BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409072

KELLY L. HOLDER, EMPLOYEE	**CLAIMANT**
AMBASSADOR PERSONNEL OF ARKANSAS, EMPLOYER	**RESPONDENT**
ALEA NORTH AMERICA INSURANCE CO./ GALLAGHER BASSETT SERVICES (TPA), INSURANCE CARRIER	**RESPONDENT**

OPINION FILED JUNE 8, 2006

Hearing before Administrative Law Judge Barbara W. Webb on March 10, 2006, in Batesville, Independence County, Arkansas.

Claimant represented by Mr. Scott A. Scholl, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Mr. David C. Jones, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on March 10, 2006, to determine whether claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation law. A prehearing conference was conducted in this case on January 23, 2006. At the hearing, the parties amended the stipulations and issues set forth in the prehearing order to include an additional stipulation as to the average weekly wage and the applicable TTD and PPD rates. Further, the parties announced that the primary issue to be litigated at the hearing was compensability, and if proven, whether the claimant was entitled to appropriate benefits, including temporary total disability and medical expenses, through June 14, 2005. The parties announced that the remaining stipulations and issues, together with their respective contentions were properly set out in the Prehearing Order dated January 23, 2006. A copy of the Prehearing Order was introduced as Commission's Exhibit Number 1.

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The employer/employee/carrier relationship existed on August 29, 2004, and at all other relevant times.

2. The claimant's average weekly wage was $263.38 per week, which would result in a temporary total disability rate of $176.00 and a permanent partial disability rate of $154.00.

3. That the respondents have controverted the claim in its entirety.

By agreement of the parties, the primary issue presented is a determination concerning compensability. If overcome, claimant's entitlement to associated benefits through June 14, 2005, must be addressed. All other issues are reserved.

Claimant contended, in summary, that she sustained an injury to her neck and back on August 29, 2004, which arose out of and during the course of her employment, and that respondents are responsible for all outstanding medical and related expenses, together with continued reasonable and necessary medical treatment; that she is entitled to temporary total disability benefits through June 14, 2005; and that a controverted attorney's fee should attach to any benefits awarded.

Respondents contend that the claimant was engaged in horseplay at the time of the August 29, 2004, incident, as that term is defined in Ark. Code Ann. § 11-9-102(4)(B)(i). Respondents further contend that the claimant was not performing employment services at the time of the alleged injury pursuant to Ark. Code Ann. § 11-9-102(4)(B)(iii), and therefore did not sustain a compensable injury.

The claimant testified on her own behalf. Amanda Jackson was called as a witness for the claimant. Terry Adkisson, John Shellenberger, Richard Van Winkle, Randall Garrison, and Delisa "Dee" Anderson were called as witnesses for the respondents.

The record consists of two volumes and is composed solely of the transcript of the March 10, 2006, hearing containing numerous exhibits. 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 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

I. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.

3. The claimant failed to prove by a preponderance of the evidence the elements of a compensable injury under the Arkansas workers' compensation laws.

4. The respondents controverted the claim in its entirety.

DISCUSSION

I. Testimony of Witnesses

The claimant is twenty-seven (27) years old and completed the eleventh grade. Prior to working for the respondent, she worked at Tyson Foods, B & B Cedar Mill, other factories and a nursing home. She began working for Ambassador Personnel of Arkansas on July 19, 2004. She explained that the Ambassador was a temporary service agency and that the placement at Ideal Bakery, now "Flowers Bakery" ("the bakery") was her first placement. She testified that she had worked there for about thirty-one days at the time of the alleged injury. She testified that her job duties involved working on an assembly line separating good buns from bad buns and adjusting the "bun" machines for the different sized buns, i.e. hot dog, hamburger, etc. The claimant explained the August 29, 2004, incident as follows:

> Well, we was just, we was at work and there wasn't no buns coming down the line, we was just, you know, taking a break like we always did. And me and Amanda Jackson was sitting, kind of sitting on the machine, we always did it, and we was sitting there talking and Terry Adkisson came over to me, he'd been sexually harassing me, and he came over there to me, grabbed my feet, and started raising them up. Then I asked him to leave me alone and he proceeded on raising my legs even higher and I asked him to stop and that's when he flipped me over the machine and I fell.

She explained that the machine she was sitting on at the time of her fall was a conveyor belt in which buns come down the line and are separated to be bagged and sealed. She testified that she was working the night shift. She began work at 1:30 in the morning and worked until 9:30 in the morning. She had a lunch break at 4:30 and fifteen minute breaks every two and a half hours. She testified that she had been working all night on the particular day in question and that the incident occurred around 6:30 in the morning. She had already had her lunch break. She testified that the injury occurred in the work vicinity. She said that during her break she went into a break room. She explained that the line would stop when they were changing out the different buns, i.e. hot dog buns, hamburger buns, etc. and that the people working the line would just stand there and talk. She was required to stay at her work location during the gaps. The gaps would last a few minutes up to five minutes. She testified that the machine was about three and a half foot off the ground. She testified that she was five foot three. She testified that she could lean up against it and pull herself up onto the machine. She explained that it was common practice for people to sit on the machine and no one ever told her that she should not sit on the machine. She was not aware of any safety problems sitting on the machine. She testified that she had never known anyone to get hurt while sitting on the machine. She explained that Terry Adkisson, a co-worker, had been making comments to her, i.e. sexual advances, and was having an affair with

Amanda Jackson. She testified that Terry Adkisson came over and grabbed her legs and lifted them high enough that she flipped over and fell backwards and landed on her neck in a large yellow tub used to discard bad buns. She testified that she fell inside the tub and laid there for a second. She testified she got up out of the tub because the line began. She went back to work even though she was hurt and continued working for a short time until she couldn't work anymore. She testified that when she resumed work, she was able to work approximately fifteen minutes and then needed to leave. She testified that she left work at approximately 7:30 a.m. She drove approximately fourteen miles to her home and then sought medical treatment at the emergency room at the White County Medical Center in Searcy, Arkansas. She testified that she had a headache, burning in her neck and aching all around her neck, and tingling that went down into her arms and into her fingertips. She rated her pain at ten on a scale of one to ten and testified that she could barely move her neck. Following her treatment at the emergency room, she received regular medical care from Dr. Chan, Dr. Ronald Williams, and Dr. Cornbloom. She underwent physical therapy and received steroid injections during the summer. She testified that the treatments were not helpful and that she wasn't getting any better. She testified she had an operation on May 2, 2005, and has experienced relief from pain for the last three months as a result of a neck brace and a neck stimulator. She testified that she continued to have good days and bad days. She explained that if she did a lot of housework and things around the house, she would hurt. If she took it easy, she would have a better day. She testified that the injury had limited her daily activities, she is no longer able to keep up with her housework, and that she could not play with her daughter like she could before the accident. She attempted to return to work approximately six weeks after the operation with Pro-Dentec. At Pro-Dentec, she was only able to work approximately

for a week since she began hurting again and getting severe headaches. She next took a job at a restaurant for light duty and worked there from August 19th to September 2nd. She explained she quit that job because she began to experience headaches. She testified that she had always provided for her child and would perform any work that her injuries would permit her to do.

She denied kicking her feet out at Adkisson playfully or flirting with him. She testified that Terry and Amanda had come by her house one day when she missed work and that Terry had come by her house the day that his wife discovered he was having an affair looking for a place to stay. She explained that at the time of her injury she had been having problems with Adkisson. She testified that she had told him to leave her alone and had told Amanda Jackson that he was making her feel uncomfortable. She testified that Adkisson was the lead man showing her how to do the job. She testified that she had never done anything on the particular day to invite or otherwise make Adkisson think that he was invited to come over and mess around or anything. She testified that she had never engaged in any horseplay with anyone at the bakery.

On cross-examination, the claimant explained that she had numbness in her right arm prior to the incident associated with carpal tunnel related to her work at Tyson's. Further, she acknowledged that in May of 2005, she experienced a fall and fell on her hip and hurt herself. She testified that she was released from the doctor's care in connection with her hip on June 14, 2005, and that the doctor told her that she could return back to work. She denied seeking medical attention in December of 2003 at the St. Edwards Mercy Medical Center for problems with her neck. She testified that she had received unrelated and prior medical treatment at St. Edwards for headaches. She admitted that she had been treated by a chiropractor for her lower back. She testified that she had never had a motor

vehicle accident. She could not explain why the medical record from Dr. Chan dated January 28, 2005, referred to a motor vehicle accident. Nor could she explain why the emergency room record dated February 22, 2006, also referred to an August 2005 motor vehicle accident. She testified that the only time she had a herniated disc in her neck was when she had been flipped over the machine at work.

Claimant testified that when she went to work for Ambassador Personnel, she filled out a document containing rules, including a rule which prohibited horseplay at all times. She testified that although everyone did it, she was not supposed to be sitting on the bun machine. She testified that she had seen safety videos prior to the accident. She testified that the machine did contain warnings. She testified that she had sat on the machine in front of her supervisors, Caddy and VanWinkle, and had never been warned not to sit on the machine.

The claimant testified that she signed the Letter of Termination on September 2, 2004, stating that the reason for termination was "insubordination, sitting on machine, horseplay". She explained the circumstances surrounding the signing of the document as follows:

> I walked in there and they totally ignored me and that's when I asked for my check they told me I had to sign this before I got my check.

Amanda Jackson was called to testify on behalf of the claimant. Amanda testified that she had worked for the bakery for two years and was still employed there. She testified that on the night that Kelly got injured, they were sitting on the machine and that Terry came by, grabbed her legs, pulled her back and she fell into a yellow tub. She testified that Terry was an operator and was not in any supervisory position. She testified that it was common practice for people to sit on the machine, i.e. the bagger, in between "skip" or in between products. She testified

that they were sitting there talking when Adkisson grabbed the claimant's legs by the ankles. He started pushing her and raising her legs up and making her raise back. He raised her legs to the top of the machine but not above her head. She observed the claimant fall over into one of the tubs. She testified that she went in head first. The claimant was hurting after she fell and complained of neck pain. She testified that the claimant was not able to work and left about thirty minutes after the incident occurred. She testified that she had not seen Adkisson do anything inappropriate to the claimant. She testified that she considered the claimant to be a friend. She testified that she was not supposed to be sitting on the machine and that the machine had warnings that the machine could kick on at any time. She agreed that people had been warned about sitting on the machine both prior to and subsequent to the incident. She testified that the employer did not condone the employees sitting on the machine. She wrote out a statement discussing the incident with Dee Anderson as follows:

> Terry walked by us as Kelly was sitting on the machine in bun wrap and then Kelly Holder started swinging her legs at Terry as he walked by. It appeared that Kelly was almost inviting him Terry to grab her legs.

She testified that the statement was in her own words. She testified that she was having an affair with Terry at the time and that they had been over to the claimant's house. She testified that although she and Terry had subsequently broken up, she held no hostility and was not mad at anyone at the time she wrote the statement. She testified that she told the truth in the statement.

Terry Adkisson was called by the respondents to testify. Adkisson testified that he had worked at the bakery in 2004. He reviewed safety films prior to working at the bakery. He received a copy of the standard employment packet containing the safety rules. On the morning of claimant's injury, Adkisson recalled that he was

in break between buns and that the other employees were at the other end sitting on the machines. He stated:

> . . . I was going back and forth throwing boxes under the machine, under the conveyors getting ready for the other buns to come down. And come by, Kelly was sitting on the machine, and she was kind of swinging her feet and I grabbed her feet, grabbed her foot and pulled it up, and then she lost her balance and fell back in the tub.

He testified that the claimant was kicking her feet up at him. He did not hear the claimant tell him to stop. He testified that he did not intentionally mean for her to flip back and hurt herself. He testified that when he raised her leg up and she went backwards, he tried to grab her but she was already lost and went in the tub. He testified that they were all good friends and were joking around when the incident happened. He explained that he asked the claimant if she was all right and she told him she was hurting but that she thought she would be all right. She then told him she had to leave and the next day he found out that she was hurt. He testified that Amanda Jackson's written statement was an accurate description of what had happened on the day in question. He testified that everybody joked around at the bakery. He recalled the claimant telling him that she had neck surgery or problems with her neck prior to the incident in question.

He testified that he was a co-employee of the claimant and, due to his tenure, was lead on the bun line. He testified that the supervisors had warned him to tell the other employees not to be sitting on the machines and also the supervisors had told them personally not to be sitting on the machines in the middle of the night. He reported people sitting on the machines to his supervisors. He was not aware of anyone being terminated for sitting on the machines. He testified that the company was somewhat lenient about employees being on the machines but that they were told not to be on the machines. He testified that if the claimant was

not on the machine it would not have happened. He testified that if she had not kicked her legs up, he would never have grabbed them. He denied ever making sexual advances toward the claimant. He described the incident on the day in question as “just horseplay.”

John Shellenberger was also called to testify on behalf of the respondents. He is employed as the manufacturing manager of the bakery. He has worked for the bakery for nine years. He testified that temporary employees would see safety videos and movies in orientation. If the temporary employees were hired as employees of the bakery, they would see another set of safety movies and videos. He testified that the claimant was still employed with the temporary agency at the time of the incident. He did not recall whether she had gotten an opportunity to review the films at the bakery. He testified that the height of the machine was probably three and a half feet from the floor. He testified that the top of the machine would be about waist high and that someone would physically have to raise yourself up on it. He testified that the policy of the company was to prohibit any sitting on the machines for safety and sanitary reasons. He testified that on this specific machine, signs read “Keep clear, machine starts, machine starts automatically.” The machine starts unannounced. The sign further says to keep clear of machine, machine starts automatically. He stated it was an absolute safety violation for someone to sit on the machine. He did not work the night shift. He testified that he did not remember warning people to get off the machines but that was because it had never happened in his presence. He agreed that at night time there weren’t as many supervisory personnel in place. He testified that he was not aware that it was common practice for employees during the night to sit on the machines.

Richard VanWinkle testified on behalf of the respondents. He was the supervisor at the bakery and has been with the company for seventeen years. He

testified unequivocally that it was not allowed for employees to sit on equipment. He testified that if he observed someone sitting on the machine, he would make them get down, give them a verbal warning, document it. If it was a temp, he would've escorted them out of the business immediately. He testified that employees have been warned in the past about sitting on the machines. He testified that Kevin Caddy was the supervisor that worked in the bun wrap area. He denied that he was aware of any employees maintaining a lenient or common practice of resting on the machines during breaks of the work process. He testified that employees were given breaks in order to rest. When the line stops, employees are supposed to be cleaning their work area and keeping it cleaned of debris. He testified that he checked in on the night shift occasionally.

Randall Garrison testified on behalf of the respondents. Mr. Garrison has worked at the bakery for two years. He was originally assigned from the temporary agency. When he came to work for Ambassador, he went through an orientation process, including safety videos and reading paperwork. He testified that he went through the temp agency's orientation but did not do it at the same time as the claimant. He testified that he was working on the particular night in question. He stated that the employees were talking and waiting for buns. He stated that the employees were joking around and in good spirits. He testified that the claimant was sitting on the bun machine against the policy. He testified that the claimant was interacting and joking around with Adkisson at the time. He described the incident as follows: "I saw Terry grab her leg and flip her over the back of the machine." He did not see the claimant do anything to invite Adkisson to flip her legs. He testified that after she fell, they helped her out of the tub. He testified that the claimant appeared to be hurt and left work. He testified that he had not heard the claimant complain of any type of neck pain before the incident. He testified that he had

never sat on the machine but that it was a common practice for other employees to sit on the machines. He was not aware that employees had been warned not to sit on the machines. He testified that this activity was done outside of the sight of the supervisors. He testified that at the time this incident occurred, the employees were waiting on buns at the time and not performing any employment services. He testified that it was his understanding that the employees were not permitted to sit on the machines when the machines would stop.

Dee Anderson also testified on behalf of respondents. She testified she works for Ambassador Personnel and was claimant's employer. She testified that the employment process was lengthy, involving lots of paperwork, criminal background checks, drug tests and safety training. She explained that the employees watched two safety videos, including the safety video from the bakery showing the inside of the factory and the machines. In addition, the employment agency performs an on-site orientation for the employees. She testified that the claimant signed documents, which included warnings about horseplay and joking at work, as well as saw both videos. She explained that the claimant was terminated for insubordination, sitting on the machine and horseplay. She denied that the claimant was required to sign the termination paperwork in order to get her check. She explained that the paperwork was normal, standard procedure and that it would have been against the law to have held an employee's paycheck. She testified that she interviewed Amanda after the incident in order to get a witness statement in accordance with their standard business practices. She testified that Amanda had filled out a witness statement which was verbatim of what she had told her during the interview. She explained that the claimant had been trained through the training videos that if she experienced sexual harassment, she should contact her on-site supervisor immediately who would in turn contact the personnel agency.

She testified she never received any sexual harassment complaints from the claimant about her job.

II. Medical Records

The admission records at the White County Medical Center emergency room reflect that the claimant presented to the hospital complaining of neck pain. She stated that one of her fellow workers were lifting her legs and turned her over and she landed in a large plastic bowl. She stated that her neck or lower cervical/upper thoracic neck was the first thing to hit. She stated that she had initial numbness and tingling in her bilateral upper extremities and was complaining of pain. She stated that the numbness and tingling had gone. The doctor observed that the patient did have some point tenderness around C5, 6, 7 and T1 in the neck. The examination revealed "cervical contusion and thoracic contusion with strain." He prescribed Lortab, Valium, and follow-up care with the claimant's primary care physician if no improvement within the next 24 to 72 hours. He further indicated that the claimant should not work for the next four days. The x-rays taken on August 29, 2004, in the emergency room, resulted in the following findings:

> CERVICAL SPINE: The cervical spine is in normal alignment. There is no evidence of fracture, subluxation or soft tissue edema. The atlantoaxial articulation is normal.
>
> THORACIC SPINE: The vertebral body height and intervertebral disc space in the thoracic spine are normal. There is no evidence of fracture or misalignment.
>
> IMPRESSION: Atraumatic views of the cervical and thoracic spine.

On August 31, 2004, the claimant presented to the Family Practice Associates in Searcy, Arkansas, complaining of neck pain in connection with an incident which occurred at the Ideal Bread Company in Batesville. At that time, the doctor noted that the claimant had marked spasm tenderness of posterior cervical

spine with about 50% range of motion of rotation. X-rays from ER unremarkable. He prescribed Vioxx, Valium, Lortab, and Toradol. He indicated that the claimant should remain off work and should return for treatment on Friday for the purposes of getting an MRI.

On September 3, 2004, the claimant appeared for follow-up treatment indicating that the Valium did not help, but Flexeril helped. The notes indicate that the claimant had moderate spasm tenderness posterior cervical spine with full range of motion, Grip strength normal, mild levator scapula tenderness on the right. The doctor ordered that the claimant return in one week and to continue the Vioxx, Flexeril, and treatment plan.

On September 10, 2004, the claimant returned to the doctor continuing to complain of pain and stiffness in her neck. Observations reflect marked stiffness and decreased range of motion of her neck, as well as tenderness of deep palpation of the muscles on the right side of her neck. Based on the cervical strain, the patient was prescribed Darvocet, Zanaflex, moist heat, and an MRI was scheduled.

An MRI was taken of the cervical spine on September 11, 2004. The conclusions from the MRI were as follows:

> 1. Mild depression of the superior endplate of C7 along the anterior aspect with slight marrow edema on the fat suppression images in this region. This may represent a mild compression deformity with no disruption of the posterior elements seen.
>
> 2. Disc bulging at C3-4 and C5-6 as above.

On September 20, 2004, based on a referral from Dr. Staggs, the claimant sought treatment with Dr. Chan, of the Neurosurgery & Spine Surgery clinic. Admission notes reflect that claimant is 26 years old, bread wrapping, not working now, got laid off, 8/19/94 horse playing. At that time, Dr. Chan diagnosed her with cervical trauma – C7 vertebral body compression fracture small C3-4 and small

C6-7 and neck pain – myofaceted and discogenic at C7. His treatment plan included no surgery and Philadelphia collar, prescription drugs consisting of Lortab, Voltaren and Robaxin and a follow-up in eight weeks.

Medical records further reflect that claimant presented to the UAMS Medical Center on October 21, 2004. At that time, claimant described her symptoms as pain in her left lower quadrant for the last four to five months. The records indicate that claimant's medications included INH, hydrocodone, Xanax, Zanoflex.

On November 22, 2004, the claimant underwent a CT exam of the cervical spine. The radiologist notes:

> The exam is compared with the plain films of the cervical spine from 8/29/04. Small defect in the superior endplate of C7 is seen which may represent a Schmorl's node along with a small spur along the anterior superior margin of C7. No acute bony abnormality is seen. No subluxation is noted on the reformatted images. . . .
>
> Otherwise essentially unremarkable CT images of the cervical spine.

On December 4, 2004, the claimant again presented to Dr. Chan. At that time, the history noted the patient did not have a Philadelphia collar. He noted his diagnosis as a C7 vertebral body fracture and ordered her to keep her neck in a collar and referred her for testing for carpal tunnel.

On January 5, 2005, the claimant presented to Dr. Peggy Brown at the White County Neurology Clinic. She stated that she had fallen at work when another employee threw her upside down over some equipment and had fractured C7 and was being followed by Dr. Chan. Further, she noted that the claimant had a cervical collar on and was complaining of numbness and tingling in both arms, pain in both arms, and pain in her neck. She conducted a nerve conduction study which demonstrated a mild right carpal tunnel syndrome and the left upper extremity was within normal limits. She found no evidence of a cervical radiculopathy by EMG

or F-wave testing. She returned the claimant to Dr. Shields' and Dr. Chan's care for further management. Her diagnosis discussed included 1) a C-spine fracture, 2) pain and numbness in both arms, and 3) right carpal tunnel syndrome.

On January 28, 2005, the claimant again presented to Dr. Chan regarding a vertebral body fracture at C7. The report further states in the diagnosis and recommendation column that "MVA C7 vertebral fracture – stable and healed, myofascial neck pain. Plan – physical therapy and Voltaren."

Admission records at the emergency room at the White County Medical Center reflect that the claimant presented herself complaining of neck pain on February 22, 2005. The history indicates that the patient presented to the emergency room with a "complaint of neck pain after being involved in a motor vehicle accident last August associated with some herniated disc in her neck and had a fracture at C7". He indicates that she started physical therapy two days ago and was having increased pain today and had come to the emergency room for further evaluation and treatment. The doctor observed that she had mild diffuse tenderness in her C-spine area and prescribed prescriptions of Toradol and Vistaril IM.

III. Compensability

The claimant has the burden of proving by a preponderance of the evidence that her claim is compensable, i.e., that she sustained an injury while engaged in the performance of employment services, rather than while engaged in horseplay. Morales v. Martinez, ___ Ark. App. ___, ___ S.W.3d ___ (Nov. 10, 2004). In Morales, the Court of Appeals rejected the contention that horseplay was an affirmative defense which must be proven by the employer. In addressing the issue of horseplay, the Court noted the following:

> "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).

In the Morales decision, the Court of Appeals affirmed the Commission in holding that a claimant who was not authorized to operate a forklift but began driving the forklift "like a game" and "playing" in the warehouse was not compensable since the injury claimant sustained when the forklift overturned was the result of horseplay. Under the provisions of Ark. Code Ann. § 11-9-102(B)(i)(Supp. 1997), the claim is barred if the claimant engaged in horseplay. The statute provides:

> 11-9-102. Definitions.
>
> (B) "Compensable injury" does not include:
>
> (i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-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; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries.

Bates v. Perkins Supply Co., Inc., 1998 AWCC 270 (E700660) (Affirming an ALJ finding that claimant's injury was the result of horseplay.)

IV. Horseplay

The instant case basically boils down to a determination of whether the claimant was a willing participant or innocent victim in the "horseplay" activity which resulted in her injury. It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson

v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). In my opinion, the respondent's version of the events as they transpired is more believable than the version of the events as related by the claimant. From a complete review of the credible evidence in this case, I find the claimant actively engaged in horseplay at the time her injury occurred.

Claimant's version of the events that Adkisson grabbed her leg without provocation is simply not credible. All of the witnesses testified that claimant and Adkisson were friends and had socialized on and off the job. The statement and testimony of Amanda Jackson, a friend of both the claimant and Adkisson, reflects that the claimant had "started swinging her legs at Terry . . . almost inviting him, Terry, to grab her legs". Adkisson testified that they were all just "joking around" when the incident happened and that he did not intentionally cause her to fall. Randall Garrison, a co-worker, testified that the employees were joking around and in good spirits and that the claimant was "interacting and joking around with Mr. Adkisson at the time".

Claimant's credibility is even more suspect after a review of the medical records in this case. Although claimant denied prior injuries, there are medical records reflecting prior treatment and complaints of injuries to her hand, arm and neck as well as references in a 1/28/05 doctor's note from the neurology clinic and

a 2/22/05 notation in an emergency room report of similar injuries from an August, 2004, motor vehicle accident.

Claimant contends, in the alternative, that even if she was involved in the incident and not simply an "innocent victim", she was still performing employment services. Whether initiation of horseplay is a deviation from one's course of employment depends on: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e., whether it was co-mingled with the performance of duty or involved in abandonment of duty; (3) the extent to which the practice of horseplay had been an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some such horseplay. 1A Larson, The Law of Workmen's Compensation, 23.00-23.66 (1992); Southern Cotton Oil Division v. Childers, 237 Ark. 909, 377 S.W.2d 167 (1964); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993).

In Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993), the Court considered an injury resulting from horseplay as a "course of employment" rather than an "arising out of employment" problem, and determined that minor acts of horseplay do not automatically constitute departures from employment, but may be found to be insubstantial. Notably, this case was decided prior to the revisions in the workers' compensation law two years later by the Arkansas Legislature adding a specific prohibition that injuries caused by horseplay shall not be considered to be compensable injuries. See A.C.A. § 11-9-102(4)(B). Moreover, any application of the Ringier case in the instant case would be misplaced since claimant fails to meet her burden under either precedent.

In the instant case, the claimant initiated the horseplay involved herein when she chose to sit on the machine and kick her legs toward her co-worker. This was a complete deviation from the job that she contracted to perform. Claimant further

admitted that she had stopped working on the assembly line at the time the alleged injury happened. Both claimant and the co-worker testified that the incident was not part of the job duties of the assembly line workers and not the nature of conduct which was normally expected to be conducted at the work location. The claimant was clearly instructed on safety rules prohibiting horseplay on the job. While the testimony revealed that unsupervised employees on the night shift made it a common practice to sit on the machine during stops in production, the evidence clearly demonstrated that the employees had been verbally warned that sitting on the machine was not permitted and in violation of company policy and that written safety warnings posted on the machine were ignored.

Employment services are being performed when the employee is engaged in an activity that carries out the employer's purpose or directly advances the employer's interests. Schultz v. Pulaski County Special School District, 63 Ark. App. 171, 976 S.W.2d 399 (1998); Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999). If the activity in which the employee is engaged only indirectly advances the employer's interest and is not inherently necessary for the performance of the job for which the employee was hired to perform, the activity is not sufficient to constitute "employment services" under the statute. Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998). One's mere presence at his place of employment does not equate to the performance of employment services. Hoyt v. Discovery, Inc., 1997 AWCC 414 (E602380). There was simply no evidence that claimant's activity was part of any organized activity sponsored by the employer or otherwise advanced her employer's interest. This case is clearly distinguishable from the facts in Patteson v. Ozark Waffles, LLC, 2005 AWCC 238 (F412585). In Patteson, the claimant fell while jumping over a booth to attempt to answer the phone as part of her job duties. The Commission found that the

employee's careless act of jumping over the booth did not alter the fact that she was performing employment services, i.e. attempting to answer the business phone. Id. In contrast, the claimant in this case was involved in nothing required by her employer and was doing nothing to carry out the employer's purpose. Rather, it was her decision to sit on the machine in violation of the safety rules of the employer, to engage in "joking around" and "horseplay", and to invite the attention of her co-worker by kicking her legs in his direction. See McKinney v. Trane Co., 84 Ark. App. 424, 143 S.W.2d 581 (2004).

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

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BARBARA W. WEBB
Administrative Law Judge