

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412005

FARHAD RAHAT

CLAIMANT

OUTCOME, INC.

RESPONDENT

FIRSTCOMP INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 25, 2005

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 14, 2005, in Springdale, Arkansas. A pre-hearing order was entered in this case on February 1, 2005 . This pre-hearing order set out the 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, the parties announced that they could agree on the appropriate weekly compensation rates and the claimant identified the period of alleged temporary total disability. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

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

1. On October 23, 2004, the relationship of employee-employer-carrier existed between the parties.
2. On October 23, 2004, the appropriate weekly compensation rates are \$215.00 for total disability and \$161.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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 his head, eye, and chest on October 23, 2004.
2. The claimant's entitlement to the payment of medical expenses, and temporary total disability benefits from October 24, 2004 through November 7, 2004.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"Claimant was injured on October 23, 2004, while working at the Outcomes, Inc. He was assaulted by a client and as a result has injuries to his head, eye, and chest."

In regard to these issues, the respondents contend:

"The respondents contend that the claimant was involved in an altercation on the date of the injury. The respondents contend that the claimant was dealing with a patient by the name of Donald Wilson. It appears that Mr. Wilson became upset over the fact that it was time to leave. Rather than follow the proper procedures, the claimant chose not to exit the situation and contact the supervisor and instead pulled a knife (not provided by the employer) and became involved in an altercation with Mr. Wilson at that point. The claimant was released to return to work as of October 26th, and was terminated due to the altercation. The claimant immediately filed for unemployment benefits."

DISCUSSION

I. COMPENSABILITY

The first issue to be addressed concerns the question of whether the claimant sustained "compensable injuries" to his head, eye, and chest on October 23, 2004. The burden rests upon the claimant to prove all of the necessary elements required by the Act for a "compensable injury."

The first of these elements are contained in Ark. Code Ann. §11-9-102(4)(D). This subdivision requires that the claimant prove by medical evidence the actual existence of each physical injury alleged to be compensable. Further, the claimant must show that the existence of these physical injuries is supported by "objective findings," as that term is defined in Ark. Code Ann. §11-9-102(16)(A)(i).

The medical evidence "establishes" the actual existence of physical injuries to the claimant's face or head and chest wall. These injuries are in the form of muscular contusions and resulting inflammation. The evidence presented also contains multiple "objective findings" to support the existence of these particular injuries. Photographs taken by the Springdale Police Department, immediately following the incident of October 23, 2004, show redness and swelling on the claimant's forehead above his left eye and his left cheek back toward his left ear. The records of Dr. John Gaston, dated October 27, 2004, note that on physical examination bruising or ecchymosis over the claimant's left forehead, temple, and cheek was observed. Bruising or ecchymosis involving the claimant's right inferior chest wall was also observed.

However, the medical evidence presented does not "establish" the existence of any actual physical injury to the claimant's left eye, itself. On his physical examination, Dr. Gaston noted that the claimant's left eye was normal. A subsequent evaluation of the claimant's left eye at the Brandon Eye Clinic indicates only an inflammation of the muscles about the eye, due to trauma. The evaluation of the actual eye, itself, and his vision did not show any traumatic abnormality.

Finally, the medical evidence presented does indicate the possible existence of a "mild concussion." However, the diagnosis of the possible existence of this condition appears to be based solely on the claimant's subjective symptoms. There is no evidence of any "objective findings" to support existence of actual injury to the claimant's brain, even a mild concussion.

For some reason, neither party has introduced the triage report, nursing report, or physician's evaluation and report regarding the claimant's emergency room visit at Washington Regional Medical Center on October 23, 2004. Only two records from this visit have been introduced. The first is a form containing discharge instructions, which include an instruction in regard what to be aware of in the event of a head injury. The second is an off work slip for the period of October 23, 2004 through October 26, 2004.

In his report of October 27, 2004, Dr. Gaston noted that the claimant "probably had a mild concussion," as a result of the incident on October 23, 2004. However, he recorded that x-rays of the claimant's skull and a CT scan of his brain, which were performed at the emergency room on October 23, 2004, were apparently normal. Dr. Gaston further observed that all the neurological testing he performed during his physical examination of the claimant was also normal or negative. Thus, his opinion concerning the probable existence of a mild concussion must be based solely on the claimant's history that he had developed memory problems after the assault.

In summary, I find that the claimant has "established" by the medical evidence, which is supported by objective findings, the actual existence of physical injuries to his face and/or head and to his chest, which are in the form of muscular contusions. I find that the claimant has failed to "establish" by medical evidence, which is supported by objective findings, the actual existence of any physical injuries directly involving his left eye or his brain.

The claimant must next prove that these medically established and objectively supported physical injuries satisfy the definitional requirements for a "compensable injury" which are set out in Ark. Code Ann. §11-9-102(4) (A)(i). These definitional requirements are :

- (1) That the injury arose out of and occurred in the course of the

employment;

- (2) That the injury was caused by a specific incident;
- (3) That the injury is identifiable by time and place of occurrence;
- (4) That the injury caused internal or external physical harm to his body;
- (5) That the injury required medical services or resulted in disability.

The claimant's medically established and objectively documented physical injuries sustained by the claimant are clearly the result of a "specific incident" and are identifiable by time and place of occurrence. The claimant's testimony, the medical evidence, and the photographs of the claimant, taken immediately following the incident, unquestionably show at least temporary physical harm to the claimant's body. In light of the nature and extent of the physical injuries experienced by the claimant, such injuries would have reasonably required medical services in order to evaluate the nature and extent of the injuries and to provide symptomatic relief from the effects of the injuries during the period of healing. The claimant's testimony (which I find to be credible) and the medical evidence shows that these physical injuries further resulted in a brief period of temporary total disability. Therefore, the record readily reveals that the claimant has proven by the greater weight of the credible evidence that his medically established physical injuries satisfy the 2nd through 5th definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

All of the evidence presented undeniably shows that the claimant's medically established injuries were sustained in an "assault." Ark. Code Ann. §11-9-102(4)(B)(i) provides:

"Compensable injury does not include:

Injury to any active participant in assaults and combats, which, although they may occur in the work place are the result of non employment related hostility or animus of one,

both, or all of the combatants and which said assault or combat amounts to a deviation from customary duties."

There is no evidence presented to indicate that the assault, out of which the claimant's physical injuries arose, was in any way the result of non employment related hostility or animus on the part of any of the parties involved. Thus, the injuries sustained would not be excluded from the category of "compensable" injuries by the provisions of Ark. Code Ann. §11-9-102(4)(B)(i). Rather, the greater weight of the credible evidence shows the existence of a causal relationship between the claimant's employment duties for the respondent and the assault giving rise to his injuries. Thus, these injuries arose out of and occurred in the course of his employment. Thus, would satisfy the final requirement for a "compensable injury" contained in Ark. Code Ann. §11-9-104(A)(i).

The evidence shows that the claimant was hired by the respondent as an "attendant" or caretaker for "handicapped" individuals, including those under the age of 18. The claimant's employment duties consisted of entertaining, transporting, feeding, and at least to some extent, supervising his charges during the day.

There is no evidence that the claimant had any formal training in dealing with "troubled" or "handicapped" individuals, except whatever he received through the respondent, during the year and a half he was employed there. The respondent's witness, Mr. Tony Posey, outlined the training provided as follows:

"Usually, we do a basic orientation, which is what he referred to as telling them how to fill out certain documentation, telling the individual about the medications, when they are administered, how often, what time, and what type of medication. Then there is a packet that we give them, the Development Disability Service Packet, which goes into what developmental disabilities are, as well as just some background information on certain disabilities. And then the last training is one on one, and this is direct training, the on scene training, where you know, because we serve a lot of different individuals. So most of the one to one training on that specific or those

specific individuals are done by the supervisor."

In describing what instructions are given to attendants or caretakers, should their charges become aggressive or violent, Mr. Posey stated:

"(The) policy is basically what they referred to as the tennis shoe rule, which if you get into a situation where things are going to be aggressive, then the thing that you do is you leave the scene, you get yourself to safety. There is restraints, there is no confrontation whatsoever that the employee is allowed to--"

The evidence reveals that Donald Wilson, the client or charge who assaulted the claimant is a large muscular 17 year old and suffers from some degree of mental retardation. The claimant had been Mr. Wilson's attendant for approximately 3 to 4 months prior to the incident. In dealing with Mr. Wilson, the claimant had been instructed that whenever Mr. Wilson became "upset," he should give him some time to "cool off" but keep him in sight. If Mr. Wilson did not "cool off," the claimant was instructed to contact a supervisor, who would supposedly deal with the situation. Apparently, Mr. Wilson had previously exhibited episodes of acting out behavior while under the care of the claimant prior to the assault. On these previous occasions, the claimant had ultimately been able to deal with the situation.

The claimant testified that on October 23, 2004, he picked up Mr. Wilson and another charge from the home of his supervisor, Wayne Briggs (apparently Mr. Posey's brother-in-law). The claimant then took the two to his house where they played on a play station for some period of time. After eating, Mr. Wilson requested that they go to the Jones Center, in order to play basketball. The difficulties apparently arose when the claimant advised Mr. Wilson that it was time to go home (i.e. back to the house of Mr. Wayne Briggs).

At this point, there is a discrepancy concerning the subsequent sequence of events between the claimant's testimony and history given to the police and the

history recorded in the police report, which appear to be derived from direct and indirect statements made by Mr. Wilson.

The claimant testified:

"I asked him, you know, 'Let's go home,' and he became mad. I don't understand why, you know. He got mad; he just ran to the door, pushed the door, you know. Then I just look at him; he attacked me, he wanted to attack me, and he just got this close, he attacked me, and I scared; you know, I don't have any other choices; I have my small pocketknife in my pocket; I did not open my knife. And he was mad and he was walking around me, and then he saw the knife in my hand and he began to attack me that moment. Then I talked to him, 'Hey, what's going on? What's wrong with you?' and I put my knife back in my pocket; I got my first punch in my eye, my left eye. I got a little bit dizzy. Then I was standing in front of him, I was standing up because behind me was a door; and I couldn't run behind. My right side was at least 10 feet deep; other side was another thing. I couldn't run in there. The only option I had was some pepper spray in my pocket; I took my pepper spray out and sprayed it to his eye. And then he got mad; he ran to my car, trying to break the window, my car window, and three or four security guards were there. You know, I just go behind him, scared of him. I was scared of Donald, you know, would attack me more. I was standing behind them, but the security guards, I guess those people were scared, too."

"He punched me one time, he backed off; then I used my pepper spray, he came to me, he punched me six or seven times more."

"He attacked my car. And I know that Donald was with me but I told him to get in my car. It was two guys that same day. I told the first guy to get in my car, and Donald was going to just go back down."

"Yeah. He (the other individual) was sitting in the car."

"(The security guards) tried to stop him (Mr. Wilson), but they couldn't."

The claimant then testified that he was struck again 6 or 7 times, including blows to his chest, before the security guards were able to restrain Mr. Wilson. The claimant also specified that he never struck Donald Wilson in any manner.

The history taken by the police report, from the claimant essentially coincides with the claimant's testimony. The police report records:

"Rahat said that as he was at the Jones Center with Wilson, Wilson became disorderly and Rahat was unable to keep him under control. I asked Rahat what Wilson was doing. Rahat said that he would not listen to him and had slammed a door open. Rahat said that he had told Wilson that they were going home in which Wilson approached Rahat in a manner as if Wilson was going to strike Rahat. Rahat stated that he had pulled the knife out of his pocket keeping it near his waist as he was scared and Wilson was already out of control and was afraid Wilson was going to punch him. Rahat said that Wilson did not punch him in which he had placed the pocket knife in his pocket. Rahat said that as he placed the knife back into his pocket, Wilson came out of nowhere striking Rahat with his closed fists. Rahat stated that after he was struck by Wilson, Rahat then got his pepper spray out and sprayed Wilson to keep him away. Rahat said that Wilson was still out of control in which Wilson went towards his red Ford Mustang striking the driver's side window several times in an attempt to break it. Rahat said that Wilson started to beat on the door and was opening and slamming his door shut. Wilson then walked away from the vehicle in which he had approached Rahat again (security for Jones Center was present at time) striking Rahat again across the face. Rahat had fell to the ground and Rahat said that Wilson had stomped on his chest several times as he was on the ground."

However, the police report also records Mr. Wilson. These statements relate that the claimant had pulled out a knife and cut him on the finger. He further stated that the claimant had sprayed him with pepper spray. The police report further notes that Mr. Wilson advised the police that the claimant had called him a "nigger."

Finally, the police report also contains information obtained from two other juveniles, who according to their statement, were friends of Mr. Wilson. These individuals apparently did not witness any of the actual altercations or assaults, and the information that they gave concerning these was solely based upon what they had apparently been told by Mr. Wilson. The statement of these two individuals is recorded as follows:

"Jamison and Calico said that Ray Ray 'Wilson' was a friend of theirs and he was in the food court rapping. Jamison and Calico said that they had give Wilson some money in which Rahat became very upset that Wilson had taken money from Jamison and Calico. Rahat told Wilson they were leaving in which they both walked out the doors. Jamison and Calico said that Ray Ray 'Wilson' came back inside very mad because he was called a nigger by Rahat and Rahat told him that he was going to jail for taking money from Jamison and Calico. Wilson also told Jamison and Calico that as he was outside, Rahat had taken a knife out and was swinging out towards Wilson. I asked Jamison and Calico if they had witnessed the knife being swung towards Wilson. Jamison and Calico said no. Jamison and Calico said that Rahat then came back inside the Jones Center where he followed Wilson out the door. Jamison and Calico said that Wilson was not acting disorderly as Wilson was rapping the whole time the incident was happening."

After consideration of all the evidence presented, I find that the history of the assault, as related by the claimant, is more credible and more actually depicts the events that occurred during the assault on the claimant. I find that the greater weight of the credible evidence indicates that Mr. Wilson was the aggressor in the assault and that this assault was the result of the claimant attempting to perform his assigned employment duties by returning Mr. Wilson in a timely manner to the place where he currently resided. The greater weight of the credible evidence fails to show that the claimant at any time attacked Mr. Wilson with a knife or cut Mr. Wilson with a knife on his finger. As noted in the police report, there was no indication on inspection of any blood on the claimant's pocket knife. Clearly, Mr. Wilson could have easily sustained a cut on his finger while he was punching the claimant or when he damaged the door at the Jones Center, or even on the door of the claimant's car when he was repeatedly slamming it shut. The claimant's failed attempt to use the pepper spray would also not reasonably be considered an active aggression, but rather a justified attempt at self defense. The attack on the claimant that is recorded on the surveillance disc clearly shows Mr. Wilson to be the aggressor in this violent

assault (at this point, I would note that the surveillance disc must be played on a computer, rather than a mere DVD player).

There is no doubt that, in hindsight, the claimant could have taken a better course of action to prevent injury to himself. Clearly, he could have been better off to have called Mr. Briggs to handle the situation, called the police to handle the situation, or simply left the claimant there. However, it was clearly one of his employment duties to look out for and take care of the claimant and to get the claimant to follow his instructions. He had also been specifically directed on prior occasions, when Mr. Wilson got out of control, not to call the police, and had been previously told by Mr. Briggs to merely wait around and see if Mr. Wilson would settle down and follow the claimant's directions. Workers' Compensation has always been recognized as being a "no fault" system. A worker is not deprived of benefits merely due to a lack of good judgement or because the worker could have avoided the injury. Benefits may be denied only if a worker intentionally causes his injury. In the present claim, there is absolutely no evidence to support the conclusion that the claimant's conduct or actions rose to the level where he could be reasonably considered to have intentionally brought about his own injuries or that he had deviated from his customary duties.

I therefore find that the claimant has proven the first and final requirement for a compensable injury under Ark. Code Ann. §11-9-102(4)(A)(i). I also find that the claimant's injuries did not occur while he was an active participant in an assault or combat that was the result of a non employment related hostility or animus by any of the combatants and that the assault or combat amounted to a deviation from the claimant's customary employment duties. Thus, the medically established and objectively documented physical injuries sustained by the claimant on October 23, 2004, represent "compensable injuries" within the meaning of the Arkansas Workers'

Compensation Act. As such, the claimant would be entitled to appropriate benefits for these injuries.

II. BENEFITS

Under Ark. Code Ann. §11-9-508, the claimant would be entitled to the payment of expenses incurred for reasonable necessary medical services for his compensable injuries. Medical services are "reasonable necessary" when they are necessitated or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. These purposes or goal are not limited solely to the resolution or improvement or the actual physical damage caused by the compensable injury. Appropriate goals also include the accurate diagnoses of the nature and extent of the injury and the providing of mere symptomatic relief.

In the present claim, the evidence presented shows that the medical services (in the form of evaluation, testing, and treatment) provided the claimant for his various complaints involving his head and chest by and the direction of the personnel at the emergency room of Washington Regional Medical Center, by and at the direction of Dr. John D. Gaston, and by and at the direction of personnel at the Brandon Eye Clinic represent "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. These services were clearly connected with or necessitated by the claimant's compensable injuries. Further, these services were of a type and nature commonly recognized by the medical community as being appropriate for the accurate assessment of the nature and extent of the injuries, the resolution of the actual physical damage caused by the physical injuries, and relief of the claimant's symptoms while these injuries were healing. The evidence shows that these services not only had a reasonable expectation of accomplishing their intended purposes and goals, but did in fact actually do so. Pursuant to the provisions of Ark.

Code Ann. §11-9-508, the respondents are liable for these expenses of these services, subject to the medical fee schedule established by this Commission.

The remaining issue concerns the claimant's entitlement to temporary total disability benefits during the period of October 24, 2004 through November 7, 2004. In order to be entitled to such benefits, the claimant must first show that he continued within his healing period from the effects of his compensable injuries and was rendered totally disabled from performing regular gainful employment, as a result of these injuries.

The medical evidence shows that the claimant was initially restricted by the physicians at Washington Regional Medical Center from engaging in employment for 3 to 5 days. He was tentatively released to return to work by the emergency room physician on October 26, 2004. On October 27, 2004, Dr. Gaston gave the claimant an excuse from work through November 7, 2004.

The claimant testified at the hearing that he was still experiencing some problems from his compensable injuries, specifically, pain in the area of his left eye and the left side of his face, together with "memory" problems. However, he had stated that he had applications in for employment, and did not feel these residual problems would prevent him from performing these positions, one of which was as a jailer. He testified that it was his opinion that he could have returned to work a "couple of weeks" after he was seen by Dr. Gaston.

The claimant also admitted that, in his deposition, he had testified that his memory "problems" had resolved within a couple of days following the incident and that the bruising in his chest had also resolved in a "couple of days" following the incident. In this deposition, he also testified that the "black spots before his eyes" had resolved a week or so following the incident and that the bruising on his forehead also resolved or went away in about a week following the incident. Finally, at the

hearing, the claimant testified that he applied for and ultimately received unemployment benefits through the Arkansas Employment Security Division approximately a week after the incident.

Ark. Code Ann. §11-9-501(a) provides:

- (1) Compensation to the injured employee shall not be allowed for the first seven (7) day's, disability resulting from the injury; excluding the day of the injury;
- (2) If a disability extends beyond that period, compensation can commence with the 9th day of disability;
- (3) If a disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury."

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove his entitlement to any temporary total disability benefits. The greater weight of the credible evidence fails to show that the claimant's "disability" from his compensable injuries extended beyond the waiting period provided by Ark. Code Ann. §11-9-501(a)(1). The medical evidence is in conflict as to whether the claimant should have been restricted from engaging in employment for only 5 days or for 14-15 days. There is also a conflict between the claimant's statements concerning the duration of his difficulties and the date upon which he personally believed himself capable of returning to employment. However, there is no doubt that the claimant held himself out as being ready, willing, and able to return to regular gainful employment, when he filed for unemployment benefits with the Arkansas Employment Security Division approximately one week following his injury.

The burden rests upon the claimant to prove that his compensable injuries precluded him from pursuing any form of regular gainful employment for which he was otherwise qualified beyond the 8th day following the compensable injury. This he has simply failed to do. Therefore, he cannot be awarded any temporary total disability benefits, at the present time.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 23, 2004, the relationship of employee-employer-carrier existed between the parties.
3. On October 23, 2004, the claimant sustained compensable injuries to his head, face, and chest. Specifically, the claimant has proven that these physical injuries are "established" by the medical evidence and supported by "objective findings." He has further proven by the greater weight of the evidence that these physical injuries arose out of and occurred in the course of his employment, were caused by a specific incident, are identifiable by time and place of occurrence, resulted in internal or external physical harm to his body, and required medical services. The evidence presented fails to prove that, at the time of these physical injuries, the claimant was an active participant in an assault or combat that was the result of non employment related hostility or animus on the part of any party concerned and amounted to a deviation from the claimant's customary duties.
4. The claimant has failed to prove that he sustained a compensable injury to his brain or a compensable injury to the left eye, itself. Specifically, he has failed to establish the actual existence of such an injury by medical evidence which is supported by "objective findings."
5. The medical services rendered to the claimant for his various complaints following the employment related incident of October 23, 2004, by and at the direction of the physicians and other personnel at the emergency room of Washington Regional Medical Center, by and the

direction of Dr. John D. Gaston, and by and at the direction of the personnel at the Brandon Eye Clinic all constitute reasonable and necessary medical services for the claimant's compensable injuries. The expense of these services, subject to the medical fee schedule established by this Commission, is the liability of the respondents herein.

6. The claimant has failed to prove that he experienced a sufficient period of temporary total disability to entitle him to benefits under the provisions of Ark. Code Ann. §11-9-501(a). Specifically he has failed to prove by the greater weight of the credible evidence that his disability from these compensable injuries extended beyond 7 days following the compensable injury, excluding the day of injury, itself.
7. The respondents have denied the occurrence of any compensable injuries on October 23, 2004, and have controverted this claim in its entirety.
8. As no benefits have been awarded directly to the claimant, no controverted attorney's fee can be awarded from the respondents.

ORDER

The respondents shall be liable for the medical expenses incurred by the claimant as the result of the medical services provided him for his compensable injuries, by and at the direction of the personnel of Washington Regional Medical Center, Dr. John Gaston, and the personnel at the Brandon Eye Clinic. This liability is subject to the medical fee schedule established by this Commission.

All benefits herein awarded, have heretofore accrued, and are payable in a lump sum without discount.

For the reasons heretofore stated in this Opinion, the claimant's request for temporary total disability benefits must be and hereby is denied and dismissed.

This award shall bear the maximum legal rate of interest until paid.
IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge