

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510117

JORDAN C. MOORE, EMPLOYEE

CLAIMANT

**PHILIP LAMITINA, d/b/a LAMITINA'S PIZZERIA,
UNINSURED EMPLOYER**

RESPONDENT

OPINION FILED JUNE 20, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 5, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant appeared pro se.

Respondent appeared pro se.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to workers' compensation benefits.

On January 31, 2006, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Jordan Cole Moore, the claimant; Paula Johnson, Carolyn Wright, and Philip Lamitina, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Jordan Moore, the claimant, with a date of birth of June 4, 1985, is a high school graduate who was employed by respondent with duties which included cooking pizzas and cleaning in the kitchen area. Philip Lamitina was the owner and operator of Lamitina Pizzeria in Waldenburg, Arkansas, which was in operation from April 2005 through December 2005. During its operation respondent employed four (4) employees, to include the claimant.

Though uncertain of the date he commenced his employment with respondent claimant estimates that he was employed by respondents for approximately months. The testimony of the claimant reflects, with respect to his work schedule, that he usually worked from 9:00 a.m. to 1:00 p.m. and then returned to work from 5:00 p.m. until closing, 10:00 p.m. Claimant asserts that he earned \$6.00 per hour.

Regarding the events of August 12, 2005, the testimony of the claimant reflects that he reported for work at 5:00 p.m. and was scheduled to remain until 10:00 p.m. Respondent did not maintain a time clock. Claimant maintains that at approximately 9:30 p.m. he suffered the injury which serves as the basis for the present claim. Claimant testified:

I was back in the kitchen taking dishes out of the sink and I turned around and I slipped on some water and I fell down on it and dislocated my knee. (T. 9).

Claimant injured his right knee in the accident. Claimant's testimony reflects that the accident was witnessed by two (2) co-workers. The testimony in the record reflects that Carolyn Wright called the ambulance and claimant was transported to the emergency room of St. Bernards Medical Center in Jonesboro.

The testimony of the claimant reflects that he was discharged from the emergency room within two hours after received emergency medical treatment on August 12, 2004. Claimant

testified that he was seen in follow up relative to his right knee injury on one occasion a couple of months following the August 12, 2004, emergency room visit. Claimant also noted that he was provided a release to return to work approximately two weeks following the accident. When released to return to work claimant did not return to the employment of respondent but rather secured employment at Riceland Foods, and has continued in the employment of same since.

Claimant's medical bills incurred relative to the August 12, 2005, accident include the ambulance bill, and the St. Bernards Medical Center emergency room bills, totaling approximately \$1000.00.

The testimony of Ms. Paula Johnson reflects that she commenced her employment with respondent in April 2005. Ms. Johnson testified that did salad prep and helped out in the kitchen. Ms. Johnson's work hours were from 4:00 p.m. to 10:00 p.m. Other individuals identified as employees of respondent by Ms. Johnson included the claimant, Carolyn Wright, Brennan Slocum and Tina Baker.

Ms. Johnson testified that while she did not witness the claimant's accident on August 12, 2005, she was at work on that day. Ms. Johnson testified that she and Ms. Wright were out front mopping at the time of the claimant's accident, which occurred at approximately 10:00 p.m.

Regarding the events of the night of August 12, 2005, Ms. Johnson testified:

We were behind that night due to a confrontation so we were running a little behind.

We were out front mopping and we heard Jordan in the back but we didn't really think anything of it because Brennan and Carolyn were back there and Carolyn went to the kitchen - -

* * *

He [Jordan] was screaming. And then Carolyn had went back to the kitchen for something and she come out and ran up front and told Mr. Lamitina that Jordan was hurt and he was on the floor.

* * *

I went back there after she had said that he was down on the floor. (T. 14-15).

Ms. Johnson testified regarding a conversation that she had with the claimant following the accident:

I did. And he had informed me that he was walking back from the dishwasher and he had gotten a tea jug or something and as he turned to walk back he slipped on water. (T. 15-16).

During cross examination Ms. Johnson explained why they were running late in closing the restaurant on August 12, 2005:

We had two customers up in the front. And the phone rang about 9:40 and nobody answered the phone because it was our understanding that you said, closed. And so nobody answered the phone and you come back there and cussed us all out. (T. 17).

Ms. Carolyn Wright testified that she was an employee of respondent and was at work on August 12, 2005. Ms. Wright's testimony reflects that she was present at the time the claimant called for help:

Yes, sir. I was coming up for, you know, to get the dustpan and sweep my dirt up, I had just swept. And I, well there was a couple over here standing and laughing and carrying on because he was always such a cutup, you know and I walked over there and said, Jordan, are you all right? And he said, it's my leg. And I could tell it was kind of, didn't look right. And I run through there and I told them in the kitchen, I said, you don't let him move. And I run up front where Phil was, you know, he was fixing, had the lights out and was fixing, we were fixing to all leave, our work is done. Yeah, I seen him and he was laying by the pizza prep table and right here is a refrigerator. There's a gap about like that. (T. 27-28).

Mr. Philip C. Lamitina, the owner and operator of respondent, testified regarding the number of individuals he employed at the restaurant and the duration of the business. Regarding his failure to secure workers' compensation insurance for his business, Mr. Lamitina's testimony reflects:

Yes, sir, but if I may, I was told by East Arkansas Insurance Agency, here in Jonesboro that I did not need workmen's comp because I had a policy on the building that carried a liability policy and it would pay up to \$5,000 on any one accident that occurred on the property. We filed a claim with, it was called Burton (phonetic) Insurance Company on Jordan and told them the accident was 8-12-05. They refused to pay the claim after investigating. And I had two letters from them to that effect.

* * *

Well, yeah, I understand that it was in error because the day I got the second letter that they refused to pay I called East Arkansas Insurance Company, they came out and I paid them for the workmen's comp right then. I said I wanted it in effect right now; somebody else get hurt - - and I said, what you told me it's not holding true. I have got to have this coverage. (T. 20).

Regarding the incident which serves as the basis for the present claim, Mr. Lamitina acknowledged that while the claimant's hours would vary, basically Monday through Thursday the restaurant was open until 9:00 p.m. and on Friday and Saturday until 10:00 p.m. While respondent did not have a time clock, Mr. Lamitina offered:

No, sir, I didn't. There were so many times that we would close up, 9:00, 8:30. A lot of times we closed at 9:30 and everyone of them got paid right to the quitting hour of ten or 9:00.

* * *

Even though we may lock the door up and walk out 30 minutes or 20 minutes early, they still got their time until the quitting hour. (T. 21).

Mr. Lamitina testified regarding the claimant's accident of August 12, 2005:

We did have a, that night was extremely slow. We had two people at table number 12, which is one of the front tables up there, two men, gentlemen. And they were eating. And there was five guys that came in. One's last name was McElwain and I believe the other one was Ivy and then there were three other guys that I didn't know. And they came in and ordered some kind of soft drinks and then they ordered some food. In the meantime the phone started ringing and ringing and ringing and I was unable to get to the phone and it just kept ringing and finally it quit. Then the phone rang back and this was the people wanting to know if we was closed, and said they called and let the phone ring for three or four minutes and nobody ever even attempted to answer. I went to the back and I asked them exactly what they thought was going on, that we were in there trying to make a living and whenever, a biggest part of our orders is to go orders and that's where Ms. Paula Johnson says that I'm jumping on everybody. I think that's kind of what a normal business owner would do when the party did not answer the phone and take the orders. At that point I told Jordan that his buddies were sitting outside and that things were starting to get out of hand. And at 10:00 I wanted him to take right on off and leave, you know, and if we were finished before he could leave and he'd be paid til ten. I went back to the front and the guys jumped on me out there and wanted to know, and this was probably about 15 until 10:00 and I told them, they said, you know, I was jumping on my help. I said, well, I'm sorry but I said sometimes help needs to be jumped onto. And I asked them to leave that if they felt that way, you know, they didn't have to worry about their food. I stuck my head back in the kitchen there and I told them the orders they had for the booth for the five fellas out here, whatever food it was to throw it in the trash. At the same respect I went back up and I told Carolyn, I said, Carolyn we hadn't had a whole lot of business today, I said, do not mop the floor, I said just sweep it and forget it. Paula came out and sat in the booth where the boys were and she remained there until she went to the back after Jordan hurt himself. That's exactly what happened. I was back up front counting the money and I would have been through before 10:00 counting but those boys kept coming back in the door inviting me outside wanting to fight. They were like 17 and 18 years old. And I told them to go on and get on out of there before I had to call the Chief of Police down there to haul them off. At that point finally I got back up to the front. I was counting money, trying to clear out the register and Carolyn come running back up there and told me that Jordan had fell. Whenever I got to the back, and the letter here from Paula Johnson states that he fell back by a black rack by the dishwasher. When he fell he was leaned up against the refrigerator and the pizza prep table right there on the corner. The first thing I looked for was to see if there was water or anything. There was no dampness on the floor whatsoever. He had a dislocated knee. After

all this stuff happened and it went on and he went to the doctor and I told Carolyn to call, you know, the 9-1-1 number. I went to the hospital that night and everything and then the next thing I know you and I are corresponding on the telephone. And I have tried to explain and it was told by Carl Bayne, James Jones, and Ms. Reed who is a Legal Advisor for your office that if he was not on the clock and he fell after 10:00 and hurt himself that I was not really responsible for him. It would be like him going home and slipping on the steps or slipping on the wet floor. And, of course, you and I talked and I understood what you said about having your day in court and that's fine. But he was off the clock, his pay check reflects that amount and the time clock. And every one of them were paid the same, to 10:00.

Mr. Lamitina's testimony reflects that he manually recorded the hours worked by his employees.

There was no time clock present. Mr. Lamitina identified two individuals, Brennan Slocum and Tina Baker, as witnesses that were present at the time of the claimant's accident, however neither was present to testify at the hearing. Regarding the witnesses, Mr. Lamitina testified:

Whenever you informed me that it looked like this was going to have to come back to a hearing I told Brennan about it and Brennan said, well, I think I need to come clean with you, Mr. Lamitina. I said, well, I said, what's the matter. And he said, well, I'll be up front and talk to you in just a minute. And he said that Jordan had finished up back there and said he had come back here by the refrigerator and to put it bluntly he was showing Jordan, I mean showing Brennan Slocum standing there how he was going to kick my henny or whatever you want to call it and he said, he picked his foot up and he kicked down and he was shouting and hollering real loud and he said all of a sudden he just went right to the floor and he told me, he said, I believe he dislocated his leg whenever he kicked real hard like that.

* * *

Brennan Slocum, the witness that I have down that I can't get returned call. I don't know if he is scared to come up here or what. But he had told me he would. Of course, another thing is this week he is suppose to be having final exams as ASU in Beebe. (T. 25).

Mr. Lamitina denies that he ever received a bills from any of the claimant's medical providers regarding the August 12, 2005, accident.

The record reflects the presence of a Weiner Fire Department document regarding a telephone alarm received at 10:17 p.m., on August 12, 2005, involving the claimant's fall at respondent. The document reflects that arrival was had at 10:23 p.m and dismissed at 10:42 p.m.(CX.#2, p. 2). A document from Lifeline Paramedics, Inc., reflects that a call was received at 10:21 p.m. on August 12, 2005, with the incident location being noted as Lamitina's Pizzeria and the patient's name as Cole Moore whose chief complaint was having fallen and right kneecap dislocation. The Lifeline Paramedics report reflects that following treatment the claimant was transferred and released to the care of emergency room staff. (CX. #2, p. 3). There is also included in the documentary evidence a bill from Lifeline Paramedics, Inc., for services rendered to the claimant during the August 12, 2005, dispatch. The bill reflects that it was addressed to respondent-employer. (CX. #2, p. 4).

The medical in the record reflects that the claimant was admitted to St. Bernards Medical Center on August 12, 2005, at 11:16 p.m. The Admission Record regarding the afore reflects the claimant's employer as respondent, which is also reflected as the guarantor . (CX. #1, p. 1). The medical records reflect that the claimant was seen by Dr. Karen Coe during his St. Bernards Medical Center emergency room visit on August 12, 2005. The impression of the claimant's injury as reflected in the medical report was that of a dislocation of the right knee. The physical examination of the claimant's right knee, reflected in the medical records, disclosed "right knee has mild erythema, minimal swelling, obvious dislocation of patella, mild tenderness and no abrasions lacerations". (CX.#1, p. 2).

The medical records reflect that the claimant provided a history of his injury as "walking at work and slipped, landed on right knee, right knee dislocated". (CX. #1, p. 4). The medical

records reflect that x-rays of the claimant's right knee were obtained during the August 12, 2005, St. Bernards Medical Center emergency room visit and that the claimant was provided medication, furnished a knee immobilizer and crutches. (CX. #1, p. 3). The medical records reflects that the claimant was provided a prescription for Vicodin, with directions to take one tablet by mouth every 6 hours as needed for pain. The prescription included 12 tablets. Finally, the medial report reflects that claimant was directed to follow-up with his family physician in one week and was informed if his knee still hurt in one week further testing might be necessary. The medical records reflects that the claimant could return to work on August 16, 2005, and must use crutches for one week. (CX. #1, p.6). The record is devoid of any documentation evidencing further medical treatment or physician visit by the claimant following his August 13, 2005, discharge from the emergency room of St. Bernards Medical Center.

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 12, 2005, the relationship of employee-employer existed between the parties.
3. On August 12, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$136.00/\$102.00, for temporary total/permanent partial disability.
4. On August 12, 2005, the claimant sustained an injury to his right knee arising out of and in the course of his employment.

5. The claimant was temporarily totally disabled for the period August 13, 2005, and continuing through August 16, 2005.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of August 12, 2005.

7. The respondent has controverted this claim in its entirety.

CONCLUSION

At issue before the Commission at this juncture is whether the injury sustained by the claimant to his right knee on August 12, 2005, was within the course and scope of his employment. The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the provision.

Claimant asserts a specific incident injury to his right knee on August 12, 2005. To prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102 (4)(A)(i). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. 126, 938 S.W.2d 876 (1997).

It is undisputed that during the pertinent time period while the respondent employed a sufficient number of employees to bring its operation within the purview of the Arkansas Workers' Act a policy of workers' compensation insurance was not in place. Respondent carried liability insurance, however due to mis-information from his insurance provider, failed to secure the required workers' compensation insurance.

The evidence preponderates that the claimant suffered an injury to his right knee on August 12, 2005. Further, a review of the medical in the record reflects the presence of objective findings establishing the injury. Additionally, the evidence preponderates that the claimant's right knee injury required medical services and resulted in a period of disability. Respondent asserts that the claimant's injury was not sustained while performing employment services and/or that the injury was the product of horseplay.

A compensable injury is an "accidental injury . . . arising out of and in the course of employment. . . ." Ark. Code Ann. §11-9-102 (4)(A)(i) (Supp. 2003). An injury is not compensable if it is "inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102 (4)(B)(iii). When an employee is doing something that is generally required by his employer, the employee is performing employment services. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999); *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). The phrase "performing employment services" is synonymous with the phrase "acting within the course of employment," in that the test for both is whether the injury occurred within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Collins v. Excel Spec. Prods.*, 347 Ark. 811, 69 S.W.3d

14 (2002).

The evidence preponderates that respondent's closing time was at 9:00 p.m. Monday through Thursday and 10:00 p.m. on Friday and Saturday. Claimant asserts that he suffered his August 12, 2005, injury at approximately 9:30 p.m. Respondent maintains that the claimant was instructed to leave work early due to slow business.

August 12, 2005, was a Friday which meant the closing time of respondent was at 10:00 p.m. The evidence reflects that the claimant right knee injury occurred after 10:00 p.m., contrary to the claimant's assertion of a 9:30 p.m. occurrence. The Weiner Fire Department document reflects that the telephone alarm call of the claimant's injury was received at 2217 (10:17 p.m.). A unit from the Weiner Fire Department arrived at respondent's business in Waldenburg within six minutes at 10:23 p.m. Lifeline Paramedics, Inc., which transported the claimant to the emergency room of St. Bernards Medical Center in Jonesboro, received a call relative to the claimant at 10:21 p.m.

The credible testimony of the two employees, Paula Johnson and Carolyn Wright, who were working up front in the restaurant reflects that upon hearing the claimant screaming one [Ms. Wright] went to investigate and upon locating the claimant on the floor ran up front and reported to respondent that the claimant was on the floor hurt. By all accounts emergency medical personnel, to include the Weiner Fire Department, was immediately summoned.

The evidence preponderates that while respondent's usual closing time was 10:00 p.m. on Friday night, on August 12, 2005, the crew was delayed due to an earlier dispute between respondent, his employees and some customers/patrons. The evidence clearly reflects that at the time of the claimant's injury, employees of respondent were performing employment services.

Ms. Johnson and Ms. Wright were mopping and/or sweeping when they first heard the claimant, who was in the kitchen area, scream. Claimant's job duties included cooking pizza, sweeping the floors and cleaning back in the kitchen. There is no direct credible evidence in the record to reflect that the claimant's injury was the product of horseplay. The evidence preponderated that the claimant suffered an injury to his right knee within the course and scope of his employment with respondent on August 12, 2005. Respondent had controverted this claim in its entirety.

Claimant was transported from respondent's business and the accident site in Waldenburg via ambulance, Lifeline Paramedic, Inc., to the emergency room of St. Bernards Medical Center, in Jonesboro. Respondent is liable for the cost of the medical services rendered to the claimant in connection to the compensable August 12, 2005, right knee injury. Claimant receive emergency medical treatment at St. Bernards Medical Center relative to the compensable right knee injury, to include diagnostic test, medication, and crutches. Ark. Code Ann. § 11-9-508 (a) requires employers to provide such medical services as may be reasonably necessary with the employee's injury. *Cox v. Klipsch & Associates*, 71 Ark. App. 433, 30 S. W. 3d 764 (2000). The evidence preponderates that the medical treatment rendered to the claimant was reasonably necessary in the treatment of his compensable injury, and for which respondent is liable.

At the time of his discharge from the emergency room of St. Bernards Medical Center on August 13, 2005, relative to the August 12, 2005, compensable right knee injury claimant was provided an off-work slip directing him to remain off work until August 16, 2005. As noted above, there is no other documented evidence of the claimant having been seen by a physician or receiving medical treatment relative to this August 12, 2005, compensable right knee injury other than the St. Bernards Medical Center emergency room visit of the date of the accident.

In the instance claim claimant suffered a scheduled compensable injury. And employee who suffers a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work. *Wheeler Construction Co., v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Ark. Code Ann. § 11-9-501 (a)(1) provides that compensation shall not be allowed to the injured employee for the first seven (7) days disability resulting from injury, excluding the day of injury. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he missed sufficient time from work to entitle him to the payment of temporary total disability benefits as a result of the August 12, 2005, compensable injury.

AWARD

Respondent is herein ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses arising out of the claimant's August 12, 2005, compensable right knee injury, to include medical related travel.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-809, until paid.

Respondent is further ordered to pay the court reporter's bill for reporting the hearing in this claim within thirty (30) days of this award.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge