

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510493

ROBIN THOMAS, EMPLOYEE	CLAIMANT
GRECIAN STAKE HOUSE PARAGOULD, EMPLOYER	RESPONDENT
SOUTHERN GUARANTY INS. CO., CARRIER	RESPONDENT

OPINION FILED APRIL 5, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on March 3, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant appeared pro se.

Respondents represented by the HONORABLE EMILY NEAL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

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

On January 24, 2006, a pre-hearing conference was conducted in this claim, from which a Pre-hearing order of the same date 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 Mr. Robin Thomas, the claimant, and Mr. Anthony Lee Jordan, coupled with medical reports comprise the record in this claim.

DISCUSSION

Robin Andrew Thomas, the claimant, with a date of birth of August 27, 1978, has an eleventh grade education. Claimant testified that he was employed by respondent-employer off and on for ten (10) years. Claimant maintains that he was continuously employed by respondent from July/August 2001 through September 2005. In describing his job duties claimant testified:

I was a cook or if my boss - - I was there as a cook but I was pretty much doing whatever was needed to be done.

I was working from 10:30 in the morning until two in the afternoon and then I'd come back and work from five to close every day except on Tuesdays and the weekends. Tuesdays I worked from 10:30 in the morning until the time we, until closing and the weekends I would work usually, except instead of coming at five I would come back in at 4:30. (T. 10-11).

The testimony of the claimant reflects that he earned \$1,200.00, a month in his employment.

Claimant testified that on September 12, 2005, he suffered an injury to his right middle finger while working for respondents. Claimant's testimony reflects that he is uncertain of the time of his injury, only that it occurred late in the evening. Claimant provided additional testimony regard the range of his job duties in his employment with respondents:

Well, I was mostly cooking and I cooked and on certain days he would have me washing dishes. And he had me, which when I washed dishes it meant taking out trash and everything else. I had to stay, I had to stay until closing whether I was cooking or whether I was washing dishes I had to sweep and mop out front. (T. 12).

In describing the mechanism of his September 12, 2005, injury, claimant testified that on that day he was assigned the duties of washing dishes by Mr. Pete Zaharapolous, the owner of the restaurant. Claimant added that the youngest son of the owner, Chris Zaharapolous, was also working on the day of the injury. Claimant continued:

And Chris had been, which anytime Pete is not there Chris runs his mouth because he knows that I'm on probation and I can't hit him. Of course I don't care if I lose my job but I don't feel like going back to jail. But he knows I can't hit him and that particular day he started off - -

* * *

Anyways that particular day it started off by, we have a projector at the Steak House because on two days a week we have Clubs that come in for meetings. And one of them uses a projector on occasions. Well, Chris had the projector out in his truck, his mom's truck, because he was driving it. And instead of going out there because I was backed up because that day I was working with the busboy who didn't really want to work that day. And I was trying to get caught up and he wanted me to go out there and get a projector out of his truck instead of him doing it himself. I started - - that's where it started. It started after I went out there and got the projector and bought it in he started running his mouth to me, just bugging me. And he'd throw french fries, stuff like that, french fry bags, he would wad them up and he'd throw them over there toward me and just bugging me. And when I went outside to dump the trash instead of just swinging at him I just went outside and hit the trash can and when I did I hit a plate that I was throwing away that was in the trash can and when I did it cut my knuckle. (T. 12-14).

Claimant testified that approximately a week following the accident he obtained medical treatment for his injury.

Regarding his work status in the employment of the respondent following the accident, claimant's testimony is less than succinct:

No. I ain't been there since pretty much the accident.

* * *

No, between the hospital and the doctor he had me off for about two weeks and three days and I was getting phone calls from Pete complaining about it because the doctors had me off work and everything else and then I went in there to pick up some money from my check that he owed me because he shorted me and that was the last day I went in - -

* * *

Yeah, the 12th was the accident. That Thursday was the last day I worked. (T. 14-15).

The testimony of the claimant reflects that he has incurred medical costs associated with his injury in the amount of \$1,800.00. While acknowledging that he had been released by the doctor claimant explained that the same was to light duty work, however respondents did not have anything there for him to do on light duty. Claimant added that when he went to the Steak House he quit his job due to remarks that the owner made about his wife.

Claimant acknowledged that he is not under the active treatment of a physician regarding the injury he sustained on September 12, 2005. Claimant attributes a lack of strength in his right hand as a residual of his September 12, 2005, accident. The testimony of the claimant reflects that he is not seeking employment but rather has filed for social security disability due to difficulty he has with his eyes, hearing, and a learning disorder.

Claimant acknowledged that he intentionally punched the trash can and injured his right middle finger on a broken plate. Further claimant acknowledged that the injury suffered in the accident was limited to his right middle finger. When questioned regarding being outside on a smoke break at the time of the injury claimant testified:

Well, when you take out, well with the busboys when you take out the trash they pretty much smoke a cigarette because that's about the only time they can smoke a cigarette. Especially if they get caught up. When they do dishes and they're really behind then they're not supposed to take a break out there. But if you get, when you wash dishes and you get caught up enough to where you can, then while you're outside dumping the trash, they'll take a smoke break. (T. 18).

Claimant acknowledged that he did take a smoke break when he went outside. The testimony of the claimant reflects that a busboy was present at the time of the injury, however he did not

remember his name.

Claimant testified that despite the fact that the his right middle finger was bleeding following the accident, he wrapped it up, put gloves on, and returned to work washing dishes. Claimant explained that the reason he did not seek medical attention at the time was because the only individual available to authorize same was Chris Zaharapolous, who did not so instruct him.

Claimant testified:

Well, I asked him and he told me to go back to work. He told me to wait until his daddy come in. (T. 20).

Claimant asserts that he returned to work the next day, and every day thereafter until “they fired me”. (T. 20).

The testimony of the claimant reflects that when he woke up on Friday morning his hand was so swollen that he was unable to bend his fingers. As a consequence of the afore he sought medical treatment at Arkansas Methodist Hospital for the lacerated finger. Claimant maintains that following the emergency room visit he followed up with his family physician, Dr. Clarence L. Kemp. Claimant testified that after several visits to Dr. Kemp he was released to light duty work.

Claimant denies that the quit rather than return to respondents to work light duty:

No, I was going to go back to work on light duty until, like I said, until Pete said what he said about my wife and that’s when I quit.(T. 22).

Regarding the availability of light duty work at respondents, claimant’s testimony reflects:

I know they don’t have any. The only light duty they have in that restaurant is running the cash register. And that’s one thing I will not do. (T. 22).

Claimant’s testimony reflects that he has sought work at a couple of places, however they

required lifting, which he is unable to do with his right hand. Claimant asserts that he has sought work through the state Employment Security Division as well as through a temporary employment agency. In both instances claimant maintains that he disclosed his restriction with respect to lifting. Claimant added that he was foreclosed from many jobs due to his criminal history.

The testimony of the claimant reflects that the only source of income for his household is that of his wife's disability. There is also a friend of the family with an income who resides in the household. It was stipulated that if called to testify the testimony of the claimant's wife, Amy Thomas, and his friend, Rick Mills, would corroborate that of the claimant with respect to the physical condition of the claimant's hand on the date that he sought medical treatment at Arkansas Methodist Hospital.

The testimony of Anthony Lee Jordan reflects that he is employed as a busboy at Grecian Steak House, respondent-employer. Mr. Jordan's testimony reflects that he was working at the Steak House in September 2005, when the claimant cut his finger. Mr. Jordan testified that the claimant was smoking a cigarette at the time of his injury. Mr. Jordan explained that he had gone outside to dump the trash, and that while he was doing so claimant was taking a smoke break.

Mr. Jordan testified regarding the claimant's injury:

He had taken a plate outside and decided he was going to punch it and break it.

* * *

He found the plate inside and when we went out he picked the plate up and hit it. (T. 31).

In describing the mechanics of the claimant breaking the plate, Mr. Jordan testified that the claimant sat it down on a box and punched it three or four times before finally breaking it. Mr.

Jordan added that after breaking the plate the claimant threw it away, dumped the trash, and walked back into the restaurant.

The testimony of Mr. Jordan reflects that he was aware that the claimant had cut his hand. Mr. Jordan testified that after the claimant wrapped his hand he resumed washing dishes and completed the remainder of his shift. Mr. Jordan's testimony reflects that he witnessed the claimant report the hand injury to Chris Zaharapolous:

He told Chris to look at his hand that he had broken a plate.(T. 34).

Mr. Jordan denied that the claimant made a requested for medical treatment. Mr. Jordan last worked with the claimant on Wednesday, September 14, 2005.

The medical in the record reflects that the claimant was seen at the emergency room of Arkansas Methodist Medical Center in Paragould on September 16, 2005, for treatment regarding his right hand. At the time of the afore visit claimant relayed a history of cutting his right hand five days earlier. The emergency room records reflects that the claimant's right hand was red and swollen. X-rays obtained during the September 16, 2005, visit did not disclose acute fracture or dislocation in the claimant's right hand. (RX. #1, p. 1-5).

The claimant was again seen at the emergency room of Arkansas Methodist Medical Center on September 17, 2005, regarding his right hand complaint. The medical record reflects that the impression of the claimant's complaint during the September 17, 2005, visit was "infected right 3rd MP joint & dorsal hand cellulitis". Claimant was discharged by the attending emergency room physician and directed to follow-up with his primary care physician.(RX. #1, p. 6-11).

On September 19, 2005, claimant was seen by his primary care physician, Dr. Clarence L.

Kemp, regarding his right hand laceration. At the time of the visit to Dr. Kemp claimant was taking medication provided the emergency room physicians for the infection and pain in his hand, to include Keflex and Lortab. Dr. Kemp noted that the claimant's hand remained swollen at the time of the visit. Claimant was released by Dr. Kemp to return to work light duty with no lifting for two weeks as of September 26, 2005. (RX. #1, p. 12-21).

After a thorough 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 September 12, 2005, th relationship of employee-employer-carrier existed among the parties.
3. On September 12, 2005, the claimant earned wages sufficient to entitle his to weekly compensation benefits of \$200.00/\$154.00, for temporary total/permanent partial benefits.
4. On September 12, 2005, the claimant did not sustain injury arising out of and in the course of his employment with respondents, pursuant to the provisions of Ark. Code Ann. §11-9-102 (4).

CONCLUSIONS

Claimant asserts that while within the course and scope of his employment with respondents on September 12, 2005, he suffered an injury to his right middle finger which required medical treatment and rendered him totally incapacitated from engaging in gainful

employment for a period of time. As a consequence of the afore claimant asserts entitlement to the cost of his medical treatment and a period of temporary total disability from respondents. Respondents take the position that any injury suffered by the claimant is not compensable under the provisions of the Arkansas Workers' Compensation statutes. The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers's compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

In order 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) (Repl. 2002). 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. App. 126, 938 S.W.2d 876 (1997).

In the instant claim the evidence preponderates that the claimant suffered a laceration to his right hand on September 12, 2005, which ultimately required medical treatment. The laceration to the claimant's hand was witnessed by a co-worker, Anthony Jordan. Further, the credible evidence in the record reflects that notice of the claimant's injury was provided to supervisory personnel of respondents following its occurrence. The September 12, 2005, injury

was sustained by the claimant as a result of a specific incident which is identifiable by time and place of occurrence.

The evidence preponderates that on September 12, 2005, during the period of the claimant's injury his assigned job duties was that of washing dishes. An additional task performed by the claimant as a dishwasher was to dump the trash. The credible testimony reflects that during the time the trash as dumped by the dishwashers and busboys the routinely took their smoke break while outside.

In the instant claim, the evidence preponderates that the claimant took a plate, which may have already been broken, from inside the restaurant outside with him when he went to dump the trash. Further, the credible evidence reflects that claimant took his smoke break before dumping the trash. After smoking a cigarette and before dumping the trash claimant intentionally struck the plate three to four times before breaking it and cutting his hand in the process.

While the evidence is clear that the claimant's actions in "punching" the plate were voluntary and intentional, they do not rise to the level of willful intention to bring about the injury he sustained as contemplated in Ark. Code Ann. §11-9-401 (a)(2). Although claimant attributes his "punching" of the trash, which resulted in his injury, to frustration bought on in dealing with his supervisor, the more credible evidence reflects that the injury was the product of horseplay on the part of the claimant. Ark. Code Ann. §11-9-102 (4) (B) (i), provides that with the exception of innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries.

The evidence preponderates that at the time the claimant sustained his injury to his right hand on September 12, 2005, he was engaged in horseplay, and as such the injury is not

compensable. This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge