

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F609713

ROBERT TRAHAN, Employee	CLAIMANT
PERRY BAKER CONSTRUCTION, INC., Employer	RESPONDENT
UNION INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED MAY 10, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by C. ERIC VESTER, Attorney, Rogers, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 11, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 17, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on August 21, 2006.
3. The claimant was earning an average weekly wage of \$480.00 per week.
4. The respondent has controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injuries to claimant's left and right feet.
2. Temporary total disability benefits from August 21, 2006 through a date yet to be determined.

3. Medical.
4. Permanent partial disability benefits.
5. Attorney fee.

Subsequent to the pre-hearing conference the respondent withdrew its stipulation with respect to the average weekly wage and the parties agreed to litigate that issue. Furthermore, since claimant contends that he is entitled to continued temporary total disability benefits, the parties agreed that claimant's request for permanent partial disability benefits is premature at this time.

The claimant contends he suffered a compensable injury to his left and right feet; that his medical bills should be paid; and that he is entitled to temporary total disability benefits.

The respondents contend the claimant was not performing employment services at the time of the incident. The claimant was involved in an altercation in which he was the aggressor. The claimant was coming down a ladder to start an altercation with a fellow co-employee when he slipped and fell causing the injury to his feet.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on August 21, 2006.
3. The respondent has controverted this claim in its entirety.

4. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent. Claimant was not performing “employment services” at the time of his injury.

FACTUAL BACKGROUND

The claimant became employed by the respondent in August 2006. Claimant primarily performed framing work for the respondent. Claimant testified that on August 21, 2006, he and other employees were setting roof trusses on a wall. In order to set the roof trusses, claimant and other employees were on the top of the walls. On the ground that day were other employees including Perry Baker, Jr., the son of the respondent’s owner. Claimant testified that Baker, Jr. and another employee named Gary Owens became involved in an argument and shoving match. The argument between Baker, Jr. and Owens involved whether a wall was out of plumb. During the course of this argument and shoving match between Baker, Jr. and Owens, the claimant according to his testimony informed Owens that he would not put up with Baker, Jr. pushing him around and that Owens should not put up with it either. According to claimant’s testimony, Baker, Jr. informed him that if he was down on the ground he would “show him”. At this point claimant began climbing down the wall brace but denied that he was doing so to confront Baker, Jr. Instead, claimant contends that he was getting down to report the incident to his supervisor and that while he was in the process of climbing down from the wall brace he was pushed off the wall brace by Baker, Jr., landed on a two by four, and suffered injuries to both of his feet including a fracture to his right foot.

After this incident claimant received medical treatment at the emergency room at Northwest Medical Center in Springdale. Claimant was given a splint and crutches to use, was given medication, and was taken off work for three days. Subsequently, claimant was

evaluated by Dr. Pleimann who prescribed a boot for claimant's right foot and returned claimant to sitting work only. Dr. Pleimann diagnosed claimant's condition as metatarsal fractures in the claimant's right foot.

Claimant has filed this claim contending that he suffered a compensable injury while employed by the respondent. He seeks payment of temporary total disability benefits beginning August 21, 2006 and continuing through a date yet to be determined; payment of medical treatment; and a controverted attorney fee.

ADJUDICATION

Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent. Specifically, I find that claimant

was not performing employment services at the time of his injury.

First, it should be noted that much of the testimony and discussion at the hearing involved the issue of whether claimant was an active participant in an assault which is not considered a compensable injury pursuant to A.C.A. §11-9-102(4)(B)(i). I find that claimant was injured before he had the opportunity confront Baker, Jr. on that day. While claimant and Baker, Jr. did shove each other after the claimant reached the ground, claimant had already suffered the injury to his feet at that time.

In order for an injury to be compensable, claimant has the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment. A claimant must be performing "employment services". According to the decisions in *Collins v. ExCel Spec. Products*, 347 Ark. 811, 69 S.W. 3d 14 (2002); and *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W. 3d 1 (2002), "employment services" are performed when the employee does something, "within the time and space boundaries of employment," and the injury occurred when the employee was acting to benefit the employer directly or indirectly.

In this particular case, I find that when claimant's injury occurred he was not acting to benefit his employer either directly or indirectly. Claimant testified that when he was getting down from the wall brace he was getting down for the purpose not of confronting Baker, Jr. but to report the situation to his supervisor, Leon Black, so that Baker, Jr. could be sent home. However, Leon Black was present at the time of this incident. Black testified at the hearing that he was approximately 15 to 20 feet away from the claimant on top of the wall with the trusses. If claimant had needed to report anything to Black, it was not necessary to get down from the wall since Black was within claimant's eyesight on top of the wall. Furthermore, according to the testimony of both Black and Baker, Jr., the claimant was coming down the wall brace for the purpose of confronting Baker, Jr. Baker, Jr. testified at the hearing that after the incident involving he and Owens was over, the

claimant stated "I wish you would do that to me." Baker, Jr. testified that he informed the claimant to "Come on down," and claimant began climbing down the wall brace. Baker, Jr. testified that approximately halfway down the wall brace claimant jumped. Baker, Jr. testified that he did not push claimant off the wall brace.

Baker, Jr.'s testimony was corroborated by that of Leon Black, the claimant's supervisor. Black testified that after the incident involving Baker, Jr. and Owens, the claimant hollered at Baker, Jr. and told him that he wouldn't talk to him like that or shove him around. Black testified that claimant then began to climb down from the wall bracing and approximately halfway down he jumped off. Black testified that Baker, Jr. did not push the claimant off the wall brace, but instead claimant jumped.

While Baker, Jr. acknowledged shoving the claimant after he reached the ground, claimant had already suffered the compensable injury when he landed after he jumped off of the wall brace.

I find the testimony of Black and Baker, Jr. regarding the circumstances of claimant climbing down the wall brace and jumping to be credible and entitled to great weight.

In short, I do not find that claimant was engaged in an assault with Baker, Jr. at the time of his injury. Claimant was not injured while an active participant in an assault or combat; instead, he was injured when he jumped off a brace to confront Baker. While there was some shoving after the claimant got to the ground, claimant's injury had already occurred. I find that claimant was not performing employment services at the time of his injury. Claimant was not getting down from the wall brace to get a supervisor or to break up an altercation between Baker, Jr. and Owens. Instead, claimant was getting down for the purpose of confronting Baker. This activity did not benefit his employer either directly or indirectly. Therefore, I find that claimant was not performing employment services when he jumped off the wall brace for the purpose of confronting Baker, Jr. Since claimant was not performing employment services at the time of his injury, he cannot prove a

compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent. Claimant was not performing employment services at the time of his injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE