

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508791

ROGER L. WAGNER, EMPLOYEE	CLAIMANT
SOUTHEASTERN SERVICE, EMPLOYER	RESPONDENT
AMERICAN STATES INSURANCE COMPANY C/O SAFECO INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JULY 18, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on April 21, 2006 at Jefferson County, Pine Bluff, Arkansas.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on July 28, 2005 at which time the claimant was earning sufficient wages to be entitled to a

compensation rate of \$195.00/\$154.00, in the event this claim is found to be compensable.

The claimant contends he broke his left arm on July 28, 2005 when he fell at work. He seeks payment of medical expenses, temporary total disability benefits from July 29, 2005 to March 22, 2006 and attorney's fees.

The respondents contend the claimant was not performing employment services at the time of his injury. The claimant was injured as a result of horseplay that he instigated.

A prehearing conference was conducted by Judge Barbara Webb. The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant and co-workers, Robert Scull, Chris Martin and Marquis Williams. These gentlemen are all developmentally disabled and their mothers attended the hearing. There were no challenges to the competency of any of the witnesses' ability to testify but their ability to communicate varied widely. All of the witnesses were placed in their jobs by a service that works with the disabled.

The claimant, age 36 (D.O.B. February 27, 1970) has a high school education and drivers license. He lives with his parents. He was employed as a janitor for the respondent-employer, mopping, dusting and taking out trash in three different buildings of the complex.

The claimant testified that he and his co-workers joked with each other but were not engaged in any physical contact before the incident. The claimant stated that he was walking down the hall to the janitor's closet when Chris Martin grabbed him from behind. The claimant lost his balance, fell on his left side and broke his arm. The claimant had not spoken to Mr. Martin and does not know why he was grabbed. The claimant reported the injury to Richard and Connie Assan and Doris Sims. These supervisors were not called as witnesses.

On cross-examination, Attorney Wade emphasized that the claimant was not assigned to work in the area in which he was injured.

MEDICAL EVIDENCE

The claimant was treated by general practitioner, Dr. Lester Alexander and orthopaedic surgeon, Dr. John Lytle, at Jefferson Regional Medical Center (JRMC). It appears some medical expenses were billed to SAFECO. The medical records show a history of injury during horseplay:

Dr. Alexander's report of 7-28-05:

He states that he injured his (left arm) today when he fell and landed on a concrete floor. He states that while he was at work at NCTR another employee ran up behind him and grabbed him and caused him to trip and fall.

Dr. Lytle's report of 7-28-05:

Mr. Wagner is a 35 year old man who was playing with another man, wrestling. He was thrown down on a tile floor and injured his arm.

One month after the injury, the claimant's history changed:

Dr. Lytle's report of 8-31-05:

He describes his injury today as another one of his co-workers came up and grabbed him from behind and in the course of that pushed him to the ground. This was not actually wrestling and he did not really have anything to do with that.

X-rays were performed which confirmed a fracture and the claimant was treated with a splint and medications. In a report dated August 10, 2005, Dr. Lytle estimated a minimum of 8 weeks for healing and released the claimant to work with his right arm only.

In a follow-up report dated September 28, 2005, Dr. Lytle diagnosed non-union of the fracture, recommended a bone stimulator, and excused the claimant from work. Repeat x-rays again showed non-union of the fracture and surgery was performed on January 5, 2006.

The claimant has requested temporary total disability benefits until March 22, 2006. The last medical report in the exhibit packet is dated January 18, 2006. The doctor mentions a weight limitation of 5 pounds while working on range of motion exercises, and there is a notation under "Workers' Compensation Return: six weeks," however, there is no formal release from the doctor.

Marquetus Williams testified the claimant came to their department in the laboratory where they clean equipment. The claimant was "wrestling" with Chris Williams in the washroom, tickling and grabbing his waist. Mr. Williams and the

claimant walked into the hallway out of view where the accident happened.

Chris Williams testified the claimant had been “messaging” with him, grabbing his waist. Mr. Williams followed the claimant into the hall and both of them fell to the floor.

Robert Skull testified the claimant was in the washroom area of their department when he started “messaging” with Chris and Marquetus and tickling Chris. Mr. Skull explained that the claimant does have a janitor’s closet in the building, but it is downstairs and the laboratory is upstairs. The claimant frequently comes upstairs to get honey buns in the break room.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective

medical evidence

- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A “compensable injury” is defined as an accidental injury... arising out of and in the course of employment....” Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2003). A compensable injury does not include an “injury which was inflicted upon the employee at a time when employment services were not being performed....” Ark. Code Ann. 11-9-102(4)(B)(iii)(Supp. 2003). An employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer.” White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999). The test for determining whether the employee was performing employment services at the time of the injury is “whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly.” Pifer

v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002).

A compensable injury does not include injuries caused by horseplay, Ark. Code Ann. §11-9-102(4)(B)(i).

The evidence of record shows the claimant was injured in an area of the building in which he had no job duties after instigating horseplay with one of his co-workers. In order to rule for the claimant, I would have to ignore the testimony of three witnesses and disregard the initial medical reports showing the accident happened as a result of horseplay. Therefore, I find the claimant has not met his burden of proof by a preponderance of the evidence.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on July 28, 2005.
2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge