

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707354

ORFA GONZALEZ, EMPLOYEE	CLAIMANT
CASA MEXICANA MEXICAN RESTAURANT, EMPLOYER	RESPONDENT
FirstCOMP INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 26, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on January 29, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Randy P. Murphy, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted January 29, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on November 14, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issue, as well as their respective contentions were properly set out in the Prehearing Order subject to an additional stipulation concerning the applicable compensation rate. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employee/employer/carrier relationship existed at

all times, including July 12, 2007, and that the claim had been controverted in its entirety for purposes of attorney's fees. At the hearing, the parties agreed to an average weekly wage of \$340.00 which would entitle the claimant to a compensation rate of \$227.00 for temporary total disability in the event the claim was found compensable.

Claimant contended, in summary, that she sustained compensable facial injuries as the result of being attacked by a co-worker on July 12, 2007; that she was entitled to payment of all reasonably necessary medical and related expenses; that she was entitled to temporary total disability from July 12 through July 31, 2007; together with a controverted attorney's fee. All additional issues were reserved.

The respondents contended that the claimant's injuries were not compensable, maintaining that they were sustained during an assault or combat which resulted from non-employment-related hostility and which amounted to a deviation from customary duties within the meaning of Ark. Code Ann. §11-9-102(4)(B)(i).

The claimant was the only witness to testify. The record is composed solely of the transcript of the January 29, 2008, hearing containing numerous exhibits. Both parties submitted post-hearing letter briefs in support of their respective contentions.

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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that she sustained an injury which arose out of and during the course of her employment with Casa Mexicana Mexican Restaurant as the result of a specific incident identifiable in time and place of occurrence on July 12, 2007. Specifically, the claimant sustained a broken nose as the result of an assault by a co-worker at the workplace.
4. The claimant was not an active participant in the assault or combat. Rather a preponderance of the credible evidence reflects that any participation in the assault was in self-defense after being attacked by the co-worker.
5. The claimant is entitled to temporary total disability benefits for the period beginning July 13, 2007, through July 30, 2007, at which time the claimant reached maximum medical improvement.
6. Respondents are responsible for all hospital, medical, and related expenses as the result of claimant's July 12, 2007, injury. All medical expenses are to

be paid in accordance with Commission Rule 099.30.

7. All additional issues have been specifically reserved.

DISCUSSION

Ark. Code Ann. §11-9-102(4)(B)(i) provides:

“Compensable injury” does not include:

(i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties;

Respondents submitted a post-hearing letter brief on the issue of compensability. Although respondents made several compelling arguments and cited several Arkansas cases addressing whether an injury sustained during a workplace assault is compensable, their arguments are not persuasive based upon the facts peculiar to this claim.

The relevant facts in this claim are undisputed. Admittedly, a claimant’s testimony is never considered uncontroverted. In fact, the testimony of an interested party is always considered to be controverted. *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

I feel compelled to point out that respondents did not call any witnesses to dispute the claimant’s testimony. Witnesses for the respondents, including the restaurant owners were present at the hearing and could have disputed any of the

claimant's testimony if it was untrue. None were called. As will be set out further below, the claimant's undisputed testimony revealed that the co-worker that assaulted the claimant and caused her injury had previously exhibited a propensity for violence. The claimant related that said worker, just days before the assault in question had threatened another worker with a knife and that management simply required an apology while allowing the aggressor to continue in her employment. This showed that the claimant's attacker had a propensity for violence. (Tr.14-15)

The claimant's description of the incident is set out below:

BY MR. MCNEELY (Continuing) :

Q Okay. And what were your job duties that day?

A Same routine as every day – phone orders, at the register, hostess, preparing the orders in the kitchen. If I had to take nachos to tables, I would. Taking orders, drink orders, from the tables. So it was the same thing every day.

Q Tell the judge what happened between you and a person known as Marlene.

A I was in the kitchen, and I believe it was like around five o'clock p.m., and she came, she looked pretty upset, and she told me to move out the way. That's when everything started.

Q Let me stop you right here. Who is Marlene?

A She is an employer, one of the coworkers.

Q She is a coworker?

A Yeah, a coworkers, yes.

Q Okay. And had she worked there the whole time you had been there?

A When I first got employed, when I got hired, I saw her, but then she stopped coming. And then they rehired her again.

Q Okay. So it's a coworker. Now, tell the judge what happened.

A She told me to move out the way. I had no problem, because she had a hot iron plate, so I moved out of her way, and she left to her table. And when she came back, she came out cursing. And I didn't understand why she was so upset. And I looked at her, and I was, like, "What's your problem? Why are you so upset? And she had her back towards me. She was, like, "Shut up." She was cursing at me, and she was, like, "You're so old," this and that. And I was, like, I guess what got her upset was that I told her that, "Well, you're older than me." That's when she turned around and she slammed a salsa ceramic bowl on my nose.

Q Okay. And I guess, for the record, right now you still have a scar right across the bridge of your nose?

A That's the scar I have on my nose here; she fractured my nose. (Tr.10-11)

Admittedly, the record reflects that the claimant retaliated after being struck in the face; however, it is clear from the testimony that the claimant was simply acting in self-defense after being the innocent victim of the assault. A portion of the claimant's testimony on cross-examination follows:

Q Okay. But the event that caused her to turn around and hit you with the bowl was when you were exchanging these words about who was the oldest?

A I guess.

Q Okay. And she hit you with the bowl?

A Ceramic bowl.

Q The salsa bowl?

A Yes.

Q It is actually a plastic bowl, isn't it? It's a plastic that looks like ceramic?

A I don't know. I guess so.

Q Okay. All right. And what happened after that? Did you have any further

discussions with Marlene that evening?

A She ran out of the restaurant, actually.

Q All right. That was it, she left work. Is that correct?

A She ran out.

Q And you didn't have any further contact at all with her that night?

A Not at all.

Q And you reported this, as you said, to the Bryant Police Department?

A Yes.

Q Okay. Who struck the first blow?

A I don't understand.

Q Okay. Did you hit Marlene?

A No.

Q Did you ever hit her in response to her hitting you?

A Yes.

Q Okay. Tell me about that.

A After she threw the salsa in my face and the salsa went in my eyes, I tried rubbing it out, and that's when she threw a punch, and she hit me in my face. And she wasn't going to stop.

Q Okay.

A And that's when, you know, I tried pushing her away, and she was still swinging, so that's when we got intracated (phonetic).

Q Okay. That's when you got what?

A When we got, you know –

Q Entangled?

A Yes. (Tr.22-24)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven, by a preponderance of the evidence, that her injury arose out of and during the course of her employment. Specifically, I find that the claimant was the innocent victim of a work-related assault. Although respondents argue that the injury was the result of nonemployment-related hostility, maintaining that it occurred as the result of name

calling, it is apparent that the aggressor became angry because the claimant was in her way while she was delivering food which resulted in an exchange of words. The hostility or animus was created by an event at the workplace. The aggressor in the assault had shown a propensity for violence. In my opinion, the assault was unprovoked.

By agreement of both parties, the sole issue presented for determination concerned compensability. The brief period of disability was not disputed. The record reflects that the claimant was released by the Arkansas Otolaryngology Center and Dr. Colclasure, her primary treating physician, on July 30, 2007. Accordingly, I hereby make the following:

AWARD

Respondent, FirstComp Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$227.00 per week for the period beginning July 13, 2007, and continuing through July 30, 2007.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are further directed and ordered to pay and/or reimburse to the claimant all reasonably necessary hospital, medical, and related expenses. All medicals are to be paid in accordance with the medical cost guidelines established by Commission Rule 099.30.

Additionally, claimant's attorney, Mr. Steven R. McNeely, is hereby awarded the maximum statutory attorney's fee pursuant to, and limited by, Ark. Code Ann.

§11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge