

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603906

JIMMY MORARA, EMPLOYEE	CLAIMANT
RICKS EXPRESS, INC., EMPLOYER	RESPONDENT
BRIDGEFIELD CASUALTY CO., CARRIER	RESPONDENT

OPINION FILED MAY 2, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on January 31, 2007, at McGehee, Desha County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

ISSUES

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

At issue is whether or not the claimant was an employee at the time of the accident and whether or not he sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-102, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties were unable to agree on any stipulations.

The claimant contends he slipped on an icy parking lot on February 18, 2006 and injured his neck and left shoulder (rotator cuff tear). The claimant seeks payment of medical expenses, temporary total disability benefits from February 19, 2006 to a date yet to be determined at a compensation rate of \$488.00/\$366.00, and attorney's fees.

The respondents contend the claimant was not an employee at the time of the accident. In the past, he had been a casual employee who was paid \$450.00 every two weeks to mow the grounds. Since a change in the management, however, he was not employed by the respondent. Alternatively, if the claimant is found to be an employee, he was not performing employment services at the time of injury – he was merely getting out of his vehicle in the parking lot. The respondents also contend the claimant’s present condition is not causally related to any injury as he suffers from a preexisting neck condition.

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, his friend, Jerome “Buddy” Clark, and Assistant Manager, Lori King. Respondents’ objection to Mr. Wallace’s testimony was sustained as the claimant did not identify Mr. Wallace as a witness in his prehearing questionnaire. Mr. Clark corroborated the claimant’s testimony. Ms. King was hostile during her testimony.

The claimant, age 57 (D.O.B. March 23, 1949) has a high school education. For the past ten years he has received Social Security (\$576.00 mo.) and SSI (\$49.00 mo.) for disability due to depression, neck and shoulder injuries. The claimant also receives income from a yard service he operates.

In late 2003 or early 2004, the claimant was hired by former manager, H. J. Winslow to perform odd jobs at the convenience store/gas station, (Tr. p. 28, take out the trash, stock shelves and the locker, mow the yard, run errands, etc.). Initially, he was paid by check and had to punch a time clock. The claimant stated his wages varied, but he received about \$100.00 a week.

At some point, the claimant asked to be paid in cash, (Tr. p. 30/59). He would receive envelopes of cash from the managers, either “Carla”, “Linda” or H.J Winslow. He no longer punched a time clock but was still allowed to charge items at the store which would be deducted from his wages. His last charge ticket was dated February 10, 2006.

On February 18, 2006 the claimant fell on ice in the parking lot and was helped to his feet by a customer, Jerome Clark. The claimant stated he had just parked his car and was on his way to the trash cans before he entered the store when the accident happened (Tr. p. 38-39/44). The claimant reported the incident to “Carla”, the manager who assumed H. J.’s job after he departed. The claimant continued working but his arm pain worsened. Two or three days later the claimant complained of arm pain while he was unloading a truck and was fired. Ultimately “Carla” was fired and Lori King became the manager.

The claimant sought medical treatment on March 3, 2006. No history of a work-related injury appears in the report. On March 15, 2006 an MRI scan revealed a “tiny” partial tear of the rotator cuff of the left shoulder. The history of injury is “slipped on patch of ice and fell injuring arm.” On April 17, 2006 an MRI of the neck was conducted which revealed multilevel degenerative disc disease (spondylosis, facet disease, stenosis) with disc bulging at C4-5, C5-6, C6-7 and C7-T1.

On cross-examination, respondents’ counsel emphasized there are no wage records to establish a contract of hire; the claimant suffered from neck and shoulder pain prior to 2006 for which he took medication; he has not been excused from work by any physician; he has declined surgery; and he has been able to work since the injury, (Tr. p. 66-67).

Assistant manager, Lori King, testified that Mr. Winslow's employment ended shortly before the accident. Mr. Winslow told her the claimant would no longer be allowed to charge items at the store. Ms. King interpreted this as an indication that the claimant was no longer an employee. Ms. King testified that there would be no need for the claimant to empty the trash cans the first thing in the morning anyway (Tr. p. 77-78). Ms. King stated that she allowed the claimant to charge cigarettes on her account since he no longer had an account with the store. However, this does not explain why the claimant was in possession of a February 10, 2006 charge ticket. Ms. King thought Mr. Winslow paid the claimant with his own personal funds but there is no proof of this. Ms. King acknowledged that the claimant reported an accident on the parking lot which is leased from Mr. Bunker.

Mr. Clark, a regular customer of the store, confirmed that the claimant fell on the ice but gave conflicting testimony about the claimant's employment duties. At one point in his testimony he stated that he assumed the claimant was on his way to pick up trash (Tr. p. 12) and yet he also stated that the claimant had no job duties in the area where he fell (Tr. p. 20), which the claimant confirmed (Tr. 62). Mr. Clark did not actually see the claimant performing any job duties on the day of the accident.

FINDINGS AND CONCLUSIONS

This is a case of a business not been run like a business. There are no attendance records, wage records, or documentation of hiring or firing. The only two people who could definitely testify about the employment relationship and salary, H. J. Winslow and "Carla", were not called as witnesses.

The claimant's desire to be paid in case is a double-edged sword. While he may use it to keep his Social Security benefits, it harms his workers' compensation case and makes it difficult to prove employment and wages, and it also diminishes his credibility.

Based on the testimony of Mr. Clark and the claimant, I find the claimant was employed by the respondent at the time of the accident. Without any documentation of wages, I find the claimant would be entitled to the minimum compensation rate of \$20.00, in the event this claim was found to be compensable.

Based on the testimony of Mr. Clark, the claimant, and Ms. King, I find the claimant did sustain a left shoulder injury, a rotator tear, after a slip and fall in the parking lot. The claimant's extensive neck problems appear to be preexisting. There is no evidence that the claimant is entitled to any temporary total disability benefits as he is able to continue working at his yard service and no physician has excused him from work. However, I find the claimant was not performing employment services at the time of his injury.

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).

The preponderance of the credible evidence shows the claimant had just arrived at work and parked his car in an area where he had no job duties. He had only taken two or three steps when the accident happened. Simply having an accident on the premises does not make the injury compensable.

1. The Workers' Compensation Commission has jurisdiction of this claim in which an employer-employee-carrier relationship existed among the parties on February 18, 2006.
2. The claimant's compensation rate is \$20.00, in the absence of wage records or credible testimony.
3. 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