

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506518

LEONA M. MIZE,
EMPLOYEE

CLAIMANT

RESOURCE POWER, INC.,
EMPLOYER

RESPONDENT

LM INSURANCE CORPORATION,
CARRIER

RESPONDENT

OPINION FILED FEBRUARY 17, 2006

Hearing before Administrative Law Judge Barbara Webb on November 21, 2005 in Searcy, White County, Arkansas.

Claimant represented by Mr. C. Michael White, Attorney at Law, North Little Rock, Arkansas.

Respondents represented by Mr. Guy A. Wade, Attorney at Law, Friday Eldridge & Clark, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on November 21, 2005 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 September 6, 2005. At the hearing, the parties announced that the stipulations and issues, together with their respective contentions, were properly set out in the Prehearing Order dated September 6, 2005. A copy of the Prehearing Order was introduced as Commission's Exhibit 1.

It was stipulated that the employer-employee-carrier relationship existed between the parties at all relevant times, including on or about May 14, 2005; that claimant earned sufficient

wages to entitle her to a compensation rate of \$205.00 per week for temporary total disability and \$154.00 per week for permanent partial disability in the event the claim was found compensable; and that respondents had 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 must be addressed.

Claimant contended, in summary, that she sustained an injury to her left knee on May 14, 2005, 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 reasonably necessary medical treatment; that she is entitled to temporary total disability benefits; and that a controverted attorney's fee should attach to any benefits awarded. Alternatively, the claimant contended that if it was determined that she was engaged in horseplay, the deviation from her job was slight and would not exclude her from recovery of workers' compensation benefits.

The respondents contended that claimant was engaged in horseplay at the time of the May 14, 2005 incident, as that term is defined in Ark. Code Ann. § 11-9-102(4)(B)(i). Respondents further contended that claimant was not performing employment services at the time of the alleged incident on May 14, 2005 and therefore did not sustain a compensable injury.

Claimant testified on her own behalf. Wesley Greenhaw was called as a witness for the respondents. The record is composed solely of the transcript of the November 21, 2005 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 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. 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

Claimant, Leona Mize, testified in her own behalf. Claimant is twenty-two (22) years old. The claimant testified that she had completed the tenth grade. She previously worked as a cashier and assistant manager at Dairy Queen and as a pharmaceutical technician under a pharmacist's supervision. She moved to Arkansas in February of 2005 after losing her home in a hurricane in Alabama.

After a short period in commission sales, she was employed on May 5, 2005 by Resource Power, Inc., a temporary employment agency. The claimant was assigned to work at Bosch Skil in a production line making various power tools, i.e. Skil saws. On May 13, 2005, the claimant was working the second shift on the assembly line. The second shift began work at 4:00 p.m. on the 13th and ended at 12:30 a.m. on the 14th of May. Claimant testified that she injured her left knee approximately 15 minutes before the shift ended. She stated that she had completed her task and was waiting for the line to begin moving since someone in the line ahead of her had slowed the line down.

Claimant explained the incident, as follows:

I had a free moment to clean up springs, screws, whatever may have fallen in the floor. So I turned to my right. There was a broom leaning against the table standing directly behind me. I turned to my right to grab that broom to sweep up my area. And when I turned to the right, I felt the popping in my knee, and I just - hit the floor. (Tr. 18)

Claimant explained that after help arrived, she was assisted off the floor and into a wheel chair by her group leader and taken to the first aid room. She was subsequently transported by her employer to the emergency room at the Baptist Health Center in Heber Springs. At the hospital, she underwent x-rays, drug tests, and a vision exam. She was given crutches and released to return to light-duty work.

She testified that she returned to light-duty work until June 8, 2005, but continued to have problems with her knee, including

pain, instability, swelling, and difficulties when standing and walking. She subsequently sought medical treatment from her family physician, Dr. Robert Cowherd. Dr. Cowherd referred the claimant for an MRI. The MRI revealed a complete ACL tear and the claimant was referred to Dr. Luter, an orthopedic surgeon. She was initially treated with physical therapy and testified that she continued therapy until she underwent an ACL replacement surgery on November 9, 2005. She testified that she had experienced pain every day since the incident. She stated that she had continued to have problems with walking, standing, getting in and out of her vehicle, and swelling in her knee. She testified that she moved from a two-story townhouse apartment due to the injury. She testified that she did not have the recommended replacement surgery until November 9, 2005 due to a lack of insurance.

On cross-examination, claimant explained that Brenda Edmonds was to her left with a small table between them and that Wesley Greenhaw was working almost "elbow to elbow" with her to her right. Although she denied doing a Tae Bo demonstration, claimant admitted that she had discussed Tae Bo and had offered to loan Brenda Edmonds her video tapes of Tae Bo on the night of the incident. She admitted that her job duties did not include dancing, aerobics, or Tae Bo. She stated that there was nothing slippery or unusual on the floor to cause her fall and that she did not slip or fall on anything. She denied that she had any prior left knee problems,

taken any medication for knee problems, complained about knee problems, or worn a knee brace. She explained that she currently was not able to return to work because she was still recovering from her surgery, but hoped to return to work.

Wesley Greenhaw was called by the respondents to testify. Claimant's attorney objected to the introduction of testimony by Mr. Greenhaw on the basis that the nature of his testimony had not been disclosed in discovery as required by the PreHearing Questionnaire and the Standing Order issued by Judge Arey. Respondents contended that claimant was aware that Mr. Greenhaw would be called as a witness and had been provided a copy of a prior statement given by the witness to an insurance adjuster. Respondents contended the objection was untimely since it had not been raised prior to the hearing of the case. At the hearing, the objection was denied on the basis that Wesley Greenhaw was disclosed as a potential witness by the respondents in their Response to Prehearing Questionnaire on August 16, 2005, and no objection was raised at the Prehearing conference held in this case. Obviously, one of the primary purposes of a prehearing conference is to address any outstanding discovery issues in order to avoid any unfair surprise. In addition, the substance of the testimony of respondent's witness could have been discovered by written interrogatories or by deposition. There was no evidence offered by claimant that she used any of the discovery procedures

available to her. The September 6, 2005 Prehearing Order clearly provides either party may call the witnesses that have been identified at least 25 days prior to the hearing. I therefore find that Mr. Greenhaw's testimony should be fully considered as evidence in this case.

Wesley Greenhaw testified that he had previously worked for Resource Power, Inc. and was assigned to work at Bosch Skil. He testified he stood to the right of the claimant in the production line and worked the same shift for the nine day period prior to May 14, 2005. He described the work space as a long hallway with at least 8 feet between the conveyer belt and the back wall. He recalled the events of the early morning of May 14, 2005, as follows:

Leona was standing there, and she had finished her Skil saw, and it come down to me, and I had to put my top and my four screws on. So I done that, and then it went to the guy beside me. Well, I turned around, and about the time I turned around, she started dancing like, and then she threw her leg up two or three times. And then the last time she threw it up, she fell backwards, and then she . . .

Q. Excuse me. Which leg was she throwing up?

A. Her right leg.

Mr. Greenhaw explained that the claimant was kicking up with her right leg toward him and that on about the fourth kick, she kicked her leg up too high, lost her balance and fell to the ground and just laid on the ground until help arrived.

He testified that the brooms were kept down the hall and that at the time of the claimant's fall there was not a broom behind

her. He testified that he was not aware that the claimant had made a complaint to her supervisor about his conduct that night. He testified that he had seen the claimant with a knee brace on her left knee prior to May 14, 2005. When he asked her about the brace, she told him that her knee was hurting and that she was taking medicine. He testified about what the claimant said:

And she kept talking about how her knee was hurting and everything, and then she pulled her brace down and then it was kind of black and blue. She said she had fell before or something like that, and that's as far as I heard. (Tr. 60)

On rebuttal, the claimant testified that she could not explain why her testimony was not consistent with Greenhaw. She testified that on the night in question, Greenhaw had made jokes and gestures about her body (i.e. the size and appearance of her rear end) that was reported to her group leader that night. She said that his comments were also overheard by her co-worker, Brenda Edmonds, and led to their discussion about losing weight and Tae Bo.

The admission notes at the Baptist Medical Center reflect that she presented to the hospital by wheelchair complaining of left knee pain at approximately 1:00 a.m. She stated that she was at work when she "turned and twisted" her left knee resulting in intense pain. The examination revealed "no obvious swelling of the knee", but "decreased range of motion of the left knee due to pain". The notes further reflect that "x-ray of knee showed no

obvious fracture or discoloration." She was diagnosed with suspected ligamentous strain of the left knee. The knee was bandaged with a compression bandage and given crutches. The treatment plan also included an ice pack for thirty minutes for two hours and prescription medications of Anaprox and Lorcet Plus to alleviate the pain. She was told to follow up with her regular physician or return on May 16 if she was not better. Otherwise, she was told she could return to work on May 16.

The radiologist report of May 14 reflects that two views were taken of the left knee. The report reflected the doctor's observations, as follows; "I see no fractures, bone, joint, or soft tissue abnormalities" and "radiographically normal left knee."

On June 1, 2005, the claimant sought treatment from her family doctor, Dr. Robert M. Cowherd, M.D. On that day, claimant's history reflects that she twisted her knee at work on May 14 when she fell and that the knee was still swollen. She advised that she was given anti-inflammatories but only took them a couple of days. Dr. Cowherd noted that the x-rays from the Emergency Room showed no fracture but some narrowing of the joint space. He continued the prescriptions and ordered an MRI to rule out meniscal tear.

On June 3, 2006, the claimant underwent an MRI on her left knee at the Baptist Health Medical Center. The MRI impressions were as follows:

Complete tear of the anterior cruciate ligament. There are associated bone contusions in the medial and lateral

condyles and in the posterior aspect of the lateral tibia. There is a mild medial collateral ligament sprain. Mild popliteus muscle strain. No definite meniscal tear is seen. The coronal images are somewhat motion compromised for assessment of meniscal pathology. Moderate size joint effusion.

On June 23, 2005, the claimant was seen by Dr. Dennis Luter of Orthopaedic Specialists. Dr. Luter noted that the claimant reported the injury as occurring about seven weeks ago at work when she turned around to reach behind her and twisted and pivoted on her left knee. While noting that her x-rays were normal and the MRI results, he reported that the claimant had a definite ACL injury. He stated that it was imperative that she work through a rehab program to regain her motion and strength before undergoing ACL reconstruction. At the point, he recommended she should proceed with surgery. He referred her to physical therapy for 3-4 weeks.

On July 19, 2005, the claimant returned to Orthopaedic Specialists for follow-up and treatment. She was seen by Dr. Charles E. Pearce, Jr., M.D. at the request of Dr. Luter. Dr. Pearce recommended that ACL reconstruction be considered, but noted that there was no emergency or urgency to the treatment. He noted that the claimant should continue with a home stretching and strengthening program.

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.)

The instant case basically boils down to a determination of whether or not to believe the claimant's version of the events or Mr. Greenhaw's version of the events. 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 testimony of Mr. Greenhaw'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 she turned to her right to grab a broom and heard her left knee pop is simply not credible. It is even more suspect in light of her admission that she was discussing Tae Bo with her co-worker at the time the incident allegedly occurred. The review of the medical records in this case is also instructive. It was not until claimant underwent an MRI and learned that she would need to undergo surgery that she described the incident as occurring when she turned around to reach behind her and twisted and pivoted on her left knee. In fact, on June 1, 2005, claimant's history reflects that she told her family doctor that she had twisted her knee when she fell. Finally, Respondents have offered some evidence that the claimant was not completely forthcoming as to the condition of her left knee. Greenhaw testified claimant had made previous complaints of problems with her left knee, had taken pain medication because of the pain in her left knee, and had worn a knee brace at work.

Claimant contends, in the alternative, that even if she was involved in some dance step or kick, she was still performing employment services. She submits the current approach is to treat an injury resulting from horseplay as a "course of employment" rather than an "arising out of employment" problem, relying on the case of Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). She further contends that minor acts of horseplay do not automatically constitute departures from employment, but may be

found to be insubstantial. Respondents contend that the claimant's reliance on the Ringier case is misplaced. Respondents argue that the case has no precedential value since the workers' compensation law was rewritten two years later by the Arkansas Legislature and added 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). For the reasons set forth herein, claimant fails to meet her burden under either precedent.

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).

Again, in the instant case, the claimant initiated the horseplay involved herein when she chose to demonstrate an aerobic exercise for a co-worker. This was a complete deviation from the job that she contracted to perform, i.e., the assembly of various power tools. 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, Mr. Greenhaw, testified that the performance of an aerobic exercise 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.

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 demonstration of Tae Bo was part of any organized health activity sponsored by the employer or otherwise advanced her employer's interest. Claimant 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 demonstrate a Tae Bo kick to her co-worker

for the purpose of advancing her personal belief in a certain exercise form. 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.

BARBARA WEBB
Administrative Law Judge