

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610862

WILLIE MCAWAY

CLAIMANT

FRED MCDANIEL dba MCDANIEL CONSTRUCTION
UNINSURED

NO. 1 RESPONDENT

PICK IT CONSTRUCTION

NO. 2 RESPONDENT

COMMERCE & INDUSTRY INSURANCE,
INSURANCE CARRIER
AIG CLAIMS, TPA

NO. 2 RESPONDENT

OPINION FILED JUNE 29, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG, in
Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville,
Arkansas.

Respondents No. 1 represented by JAMES EVANS, JR., Attorney,
Springdale, Arkansas.

Respondents No. 2 represented by MELISSA WOOD, Attorney, Little
Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 23, 2007, in Springdale,
Arkansas.

A pre-hearing order had been entered in this case on November
29, 2006. However, subsequent to the entry of this pre-hearing
order significant changes occurred in the case that required
extensive amendments of the Order.

First, Fred McDaniel dba McDaniel Construction was added as an
uninsured respondent-employer. Mr. McDaniel was represented by
James Evans, Jr., an attorney at law in Springdale, Arkansas. The
issues were amended to reflect that the claimant was only seeking
temporary total disability benefits through December 29, 2006. The
additional issues (numbers 5 and 6), were added. These issues

involved the effect of Ark. Code Ann. §11-9-102(4)(B)(iv) and the matter of the appropriate weekly compensation rates. A copy of the pre-hearing order with these amendments noted thereon was made Commission's Exhibit No. 1 to the hearing.

Finally, at the hearing, a stipulation was offered by the parties. This stipulation was to the effect that on all relevant dates, Commerce & Industry Insurance Company provided workers' compensation coverage for Pick It Construction Company. This stipulation is accepted as fact.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The existence of a covered employment between the claimant, McDaniel Construction and/or Pick It Construction.
2. Whether the claimant sustained a compensable injury on August 2, 2006 to his left arm.
3. The claimant's entitlement to the payment of medical expenses, temporary total disability from August 3, 2006 through December 29, 2006, and attorney's fees.
4. Whether the claimant's injury constituted "horseplay" or an "assault" under Ark. Code Ann. §11-9-102(4)(B).
5. Whether any injury was substantially occasioned by the use of alcohol, illegal drugs, or drugs used in contravention of physician's orders.
6. The appropriate weekly compensation rates.

In regard to these issues, the claimant contends that he sustained compensable injuries in a work related fall on August 2, 2006. As a result, he seeks the payment of medical expenses, temporary total disability, benefits from the date of the injury through December 29, 2006, and attorney's fees.

In regard to these issues, the respondent Fred McDaniel dba McDaniel Construction Company has made no contentions.

In regard to these issues, the respondents Pick It Construction Company and Commerce & Industry Insurance Company contends:

"Respondents #2 contend that the claimant's employer at the time of his injury was Fred McDaniel. As such, Pick It Construction Company, Inc. and its insurance carrier, AIG Claim Services, Inc. should be dismissed from this claim. In the alternative, respondents #2 raise the affirmative defenses of horseplay and intoxication. Additionally, in the event compensability is found in this matter and AIG Claim Services, Inc. is found responsible for any benefits, respondents #2 will request that the Commission enter an order pursuant to Ark. Code Ann. §11-9-402(b)(1), directing Fred McDaniel to pay AIG Claim Services, Inc. the full amount of any compensation paid or payable to or on behalf of the claimant."

DISCUSSION

I. EMPLOYEE-EMPLOYER RELATIONSHIP

As in most cases of this type, the record shows that the relationship between the claimant and Fred McDaniel dba McDaniel Construction Company contain elements of both an independent contractor relationship and an employee-employer relationship. However, after consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence supports the relationship of employee-employer.

The record reveals that the claimant was paid in cash for his services, that no money was deducted for social security or income tax, and that the claimant received no W-2 or 1099 at the end of the year. The claimant also apparently had some skill and training in laying concrete. However, the evidence further proves that the claimant's day to day activities were under the direct supervision and control of Fred McDaniel dba McDaniel Construction Company. Mr. McDaniel determined the method and manner in which the work would be performed from selecting and assigning to the claimant the particular job he was to perform at any given time to setting the times the claimant was to work. The evidence unquestionably shows that both the claimant and Mr. McDaniel retained the right to terminate their relationship at any time and for any reason without incurring any liability to the other party.

It is my opinion that the greater weight of the credible evidence establishes that the employee-employer-relationship existed between the claimant and Fred McDaniel dba McDaniel Construction Company, at the time of the claimant's injury on August 2, 2006. The evidence further shows that at the time of the claimant's injury, Fred McDaniel dba McDaniel Construction Company had at least 4 or 5 regularly employed employees, such as the claimant. Therefore, the relationship between the claimant and Fred McDaniel dba McDaniel Construction Company would represent an employment covered by the Act under either Ark. Code Ann. §11-9-102(11)(A), (B), or (D).

Next, it becomes necessary to examine the relationship between the claimant and respondent Pick It Construction Company, on August 2, 2006. In this regard, the evidence reveals that the job which the claimant was performing on August 2, 2006, was in furtherance of a contractor-subcontractor relationship between Pick It Construction Company and Fred McDaniel dba McDaniel Construction or McDaniel Concrete. At that time, Fred McDaniel dba McDaniel Construction or McDaniel Concrete was uninsured for workers' compensation purposes. Therefore, pursuant to Ark. Code Ann. §11-9-402(a), Pick It Construction Company became liable for any workers' compensation benefits to which the claimant might be found entitled. As Commerce & Industry Insurance Company provided workers' compensation coverage for Pick It Construction Company, at that time, it too became liable to the claimant for any appropriate workers' compensation benefits. However, under Ark. Code Ann. §11-9-402(b), Pick It Construction Company can recover from Fred McDaniel dba McDaniel Construction or McDaniel Concrete, the amount of any compensation it may be required to pay.

II. APPROPRIATE COMPENSATION RATES

The next issue to be addressed concerns the claimant's average weekly wage and appropriate weekly compensation rates, on August 2, 2006. In regard to this issue, both the claimant and Fred McDaniel testified that the claimant was paid at the rate of \$100.00 per day for his services. The record further indicates that the claimant would work an average of 5 days per week.

On the particular job that the claimant was working at the time he was injured, he was also to be provided free on site lodging. This lodging consisted of the use of a furnished apartment with utilities, which the claimant would share with other employees of the respondent. However, this apartment was only available to him for the duration of his participation in the job at that particular apartment complex.

After consideration of the evidence, it is my opinion that the greater weight of the evidence shows that the claimant had an average weekly wage of \$500.00. This would yield appropriate weekly compensation rates of \$333.00 for total disability and \$250.00 for permanent partial disability.

It is my opinion that the claimant's free use of the furnished apartment for the duration of his work at that particular job site represented the payment of added expenses related to the particular job, rather than wages. As such, it would not be considered in determining either the average weekly wage or the appropriate weekly compensation rates. The lodging being provided was for the relatively brief period of the particular job, which was located a considerable distance from the employee's regular place of residence. The providing of this temporary lodging would have reduced the claimant's added expenses from working on this distant job site, but would not have acted to replace his regular living expenses of maintaining a residence. This was simply a method for payment of travel expenses rather than wages.

III. EFFECTIVE ARK. CODE ANN. §11-9-102(4)(B)(iv)

The next matter to be addressed concerns the effect of Ark. Code Ann. §11-9-102(4)(B)(iv). The initial burden rests upon the respondents to prove the presence of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders in the claimant's body at the time of the accident and injury. After consideration of the evidence presented, it is my opinion that the respondents have failed to meet this threshold burden.

The medical records for the claimant's initial hospitalization indicate a history of illicit drug use. These records further note a history that the claimant had drunk a beer the day of his hospitalization and had smoked marijuana the day before (Claimant's Exhibit No. 1, page 44).

However, the claimant testified that on August 2, 2006, he had drunk a beer only after the accident, but prior to arriving at the emergency room. Although it is difficult to decipher, the notation by the emergency room nurse would appear to coincide with this testimony (Respondent No. 2, Exhibit No. 1-page 4). No drug or alcohol tests were performed on the claimant, at the time of his initial hospitalization or anytime thereafter. There is also no indication in the emergency room records that the claimant in any way appeared to be intoxicated or under the influence of either alcohol or drugs. In fact, none of the respondents' witnesses, in their testimony, indicated that the claimant appeared to be under the influence of alcohol or drugs on August 2, 2006.

It is simply my opinion that the greater weight of the credible evidence fails to show the presence of alcohol or illegal drugs in the claimant's body at the time of his injuries on August 2, 2006. The presence of these substances cannot be presumed from the fact that the claimant may have used marijuana or consumed beer the day prior to his injuries. Certainly, his consumption of a beer subsequent to his injuries would be of no relevance. Therefore, the rebuttable presumption that the claimant's injuries were occasioned by his use of alcohol, illegal drugs, or drugs used in contravention of a physician's orders has not been raised and Ark. Code Ann. §11-9-102(4)(B)(iv) would not expressly exclude his injuries from the category of "compensable injuries", as that term is used in the Act.

IV. COMPENSABILITY

The burden rests upon the claimant to prove all of the elements necessary to establish a "compensable injury". These elements are found in Ark. Code Ann. §11-9-102(4)(D) and §11-9-102(4)(A).

Ark. Code Ann. §11-9-102(4)(D) requires that the claimant prove by medical evidence, which is supported by "objective findings", the actual existence of the physical injury alleged to be compensable. Ark. Code Ann. §11-9-102(4)(A) sets out the definitional requirements for various categories of "compensable injuries". The applicable category in this case is found in §11-9-102(4)(A)(i). The definitional requirements for this category are:

- (1) The injury must arise out of and occur in the course of the employment;
- (2) The injury must be caused by a specific incident;
- (3) The injury must be identifiable by time and place of occurrence;
- (4) The injury must cause internal or external physical harm to the claimant's body;
- (5) The injury must require medical services or result in disability.

Clearly, the evidence presented shows that the claimant has satisfied the statutory requirements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-102(4)(D). The medical evidence presented clearly shows that the claimant sustained a physical injury on August 2, 2006, which was in the form of a complete fracture of both of the bones in his forearm. The presence of this physical injury is further supported by purely objective radiographic findings and visual observations made during corrective surgery.

The evidence presented further shows that the claimant's injury of August 2, 2006, clearly satisfies 4 of the 5 definitional elements of Ark. Code Ann. §11-9-102(4)(A)(i). The claimant's injury to his left arm was clearly caused by a specific incident. It is also identifiable by time and place of occurrence. This injury also caused both internal and external physical harm to the claimant's body. Finally, the very nature of this injury was such that it obviously required medical services and resulted in at least a period of temporary disability.

The real dispute in this case is whether the claimant's injury "arose out and occurred in the course of his employment". Intertwined with this issue are the categories of injuries that are legislatively prohibited from being "compensable", even though they maybe in some ways related to or associated with the employment. These categories of excluded injuries are found in Ark. Code Ann. §11-9-102(4)(B). The intoxication exclusion found in §11-9-102(4)(B) has already been addressed. The other one raised by the respondent is found in §11-9-102(4)(B)(i), which excludes injuries sustained by an active participant in an assault or combat that was the result of non employment related hostility or animus of one or both of the combatants and which represented a deviation from customary duties or was the result of horseplay where the claimant was not an innocent victim.

Clearly, the claimant's injuries were not the result of horseplay, but were sustained while he was engaged in a physical altercation with Carl Sigears. This altercation occurred during the claimant's assigned working hours and at his assigned work site. The record further shows that Mr. Sigears was in a supervisory capacity over the claimant.

Although it is apparent from Mr. Sigears testimony that he did not personally think much of the claimant, the cause of Mr. Sigears dislike for the claimant and the cause of the confrontation that led to the altercation and ultimately to the claimant's injuries clearly appear to be work related. Mr. Sigears testified that during the period he worked with the claimant, the claimant was not

a good or hard worker and that, in his opinion, the claimant was simply taking advantage of the fact that he was the son-in-law of Fred McDaniel, the owner of McDaniel Construction Concrete. He testified that on August 2, 2006, he observed the claimant slacking off in his performance of his assigned job. At that point, he advised Fred McDaniel of the situation and was told to move the claimant to a more physically demanding job. Mr. Sigears testimony, in this regard, is substantially corroborated by that of Mr. Fred McDaniel.

It was after Mr. Sigears had transferred the claimant to a more physically demanding job that the confrontation and subsequent altercation occurred. There is a direct conflict in the testimony between Mr. Sigears and the claimant concerning the specific actions that each took immediately leading up to and during the altercation and the claimant's injury.

Mr. Sigears description of these events are as follows:

"And we went around the corner and the truck had got pretty low so there wasn't enough (concrete) to screed, so basically whenever we'd run out on that (concrete), everybody would grab a float and kind of go back and start hitting the edges. When I was hitting the edges on this side, willie (the claimant) was on the outside, but he was telling me that the Spanish guy was in the back, that he wasn't doing a very good job and he was cutting the joints kind of crooked and he wasn't brooming it proper, and at that point, I was telling willie that if he had been doing his job, he wouldn't have had enough time to go back and watch the Spanish guy.

So willie told me that he thought I was being kind of prejudiced, and I asking the Spanish guy's side, and at that point, I told him that I thought the Spanish guy was doing a pretty good job, and I'd rather have one guy like the Spanish guy than have ten guys like him...

He (the claimant) was staying verbal statements to me and we both kind of got to talking back and forth, saying things that wasn't very properly, basically, and I finished megging inside and then I jumped on the opposite side to meg the side that he (the claimant) should have been megging, and while I was megging, he was constantly talking to me, telling me about he felt like I was prejudiced and I was taking the Spanish guy's side and kept going on and on, and I was talking back and we were both talking backward and forward. Finally, I finished megging and I stood up, and me and him both was talking face to face, and we probably talked two or three minutes verbally backward and forward, and finally I told him that I thought he was worthless to be talking tho him, said I wouldn't want to have him on my crew anyway, and I turned around and walked off, and as I proceeded to walk towards the cement truck, he rapidly walked behind me and was constantly asking me if I thought he was a punk, and I jut kept walking and he said, 'well, do you think I'm a punk?' and I said, 'I don't know what you are.' And at that point, he walked past me and stepped in front of me and stopped abruptly, so I had to stop immediately to keep from bumping into him. So at that point, I stopped and put both of my hands on his chest and when I put my hands on his chest, he hit me in the eye, and once he hit me in the eye, it was on after that." (T.47-49)

The claimant's versions of the events are somewhat different.

The claimant testified:

"well, Carl sigears was just verbally abusing me and he said some things about he was going to fight me and beat me up; I thought it was kind of threatening. I told him he wasn't going to do nothing and he jumped across the sidewalk and put his hands on me like this, you know, roughed me up...

Okay. He put his hands on me, and he put his hands on me; he took my shirt, he was grabbing it up, cursing me out real loud; then he let me go. And then I was going to go tell Fred (McDaniel) about what Carl was doing because that was just too much...

So he got back in front of me again with this long float in his hand and told me what he was going to do to me again and asked me what I would do, so I told him to get out of my face. So he pushed me and then he swung at me and I ducked and I punched him." (T.10)

The evidence shows that no fighting among employees or employees and supervisors was allowed by Mr. McDaniel. Both Mr. Sigears and the claimant were immediately terminated for their conduct. There is also no evidence that such fights were common or frequent among Mr. McDaniel's employees.

After consideration of the testimony of both of these witnesses, it is my opinion that the testimony of Mr. Sigears is more credible. His involvement and pecuniary interest in this case is obviously less. I would also note that some of the actions attributed to Mr. Sigears by the claimant would appear to be somewhat inconsistent and illogical. This would particularly apply to his testimony where he describes Mr. Sigears getting in front of him with a "long float" (a pole with a cross piece on the end), then states that Mr. Sigears was close enough to him that the claimant told him to get out of his face, and was also close enough that he was able to push the claimant and swing at him. Regardless, the testimony of both witnesses establishes that the claimant was the one that actually struck the first blow.

Historically, the general rule in this jurisdiction has been that injuries resulting from assaults are compensable where the assault is causally related to the employment, but not compensable where the assault arises out of purely personal reasons, Daggs v. Garrison Furniture Company, 250 Ark. 197, 464 S.W. 2d 593(1971); Townsend Paneling v. Butler, 247 Ark. 818, 448 S.W. 2d 347(1969); Bagwell v. Falcon Jet Corporation, 8 Ark. App. 192, 649 S.W. 2d 841(1983). This is the same general rule noted at IA.Larson, The

Law of Workmen's Compensation 11(1972), which was quoted with approval in Westark Specialties et al v. Lindsey, 259 Ark. 351, 532 S.W.2d 757(1976). It would further appear that Ark. Code Ann. §11-9-102(4)(B)(i) merely codifies this rule when it excludes from the definition of "compensable injury" injuries sustained in assaults only if they are the result of non employment related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from the customary duties of the individuals involved.

Ark. Code Ann. §11-9-102(4)(B)(i) appears to place no relevance on the matter of who was the aggressor or who actually precipitated the actual physical exchange. Again, this seems to follow existing case law, Johnson v. Safreed, 224 Ark. 397, 273 S.W. 2d 545(1954).

Clearly, the record shows that the claimant was an active participant in an assault or combat which gave rise to his injuries. This assault or combat further represented a deviation from the claimant's customary duties. However, Ark. Code Ann. §11-9-102(4)(B)(i), as with all portions of the Act, must be strictly interpreted. This specific wording of this subsection excludes injuries resulting from assaults only if three facts are proven. The claimant must be an active participant. Such participation must amount to a deviation from the claimant's customary duties. Finally, the assault must be the result of non employment related hostility or animus of one, both, or all of the combatants. The assault or combat in the present case was not the result of non

employment related hostility or animus of either of the parties, thus, it is not legislatively excluded from the definition of a compensable injury by Ark. Code Ann. § 11-9-102(4)(B)(i).

However, the claimant's injury must still "arise out of and occur in the course of his employment". It must also occur at a time when the claimant is performing employment services, Ark. Code Ann. §11-9-102(4)(B)(iii). The Appellate Courts have recognized that the issue of arising out of and occurring in the course of the employment is closely interrelated with the performance of employment services.

At the time the claimant punched Mr. Sigears in the eye and precipitated the actual physical combat that led to his injury, he was clearly not performing employment services. His actions at that time in no way benefitted, either directly or indirectly, the respondent employer. In fact, his actions expressly violated established company policy. His subsequent injury was not a reasonable and natural result of a risk of his employment, but was rather a reasonable and natural result of a deviation from his employment by his intentional misconduct.

In reaching my decision, I recognize that the Arkansas Supreme Court, long ago, announced that it would not strictly follow the "aggressor rule", Johnson v. Safreed, (supra). I also recognize that the Arkansas Workers' Compensation Act does not expressly exclude compensation from individuals who institute an assault or combat. In fact, the legislature even amended the prior exclusion of compensation to individuals who willfully intended to bring

about injury or death to themselves or others, Ark. Stat. Ann. §81-1305(Repl.1976) to limit it only to individuals that willfully intended to bring about their own compensable injury or death, Ark. Code Ann. §11-9-401(a)(2).

However, in the present case, the claimant's own willful misconduct far exceeds that excused in Johnson v. Safreed and represents such a departure from the course and scope of his employment so as to take his subsequent injury outside the coverage of the Act. It is simply my opinion that the claimant has failed to meet his burden of proving that his injury on August 2, 2006, arose out of and occurred in the course of his employment, as required by the provisions of Ark. Code Ann. §11-9-102(4)(A)(i). Thus, his injury would not meet the requirements for a "compensable injury" and he would not be entitled to any benefits under the Act for this injury.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On August 2, 2006, the relationship of employee-uninsured employer existed between the claimant and Fred McDaniel dba McDaniel Construction Company or MacDaniel Concrete Company.

3. On August 2, 2006, Fred McDaniel dba McDaniel Construction company or McDaniel Concrete was an uninsured subcontractor of Pick It Construction Company, which was insured for workers' compensation purposes by Commerce & Industry Insurance Company. Under the provision of Ark. Code Ann. §11-9-402(a) Pick It

Construction Company and & Industry Insurance Company would be liable to the claimant for any benefits to which he would be entitled under the worker' Compensation Act.

4. On August 2, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$333.00 for total disability and \$250.00 for permanent partial disability, should such benefits have been appropriate.

5. The claimant has failed to prove by the greater weight of the credible evidence that the injury he sustained, on August 2, 2006, represented "compensable injury", as that term is defined by the Arkansas workers' Compensation Act. Specifically, he has failed to prove by the greater weight of the credible evidence his injury arose out of and occurred in the courses of his employment with Fred McDaniel dba McDaniel Construction Company or McDaniel Concrete Company, as required by Ark. Code Ann. §11-9-102(4)(A)(i).

6. All respondents have denied the occurrence of any compensable injury to the claimant on August 2, 2006, and have controverted this claim its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE