tabor to stand up and then she could move to the end and stand up and walk to the phone.

Ark. Code Ann. §11-9-102(4)(B) provides that a compensable injury does not include....injuries caused by horseplay.

“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. *Southern Cotton Oil Division v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (1964). 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*, CA 04-92 (Ark. App. §11-10-2004).

In the present case, the claimant’s activity of sitting in the booth was clearly a prohibited activity. Finally, the claimant’s activity of stepping over a booth to get to the telephone cannot be considered performing employment functions but can be distinguished as horseplay. Ms. Dick testified that going over the top of a booth was not the proper way to answer the telephone and even the claimant conceded that this was not the appropriate manner to get to the telephone. After considering all the credible evidence, I find the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment and while she was performing employment services. I find the claimant’s

activity constituted horseplay and, therefore, is not a compensable injury.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment.

The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE